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Procedural Aspects of the General Anti-Avoidance Rule. Comparative Analysis of the Cases of Chile and Spain

Aspectos procedimentales de la norma general antielusiva. Análisis comparado del caso de Chile y España

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Abstract

Tax avoidance is a matter of worldwide concern, since it produces effects that impinge the proper functioning of any tax system. One of the strategies for fighting against tax avoidance is the establishment of an general anti-avoidance general rule (GAAR). This work is aimed at comparatively analyzing the procedural aspects of the Chilean GAAR and the Spanish GAAR, based on the similarities between their regulations, in order to benefit from the experience of the Spanish legislation, with achievements and shortcomings, for the complex legal activity that will entail the application of the GAAR in Chile.

Keywords: *Tax avoidance, general anti-avoidance rule, abuse of legal forms, conflict of application of the tax norm, tax avoidance declaration.*

Resumen

La elusión fiscal es un tema de preocupación mundial porque produce efectos que atentan contra el correcto funcionamiento de todo sistema tributario. Una de las estrategias para luchar contra la elusión fiscal es el establecimiento de una norma general antielusiva (NGA). Este trabajo tiene por objetivo analizar comparativamente los aspectos procedimentales de la NGA chilena y la NGA española, con base en la similitud de sus regulaciones, a fin de aprovechar la

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experiencia, con aciertos y desaciertos, de la legislación española para la compleja actividad jurídica que implicará aplicar la NGA en Chile.

Palabras clave: *Elusión fiscal, norma general antielusiva, abuso de las formas jurídicas,; conflicto de aplicación de la norma tributaria, declaración de la elusión..*

INTRODUCTION

Tax avoidance has become a common subject in the tax policy agendas of countries worldwide. In fact, in the year 2013, the member countries of the Organization for Economic Co-operation and Development (OECD) agreed to collaborate jointly in developing actions for fighting tax avoidance;[1] thus, the "Action Plan to Address Base Erosion and Profit Shifting" (BEPS Plan) was approved. Tax avoidance emerges from actions of taxpayers that, looking for tax savings, formally comply with the Tax Law, but go against its sense or meaning; therefore, it is an illicit tax planning.

Tax avoidance is a matter of worldwide concern, since it produces effects that impinge the proper functioning of any tax system. So, it diminishes tax revenues since it deprives the state of the public revenues to which it is legitimately entitled. It goes against free competition because the avoiding taxpayer obtains financial benefits that give him an inadmissible advantage in detriment of the complying taxpayer. It infringes constitutional principles established as equitable criteria for the distribution of the tax burden, such as the principle of tax equality; between two taxpayers with equal economic capacity, the avoiding taxpayer will endure a lower tax burden than the complying taxpayer.[2]

Among the strategies for fighting against tax avoidance, there is the establishment of a General Anti-Avoidance Rule (in what follows, GAAR). A GAAR can be defined as a legal norm structured by a generic factual situation, defined by law as constitutive of avoidance, whose legal consequence is to assign the Tax Administration powers to disregard the act or legal transaction and apply the tax regime that the taxpayer has tried to avoid.[3]

It is important to clarify that tax avoidance involves complying with the principle of tax legality from a formal perspective, that is, the avoiding taxpayer complies with the letter of the law. Nonetheless, tax avoidance entails the infringement of the principle of tax legality from a substantive perspective, that is, the avoiding taxpayer, by misusing legal forms or by creating contrivances, infringes the sense or meaning of the law.

Therefore, the declaration of tax avoidance is a task that necessarily involves complex interpretation activities and legal reclassification. In this context, the relevance of studying the procedural aspects that allow the application of a GAAR is clear, so that, being an effective procedure in the fight against tax avoidance, respects the rights and guarantees of the taxpayer.

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[1] OECD (2013).

[2] In this regard, the Spanish Constitutional Tribunal has declared: "what taxpayers do not pay having to do so, will have to be paid by others with more civic spirit or less chances or defrauding". STC 110/1984, FJ. 3°.

[3] GARCÍA (2004) p. 259; SANZ (2012), pp. 53-55.

A GAAR was first established in the Chilean tax system with the Act ["*Ley*"] N°20.780, from the 29th of September 2014. To this effect, eight normative provisions of substantive and procedural character, were included. These are contained in articles 4° bis, 4° ter, 4°quáter, 4°quinquies, 26 bis, 100 bis, 119 and 160 bis, all of them of the Chilean Tax Code (in what follows, TC).[4] Spain is among the legislations from which these normative was inspired. By reviewing the Chilean normative provisions and comparing them with the Spanish ones, we can ascertain that there is a relevant similarity, even though, as explained below, they are not identical. In this sense, the Chilean legislation established two modalities that set the general anti-avoidance rule: the abuse of legal forms and the tax simulation.

Since then, the GAAR has not been judicially applied in Chile[5]; nevertheless, it is not a novel institution in the world[6]. In Spain, a GAAR was first established in the tax system with the General Tax Act ["*Ley General Tributaria*"] 230/1963, from the 28th of December, (in what follows, LGT 1963); article 24 of the LGT 1963 introduced a GAAR with the modality of fraud of tax law.[7] With important improvements, the Spanish GAAR remained in the act that succeed it, General Tax Act ["*Ley General Tributaria*"] 58/2003, from the 17th of December 2003 (in what follows, LGT 2003); article 15 of the LGT 2003 introduced a GAAR, with the modality of conflict in the application of the tax norm; besides, it is necessary to consider article 16 of the LGT 2003 that establishes the Tax Administration's power to declare the existence of tax simulation.[8]

Even though there are differences between both modalities of avoidance,[9] the similarity between the hypothesis of abuse of legal forms of the Chilean GAAR[10] and the hypothesis of the conflict in the application of the tax norm of the Spanish GAAR[11] is obvious. On the

[4] TOLEDO (2022), p. 8.

[5] This statement requires a clarification. The Chilean Tax Administration has started several administrative procedures in which it has analyzed whether to apply the GAAR and has presented seven requirements before the Tax and Customs Tribunals in order to request the declaration of tax avoidance. In one case, the first one of them, the procedure was not carried out, since the overseeing entity withdrawn the requirement before this was notified to the taxpayer. The other six are currently been procesed.

[6] OSORIO *et al.* (2022), pp. 115-184.

[7] Fundación Impuestos y Competitividad (2015), p. 45.

[8] Fundación Impuestos and Competitividad (2018), p. 55; Calvo (2016), pp. 143 and ff.

[9] So, for example, the abuse of legal forms does not contemplate the test of artificiality or impropriety, which is established by article 15.1.a) of the LGT. In the case of simulation, the main difference is that in Chile simulation is considered a general anti-avoidance rule and article 4°quáter specifies when simulation takes place, clarification that the Spanish norm does not include.

[10] In Chile, article 4° ter of the TC provides: "Taxable events contained in tax laws shall not be avoided through the abuse of legal forms. There is such abuse in tax matters when the taxable event is totally or partially avoided or the taxable base or the tax obligation is diminished or said obligation is postponed or deferred, through acts or legal transactions that individually or jointly considered do not produce legal or economic results or effects relevant for the taxpayer or a third party, different from those to which this subsection refers.

It is legitimate the reasonable choice of conducts and alternatives laid down in the tax legislation. Therefore, the sole circumstance that the same economic of legal result can be obtained through other legal transaction or transactions that would entail a greater tax burden; or that the chosen legal transaction or group of legal transactions does not generate a tax effect or generates a reduced or deferred tax effect or in a lower amount, if these effects are a consequence of tax law.

In case of abuse the tax obligation that emanates from the taxable events established by law shall be required".

[11] In Spain, article15 of the LGT 2003 provides:

basis of this similarity between the legislative regulations, this work has as main objective to carry out a comparative analysis of the procedural aspects of the Chilean GAAR and the Spanish GAAR, with the purpose of benefiting from the experience of the Spanish legislation that, with achievements and shortcomings, has been interpreting and applying a general anti-avoidance rule for decades. This is especially relevant considering that on the 7th of July 2022, the Chilean Government introduced in the National Congress a tax reform bill towards a fiscal pact for development and social justice which, among other matters, provides that the application and declaration of tax avoidance is made by the Tax Administration.[12]

To this effect, the comparative analysis is focused on three subjects: (1) competent authority for declaring tax avoidance; (2) procedure for declaring tax avoidance and rights of taxpayers; (3) burden of proof and assessment of evidence. Lastly, conclusions are presented.

I. COMPETENT AUTHORITY FOR DECLARING TAX AVOIDANCE

At the comparative level it is a common place to identify the declaration of tax avoidance, through the application of a NGA, as one more of the legal powers of oversight exercised by the Tax Administration. This applies not only to European jurisdictions,[13] but is also the rule in Latin America.[14]

In effect, from the duty to contribute to sustain public expenses, a constitutional duty of the Tax administration to keep an effective oversight of taxpayers is established, which:

> pretends to contain the growth of acts of fraud, fiscal fraud and other ways of infringing legislation [so], the Administration needs to position itself, in the most adequate possible way, to expand the sanctioning consequences applied to cases of infringement of tax obligations, through the creation of instruments aimed at that purpose, with the necessary improvement of the current legislation.[15]

1.1 Tax Administration in Spain

This same idea has been expressed in Spain by the Constitutional Tribunal [Tribunal Constitucional][16] by indicating the essential character of the labor of inspection and

"Article 15 Conflict in the application of the tax norm

1. There is a conflict in the application of the tax norm when the taxable event is totally or partially avoided, or the base of the tax debt is diminished through acts or transactions in which the following circumstances occur:

a) That, individually or jointly considered, are notoriously contrived or improper for achieving the obtained result.

b) That its or their use do not produce relevant legal or economic effects, other than tax saving and the effects that would have been obtained from the usual or proper acts or transactions.

2. For the Tax Administration to declare the conflict in the application of the tax norm, the favorable report from the Advisory Commission to which article 159 of this act refers, shall be previously required.

[12] Boletín N°15170-5 (2022).

[13] Besides Spain, this is the case in France, Italy, Portugal, Germany, the United Kingdom, to name some jurisdictions.

[14] This is the case, for example, of Colombia, Peru, Argentina, Mexico, Costa Rica.

[15] TAVEIRA (2008), p. 18.

[16] SSTC 76/1990, FJ 3°, and 110/1984, FJ 3°.

examination that the Tax Administration must carry out in order to fulfill the duty to contribute with sustaining public expenses. The legislator must establish it and the Tax Administration must fulfill its purpose, since it is a requirement intrinsic to a just tax system. In its labor, the supervising body has to be vigilant and effective. Moreover, with regard to the fight against tax fraud, it has emphatically indicated that:

> it is an end and a mandate that the Constitution imposes to all public powers, specifically to the legislator and to the Tax Administration bodies. From this follows that the legislator must enable the powers or legal instruments that are necessary and adequate so that, with due respect for the constitutional rights and principles, the Tax Administration is in a position to effectively collect tax debts, and, where appropriate, to sanction the breach of the obligations of taxpayers, or the infractions committed by those subjected to tax norms.[17]

This is why it is not surprising that, from the legal establishment of the first GAAR in the Spanish LGT 1963, the competent authority for declaring tax avoidance is the Tax Administration itself and that remains so regarding the conflict in the application of the tax norm, contemplated in article 15 of the LGT 2003.

In this sense, the power is given to the Tax Administration currently taking action, so it can be the Tax Administration State Agency ["*Agencia Estatal de Administración tributaria*"], an autonomic community ["*comunidad autónoma*"] or a local entity. Consequently, the GAAR is applicable to both internal and external taxation. That said, the Tax Administration currently acting will also be important when identifying the structure of the Consultive Commission, as discussed *infra*.

Effectively, with the exception of the sanction established in article 206 bis of the LGT 2003, the legal setting of the conflict in the application of the tax norm is a product of the work of two commissions, namely, the Commission for the Study and Proposal of Measures for the Reform to the General Tax Act ["*Comisión para el Estudio y Propuestas de Medidas para la Reforma de la Ley General Tributaria*"] and the Commission for the Study of the Draft of the New General Tax Act ["*Comisión para el Estudio del Borrador del Anteproyecto de la Nueva Ley General Tributaria*"], and of the review of the Draft of the New General Tax Act carried out by the Council of State ["*Consejo de Estado*"]. From reviewing these works we can determine that it was discussed whether to include a GAAR in the Spanish LGT,[18] the majority opinion advocating for a general clause for avoiding fraud of tax law being the one that prevailed. Moreover, there was a debate about the requisites for applying the norm that should be contemplated by the GAAR –the indetermination of the used concepts being problematic–[19] and on the legal consequences of its verification.[20] Nevertheless, there were no major reservations regarding the currently acting Tax Administration having jurisdiction for

[17] STC 76/1990, FJ 3°.

[18] Comisión para el Estudio y Propuestas de Medidas para la Reforma de la Ley General Tributaria (2001), pp. 49-50.

[19] Dictamen del Consejo de Estado al Anteproyecto de Ley General Tributaria, N° 1.403/2003, from the 22th of May 2003, pp. 41 and ff.

[20] Comisión para el Estudio y Propuestas de Medidas para la Reforma de la Ley General Tributaria (2001), pp. 50 and ff.

declaring tax avoidance. At most, special mention to the burden of the proof that had to rest with it.[21]

1.2 The Tax and Customs Tribunal in Chile

In contrast, if we focus our gaze on the Chilean reality, two peculiarities can be ascertained in this regard.

Firstly, and as an exception to what happens in comparative law, the legal power to declare tax avoidance by application of a GAAR is not given to the Tax Administration but falls within the jurisdiction of a Tax and Customs Tribunal (in what follows, TTA).[22] Therefore, the tax authority must request to that tribunal through an injunction that avoidance be declared after a special administrative procedure.

Secondly, it is necessary to indicate that not all Tax Administration in Chile has the power to request the TTA the declaration of tax avoidance, since the modalities of the GAAR have only been established in the TC with regard to the actions of the Internal Tax Service ["*Servicio de Impuestos Internos*"] (in what follows, SII), entity that has jurisdiction regarding internal fiscal taxes and whose control (inspection and application) does not fall within the jurisdiction of another public entity.[23] Then, the precepts of the TC, the anti-avoidance general statute being among them, are applied exclusively to the matters of internal fiscal taxation that, according to the law, fall within the jurisdiction of the SII.[24]

Therefore, not every avoided tax can be pursued according to the rules of the Chilean GAAR. In fact, external fiscal taxes are not under the jurisdiction of the SII but fall within the General Directorate of Customs ["*Dirección General de Aduanas*"], which lacks the power analyzed here. Additionally, there is an area of regional al local taxation, whose oversight does not fall within the jurisdiction of the SII and, therefore, the avoidance of its respective regulation cannot be fought using the GAAR. That said, the land tax on real estate property[25] is the paradigmatic example of a local tax for whose oversight the SII is empowered. Therefore, the GAAR is applicable to it.

Although the SII lacks legal powers for directly declaring tax avoidance, it is necessary to point out that this was no so in the original design of the general anti-avoidance statute. In fact, and as it is the case in Spain, which is the source of inspiration for the Chilean regulation,[26] the bill introduced in the National Congress and that became the Act N° 20.780, gave to the SII the power to declare the tax avoidance.

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[21] Comisión para el Estudio y Propuestas de Medidas para la Reforma de la Ley General Tributaria (2001), p. 52.

[22] See articles 4° quinquies and 160 bis of the TC.

[23] Artícle 1° of the Decree with Force of Law ["*Decreto con Fuerza de Ley*"] N° 7, of the Ministry of Finance ["*Ministerio de Hacienda*"], of 1980.

[24] Article 1° of the TC.

[25] Article 1° of the Act ["*Ley*"] N° 17.235, on Land Tax ["*Impuesto territorial*"].

[26] For all, UGALDE (2018a), pp. 29, 40 and ff. Against, Saffie, as follows from his intervention in the processing of the Act N° 20.899, indicating that in the United Kingdom and Australia there are equivalent norms. Biblioteca del Congreso Nacional (2016), p. 105.

Moreover, the bill initially did not require the Director of the SII to carry out said task, this power being within the jurisdiction of the unit that conducted the investigation and adopted the final administrative action (the respective liquidation, tax warrant to pay ["*giro*"] or resolution), being subjected to certain procedural requirements.[27] Criticisms to these proposal did not wait and two weeks after the introduction of the bill, the Executive introduced a second proposal of procedure, keeping the power to declare tax elusion under the jurisdiction of the SII, but now the competent authority for it would be the Director of the SII, being subjected to certain procedural requirements.[28]

In order to unlock the processing of the bill that became Act ["*Ley*"] N° 20.780, on the 8th of July 2014, the government at the time and the opposition subscribed a Protocol of Agreement for a Tax Reform for a More Inclusive Chile. As for the application of the GAAR, the point 6 "Institutionality and Powers of the SII" ["*Institucionalidad y atribuciones del SII*"] of said text expressly recorded that the declaration was to be made by the TTA.[29] This explains that at present two procedures are needed, an administrative and a jurisdictional one, to declare tax avoidance and deprive from tax effects those plannings in which the requirements of one of the two modalities of GAAR are met, namely, abuse of legal forms or simulation.

II. Procedure for Declaring Avoidance and Rights of Taxpayers

Tax avoidance is one of the hardest problems to solve in the Tax Law,[30] since depriving the tax effects of plannings involves subtracting tax effects from party autonomy and to consider, consequently, that the taxpayer's actions were not in accordance with current legality. Hence the importance of the procedure regulated for determining the existence of tax avoidance. Since the legal setting of a GAAR is the result of an internal strategic balance that is difficult to achieve,[31] and that must tend to an adequate respect for the rights of the taxpayer.

In this regard there is a radical difference between the compared regulations, since the Chilean one diverges from the Spanish, which is one of its inspiration sources, and specifies that a tribunal must declare that the requirements of the modalities have been met and shall establish whether the advisor committed or not the associated infraction, so that the procedures in one legislation and the other also differ.

2.1 The Spanish Reality: Declaration by the Tax Administration Requiring Prior Favorable Report by the Consultive Commission

In Spain there is a special administrative procedure that the Tax Administration must follow in order to declare the existence of a conflict in the application of the tax norm, but not for declaring simulation. This special requirement was already contemplated by the fraud to the tax law. In this regard, the Spanish doctrine considered that this legal requirement of

[27] Further in this regard in section 2.

[28] Further in this regard in section 2.

[29] Biblioteca del Congreso Nacional (2014), p. 1703.

[30] Palao (2009), p.9.

[31] Cipollina (2017), p. 48.

a special procedure was one of the causes of the inapplicability of legal fraud ["*fraude de ley*"],[32] since it was not directly regulated in the LGT, and the Royal Decree ["*Real Decreto*"] 1919/1979, from the 29th of June that included it, was only in force from 1978 to 1993.

The LGT 2003 endeavors to solve this problem. Therefore, the law indicates that for the Tax Administration to establish the existence of a conflict in the application of the tax norm there must be a previous favorable report by the Consultive Commission.

Effectively, when the currently acting Administration considers that the requirements of the conflict in the application of the tax norm are met, it will communicate it to the interested party, granting her a term period of 15 days for presenting her allegations as well as the evidence she deems appropriate. Once these are received, or after the term has expired, the currently acting Administration forwards the file to the collegiate advisory body, which in a term period of three months –extendable for a month in a well-founded manner– must issue its report. That said, the term period is not fatal, and the report may be issued later. The report and the other acts adopted according to this article are not subject to remedy or complaint, but regarding those that are brought against acts and liquidations resulting from the examination, it will be possible to consider the appropriateness of declaring the conflict in the application of the tax norm.

On this point, it is interesting that the composition of the Advisory Commission is not invariable, since it depends on the currently acting Tax Administration, circumstance preventing the existence of uniform criteria for understanding when the conflict requirements are met.[33] So, it shall be integrated by two representatives of the General Tax of the Ministry of Economy and Finance ["*Directorate de la Dirección General de Tributos del Ministerio de Economía y Hacienda*"] appointed by resolution of the General Director of Taxes ["*Director General de Tributos*"] and two representatives of the currently acting Tax Administration (of the State Tax Administration Agency ["*Agencia Estatal de Administración Tributaria*"], of the Autonomic Tax Administration ["*Administración tributaria autonómica*"], or of the local entity).[34]

From the previously stated follows that, unlike what happens in Chile, in Spain there is not a special procedure for the Tax Administration to apply the hypothesis of simulation which, moreover, if the legal requisites are met, can result in an administrative sanction or the commission of a tax illicit. This explains that on occasion, the choice has been to pursue cases of avoidance through the hypothesis of simulation established in article 16 of the LGT 2003: the special administrative procedure is omitted and the taxpayer can be subjected to criminal sanctions.[35] Furthermore, it is not possible to impose sanctions on a taxpayer if a GAAR is applied, since regarding the fraud of law the Spanish Constitutional Tribunal declared that imposing the penalty assigned to the illicit against public finances ["*Hacienda Pública*"] contained in the old article 349 of the Penal Code would infringe the principle of legal reserve in its dimension of requiring the establishment of clearly defined criminal offenses ["*tipicidad*"],[36] criterion that can be transposed to the application of the tax norm.

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[32] DELGADO (2004), p. 37.

[33] PALAO (2009), p. 171.

[34] Article 194.4 of Royal Decree ["*Real Decreto*"] 1065/2007.

[35] CHOCLÁN (2002), pp. 2-4.

[36] STC 120/2005, from the 10th of May, ponente Sr. Pascual Sala Sánchez, FJ 4°: "using the legal form of the fraud of law —whether it is a fraud of tax law or of a law of another sort— to directly fit a certain behavior in

2.2 The Chilean Reality: The Need of Both an Administrative and a Judicial Procedure

As indicated, the jurisdiction for declaring tax avoidance corresponds to the TTA, concretely, the one in whose territorial jurisdiction the taxpayer is domiciled and, if the taxpayer is a legal person, its domicile shall the one belonging to the head office.[37] Regardless, the first legal design of the Chilean GAAR was different.

In fact, the bill initially gave jurisdiction to the unit carrying out the investigation and dictating the final administrative action. It was required the previous authorization of the respective Regional Director ["*Director Regional*"], of the Director of Mayor Taxpayers ["*Director de Grandes Contribuyentes*"], or of the Sub-Director of Supervision ["*Subdirector de Fiscalización*"], which depended on the specific unit carrying out the tax examination. This authorization would be given after said authority had reviewed the report prepared by the Legal Department of the respective Regional Directorate ["*Dirección Regional*"] or of the Directorate of Mayor Taxpayers ["*Dirección de Mayores Contribuyentes*"] and, in the case of Sub-Directorate of Supervision ["*Subdirección de Fiscalización*"], of the Legal Sub-Directorate ["*Subdirección jurídica*"].[38]

Criticisms to this proposal did not wait, since it was argued that with this regulation the taxpayer was in a position of defenselessness,[39] since it did not contemplate her mandatory intervention. Ultimately, there was an infringement of the fundamental guarantee of due process.

This way, two weeks after the bill was introduced, the Executive introduced a second proposal of procedure, which kept within the jurisdiction of the SII the power to declare tax avoidance and clarified that said power was to be exercised by the Director of the SII ["*Director del SII*"], who would declare the tax avoidance after a favorable report issued by the Legal, Normative and Overseeing Sub-directors ["*Subdirectores jurídico, normativo y de fiscalización*"] acting in concert.[40] As may be seen, this regulation did not contemplate the mandatory intervention of the taxpayer, thus not solving the questions regarding due process. The taxpayer could only defend herself after the notification of the final administrative action, by taking legal action before a tribunal.

Ultimately, the Agreement Protocol ["*Protocolo de Acuerdo*"] establishes what would be the regulation currently in force: the TTA is the competent body for declaring tax avoidance.

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a criminal offense that does not satisfy per se the indispensable typical requisites for it constitutes an analogy in *malam partem*, which is forbidden by art. 25.1. CE". ["la utilización de la figura del fraude de ley —tributaria o de otra naturaleza— para encajar directamente en un tipo penal un comportamiento que no reúne per se los requisitos típicos indispensables para ello constituye analogía *in malam partem* prohibida por el art. 25.1 CE".]

[37] Article 119 of the TC.

[38] Biblioteca del Congreso Nacional (2014), pp. 104-105.

[39] GARCÍA & ÁLVAREZ (2014), p. 57.

[40] Biblioteca del Congreso Nacional (2014), pp. 170-171.

Although a certain part of the Chilean literature considers necessary to give to the SII the power to declare tax avoidance.[41] and the tax reform currently being processed in the National Congress proposes it,[42] there is an important sector that considered that the constitutionality objections persist.[43]

In fact, for this opinion the constitutionality problems can only be solved if an independent tribunal, after a fair and racional process, declares tax avoidance. For such declaration to take place, the SII must proof that the legal transaction does not correspond to the cause of the taxpayer's real motivation and only once this has been determined, it shall be appropriate to apply the respective taxes.[44] To this is added a supposed infraction of the principle of legality in establishing sanctions, on the grounds that the abuse of legal forms and the simulation are administrative sanctions.[45] Nevertheless, this criticism is not unfounded, since these powers are considered to be aimed at re-establishing the law and do not seek to punish the taxpayer, but to modify a situation of failure to comply with the regulation.[46] Lastly, there is an opinion that considers that the competent authority must be a judge because the sanction derived from the application of the abuse of legal forms is the unenforceability of the respective legal transaction which, as civil sanction, requires to be judicially declared.[47]

But the requirement that the declaration of tax avoidance must be made by a TTA is also explained by the fact that, if the SII were to be given this power, this could imply a regression to the situation prior to the year 2010, time when the SII was both judge and interested party, which involves an infringement of due process.[48] In this sense, the doctrine posed the question as to whether the liquidation, tax warrant to pay ["*giro*"] or decision adopted by the SII establishing the existence of abuse was a judgement or not and, therefore, represents jurisdictional activity by the Administration.[49] On this particular, the Association of Magistrates of Tax and Customs Tribunals ["*Asociación de Magistrados de los Tribunales Tributarios y Aduaneros*"] during the processing of the Act ["*Ley*"] N°20.780 declared that the power to "legally characterize the simulation of an act, should be heard by tax and customs tribunals and not administratively declared, thus ensuring the rights of taxpayers before the State Administration".[50] Adding that:

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[41] SAFFIE (2021), p. 272. And questioning the appropriateness of giving the SII the power to hear and decide the matter, ZURITA (2017), p. 355.

[42] Boletín N° 15.170-05 (2022).

[43] GARCÍA & ÁLVAREZ (2014), p. 58.

[44] AVILÉS (2014), p. 234.

[45] GARCÍA & ÁLVAREZ (2014), pp. 58-60. Also VERGARA (2022) p. 101, in whose opinion the GAAR may not be applied to facts that took place before its entry into force, since sanctions must be legally established prior to the commission of the illicit act.

[46] In this regard, NAVARRO (2022), pp. 153-156.

[47] GARCÍA & ÁLVAREZ (2014), p. 56.

[48] GARCÍA & ÁLVAREZ (2014), p. 57.

[49] GARCÍA & ÁLVAREZ (2014), p. 57.

[50] "calificar la simulación de un acto, debieran ser conocidas por tribunales tributarios y aduaneros, y no declaradas administrativamente, asegurando así los derechos de los contribuyentes frente a la administración del Estado" Biblioteca del Congreso Nacional (2014), p. 1680.

> if the SII declares in a liquidation that a legal transaction or contract has been simulated, how is it possible to know if the taxpayer can file a claim against the amount of taxes and against the declaration of the simulation of the legal transaction or contract. Eventually a claim could be made; nevertheless, simple administrative situations, such as the tax warrant to pay ["*giro*"], prevent the taxpayer from substantiating a claim against a declaration of simulation.[51]

It is interesting that they do not propose a special procedure for declaring tax avoidance, which was how the matter was ultimately regulated, but they rather indicate that the general complaints procedure ["*procedimiento general de reclamaciones*"] should be applied, such as the tax reform bill currently being processed in the National Congress proposes.[52]

Ultimately, for the TTA to declare that the requirements of the GAAR regarding either abuse of legal forms or simulation were verified, it is necessary that two procedures take place: an administrative procedure and a judicial procedure.[53]

Firstly, an administrative procedure for classifying the acts or transactions as constitutive of tax avoidance must take place,[54] which can be initiated in the context of an inspection, but not necessarily, for it suffices that the SII "is currently examining records provided by the tax payer".[55] Once a possible case of avoidance is detected by an operative unit of the SII –Regional Directorate ["*Dirección Regional*"], Directorate of Mayor Taxpayers ["*Dirección de Grandes Contribuyentes*"] or Sub-Directorate of Supervision ["*Subdirección de Fiscalización*"]– the SII has instructed that it shall elaborate a report and submit it to the Bureau of Tax Avoidance Analysis of the National Directorate ["*Oficina de Análisis de la Elusión de la Dirección Nacional*"], which shall, in turn, forward it to the Director of the SII ["*Director del SII*"], so that the Director evaluates if the requisites of the abuse of legal forms or simulation have been met in the case. There is the possibility that the Director summons the "Anti Avoidance Committee" ["*Comité Anti Elusión*"], in an advisory capacity and, therefore, not binding, which is comprised by the Director of the SII ["*Director del SII*"] and the Legal, Normative, and Supervision Sub-directors ["*Subdirectores jurídico, normativo y de fiscalización*"].[56]

Resulting from the previous analysis, the following situations can take place:

(i) That the Director decides that the requisites are met, in which case the taxpayer shall be summoned by the unit of the SII that detected the case of tax avoidance, in coordination with the Bureau of Tax Avoidance Analysis ["*Oficina de Análisis de la Elusión*"].

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[51] "si el SII declara un acto o contrato simulado en una liquidación, cómo es posible conocer si el contribuyente puede reclamar del monto de los impuestos y de la declaración del acto o contrato simulado. Eventualmente podría ejercer un reclamo; sin embargo, situaciones administrativas de carácter simple, como el giro, impiden fundamentar contra una declaración de simulación" Biblioteca del Congreso Nacional (2014), p. 1680.

[52] See Biblioteca del Congreso Nacional (2014), p. 1680 and the number 4) of article 1° of the Boletín [Bulletin] N° 15.170-05 (2022).

[53] UGALDE (2018b), pp. 13 y ss.

[54] Regulated in article 4° quinquies of the CT and in Circular SII N° 41/2016.

[55] "esté conociendo de ciertos antecedentes proporcionados por el contribuyente" GONZÁLEZ (2014), p. 101.

[56] Resolución [Resolution] SII N° 68/2016.

In this case, the citation to the taxpayer is mandatory. Once the citation is notified, the taxpayer can provide a satisfactory answer[57] or acquiesce to the fiscal claim, paying the amount of avoided taxes. In that case, the administrative procedure ends either with a recorded settlement ["*acta de conciliación*"], or with a rectifying declaration ["*declaración rectificatoria*"] and/or tax warrant to pay ["*giro*"], respectively.[58]

If the former does not take place, the Regional Directorate ["*Dirección Regional*"], Directorate of Mayor Taxpayers ["*Dirección de Grandes Contribuyentes*"] or the Sub-Directorate of Supervision ["*Subdirección de Fiscalización*"], as applicable and after coordinating with the Bureau of Tax Avoidance Analysis ["*Oficina de Análisis de la Elusión*"], shall suggest the elaboration of a requirement. That said, the Legal Sub-Directorate ["*Subdirección jurídica*"] shall draw the requirement up and, in any event, the Director of the SII ["*Director del SII*"] shall decide if the requirement is submitted, being able to request from any of the areas participating in the procedure the modifications to the requirement that are deemed necessary. On this, the Director may also summon the "Anti Avoidance Committee" ["*Comité Anti Elusión*"], always in an advisory capacity.[59]

If, ultimately, action is to be taken, the Director signs the requirement, which shall be submitted to the competent TTA. This fact determines the conclusion of the administrative procedure.

(ii) If the Director considers that the requisites of abuse or simulation have not been met. In any case, the Director may:

(a) Formulate recommendations regarding the report, which can lead to the need that the acting unit gathers further background information.

(b) Consider that the requisites of abuse or simulation have not been met, even though there is tax default. In this case, the oversight shall continue according to the general rules.

(c) Consider that there are indications that a tax crime has been committed. In this case, a procedure shall be initiated, which has been characterized as an administrative procedure, called background information gathering ["*recopilación de antecedentes*"], in order to determine the commission of the illicit sanctioned by a penalty involving deprivation of liberty and, when appropriate, to enable the start of a criminal investigation by the Public Ministry ["*Ministerio Público*"].[60] This will take place if the SII reports ["*denuncia*"] or lodges a complaint ["*querella*"] or, if the complaint is lodged by the Defense State Council ["*Consejo de Defensa del Estado*"], at the requirement of the Director of the SII ["Director del SII"].[61] In this sense, unlike the situation in Spain regarding simulation, the SII has instructed that the application of the GAAR –and therefore also of the simulation– and a criminal prosecution are not

[57] Within the time limits contemplated by article 63 of the CT.

[58] Circular SII N° 41/2016, p. 9.

[59] Circular SII N° 41/2016, p. 9.

[60] According to NÚÑEZ and SILVA (2018), p. 154, in this case, in order to exercise criminal action, an authorization of the public entity (SII) is required, in virtue of the technical or specialized character of its regulation.

[61] Article 162 of the TC.

compatible, so, if there are indications of crimes, the procedure for applying the GAAR concludes.[62]

(d) Propose to archive the records. This will happen if the requisites of tax avoidance are not verified –abuse of legal forms and simulation–, and there is no tax default.

Once the Director of the SII ["*Director del SII*"] submits the requirement before the competent TTA, the judicial phase begins.

What is relevant in this regard is that the tax audit and the ensuing determination of the difference in the taxes or the tax result correction shall not be carried out by the SII.[63] Indeed, said declaration shall be made by a jurisdictional organ with tax jurisdiction, after the completion of the judicial procedure for declaring the existence of abuse or simulation and the determination of the respective liability, according to article 160 bis of the TC.

Hence the importance that the requirement provides grounds to the tribunal regarding the tax incidence of the planning to avoid taxes, that is, the tax savings intended to be corrected. Due to that motive, the legal requirement is that the SII solicits the avoidance declaration –abuse of legal forms and simulation– in the requirement, in a "well-founded manner and providing the legal and factual grounds upon which its request is substantiated and that allow the determination of taxes, penalties or fines resulting from the judicial declaration to which this article refers".[64]

The judicial procedure contemplates the possibility of contradiction ["*bilateralidad de audiencia*"], giving the taxpayer a 90-day term period– and to the person possibly responsible of the sanction contained in article 100 bis of the TC– to answer the requirement of the SII. Subsequently, all parties shall be subpoenaed to a hearing intended for the parties to present their arguments regarding the points raised both in the requirement and in the reply. If new background information is provided by the taxpayer or the advisor during the hearing, the SII shall have a 15-day term period to contest it. Subsequently, the 20-day period for presenting evidence begins if there is controversy on factual matters, after which observations to the evidence may be submitted within 5 days and, finally, the tribunal shall give definitive judgement within 20 days. The evidence shall be assessed according to the rules of sound judgement ["*reglas de la sana crítica*"] and its decision shall be grounded "considering the economic nature of the taxable events according to article 4° bis".[65] Due to the established remedy system, the case may get to be heard by Supreme Court ["*Corte Suprema*"] through the appeal of cassation on the merits ["*recurso de casación en el fondo*"].

From the described overview, three aspects are to be highlighted:

(a) The administrative action determining the difference in taxes or correcting the tax result declared by the taxpayer, is issued by the SII after the conclusion of the judicial procedure and in compliance with the order given by the TTA in its judgement.

(b) The term period established for resolving the matter is inferior to the one contemplated in the general claims procedure ["*procedimiento general de reclamaciones*"], which is of 60 days.

[62] Circular SII N° 41/2016, p. 8.

[63] NAVARRO *et al.* (2021), pp. 35-36.

[64] Article 160 bis of the TC.

[65] Subsection 4° of article 160 bis of the TC.

Considering the complexity of tax avoidance cases, it would have been preferable to increase the term period. Although the delay to issue the decision does not influence it, it can nevertheless have effects in the classification made by the judges, so the temptation might be to delay the ruling that summons the parties to hear the judgement ["*resolución que cita a las partes a oír sentencia*"], and that marks the beginning of the phase of definitive judgement.[66]

(c) For the legislator, the judgement declaring the existence of tax avoidance is a declaratory, not a constitutive, judgement, since it indicates that the tribunal declares the tax avoidance and establishes penalties and applicable fines. It follows that the fact making up the tax avoidance is the action of the taxpayer and the penalty of 1,5% for each month of a fraction of it and the applicable fines for tax default are accrued since the term for declaring the taxes expires without the taxpayer having duly done so.

Finally, it is important to mention that on the 7th of July 2022 the Chilean government introduced in the National Congress a tax reform bill towards a fiscal pact for development and social justice. This bill substantially modifies the procedure for declaring tax avoidance, since it proposes to give jurisdiction for it to the SII and to eliminate the current judicial procedure directed at declaring tax avoidance.[67] The SII would directly declare tax avoidance, after subpoenaing the taxpayer. The tax avoidance would be declared by the Director of the SII ["*Director del SII*"] through a resolution and the taxpayer would be notified of the final administrative action –liquidation, resolution or tax warrant to pay ["*giro*"] –, which is subjected to be challenged according to the rules of the general claims procedure ["*procedimiento general de reclamaciones*"].

The determination of the competent body for declaring tax evasion is a matter of tax policy. At the comparative level the rule is that the Tax Administration has jurisdiction for applying the GAAR, but the judicial alternative is also a valid alternative.

More important than the competent entity, is the manner in which the procedure for determining the application of the GAAR is regulated. The current system contemplates the mandatory intervention of the taxpayer during the administrative phase, the SII has the burden of the proof and the declaration of tax avoidance takes place after a contradictory procedure.

The proposed text lacks the necessary safeguards for the taxpayer, since, alone with establishing the SII as the competent authority, it only requires that the taxpayer be previously subpoenaed and that the final administrative action is issued within a maximum time limit. The proposal does not establish any sort of procedure for protecting the taxpayer, nor does it regulate the administrative procedure in detail, nor its time limits, and although it establishes that the decision to declare tax avoidance is made by the Director of the SII ["*Director del SII*"], it does not contemplate the intervention of a collegiate body, made up of officials of the Tax Administration, as in the Spanish case, or by persons external to it, but linked to the area of taxation, as is the case in the United Kingdom.

[66] NAVARRO *et al.* (2021), pp. 35-36.

[67] Further on the proposed changes regarding the GAAR in the tax reform bill, see: TOLEDO *et al.* (2022), pp. 12 a 16.

2.3 Burden of Proof and Assessment of Evidence

Tax avoidance entails complying with the principle of legality from a formal perspective; nevertheless, it involves infringing it from a substantive perspective. Therefore, determining the existence of tax avoidance is a complex legal activity.

In this context, it is relevant to determine who has the burden of proof and who must assess the evidence regarding the existence of tax avoidance. Reviewing different legislations across the world, diverse alternatives can be found. There are countries that establish that the taxpayer has the burden of proof, such as Australia, Brazil, the United States, Ireland and Sweden. Others, that the burden of proof is shared between the taxpayer and the tax authority, such as Germany, Canada, Poland, South Africa and Switzerland.[68]

In order to carry out the comparative analysis of the declaration of avoidance and the application of the GAAR in the Chilean and Spanish legislations, four different criteria shall be considered: (a) burden of proof; (b) object of the evidence; (c) effects of the evidence; (d) assessment of the evidence. Since there is no special procedure for declaring tax avoidance by simulation in Spain, this analysis will focus exclusively on the "conflict of application of the tax norm" ["*conflicto de aplicación de la norma tributaria*"] modality in Spain and on the "abuse of legal forms" ["*abuso de las formas jurídicas*"] modality in Chile.

2.4 Burden of Proof

The burden of proof refers to the rules that "distribute the responsibility of providing evidence in the process"[69] and therefore, "it is a faculty whose exercise is necessary for the obtention of an interest";[70] answers the question: who must prove the existence of tax avoidance?

In the Chilean and Spanish legislations, the Tax Administration must prove the existence of tax avoidance. In Spain, the LGT expressly provides that "in the tax application procedures, who asserts a claim must prove the facts that constitute it".[71] In Chile, more specifically, the TC provides that the SII must prove the existence of abuse or simulation, as modalities of the GAAR.[72]

Both legislations establish that the inspection or oversight for tax avoidance must be communicated to the taxpayer and grant her the procedural opportunity for providing the evidence deemed necessary for opposing the claim of the Tax Administration. In the case of Spain, article 159 of the LGT 2003 grants the taxpayer a term period of 15 days, before the Tax Administration. In the case of Chile, a term of one month is granted before the Tax

[68] FUNDACIÓN IMPUESTOS Y COMPETITIVIDAD (2015), pp. 31 & 32.

[69] OSORIO (2019), p. 189.3

[70] STS 1865/2007, FJ. 3°.

[71] Article 105.1 de la LGT 2003.

[72] Article 4°bis subsection 5° of the TC.

Administration,[73] extendable according to the rules of citation ["*citación*"],[74] and of 90 days before the respective tribunal,[75] to oppose the declaration of tax avoidance.

Given the distinct features of the procedure to declare tax avoidance in the Spanish and Chilean legislations, it is important to underscore the differences between them. In Spain, the body currently carrying out the tax inspection, after notifying the taxpayer and receiving the appropriate evidence, must submit the complete dossier to the Advisory Commission ["*Comisión consultiva*"] so that it reports on the existence of tax avoidance or lack thereof. In Chile, the TC provides that the Director of the SII ["*Director del SII*"] shall request the declaration of abuse of simulation before the competent TTA, in a well-founded manner and providing the legal and factual grounds upon which its request is substantiated; on its part, the TTA shall substantiate its judgement.[76]

2.5 Object of the Evidence

The object of the evidence refers to the need to prove the existence of the elements that make up the GAAR modality whose application is intended. It answers to the question: what must be proved? In this regard we can ascertain similarities between "the conflict of application of the tax norm" from Spain and the "abuse of the legal forms" from Chile. In both cases it shall be necessary to prove a tax saving and the so-called test of relevancy shall be passed.

Tax saving consist in proving that the taxpayer's conduct involves a tax benefit resulting from avoiding the taxable event or diminishing the taxable base. In the case of Chile, the postponement or deferral of the tax obligation is also contemplated.

The relevancy test consists in proving that the conduct of the taxpayer did not produce relevant legal or economic effects, other that tax saving. In the case of Spain it is also required that the acts of the taxpayers must be, either individually or as a whole, notoriously contrived or improper, that is, acts that are inadequate for obtaining the intended outcome.[77] Even though the Chilean legislation does not consider the element of contrivance, it provides that there is no tax avoidance in case of economy of choice,[78] which considers the reasonableness of the taxpayer's acts.

In both legislations the Tax Administration must proof each of the requirements of the GAAR modality intented to be applied. To this effect, it must compile all the elements of evidence during the administrative phase prior to the declaration of tax avoidance. Furthermore, in both legislations the taxpayer may provide elements of evidence to prove that there was no tax savings or that her conduct is informed by relevant legal or economic effects, other than merely saving taxes.

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[73] Article 4°quinquies of the TC.

[74] Article 63 of the TC.

[75] Article 160 bis of the TC.

[76] Article 160 bis of the TC.

[77] FERREIRO (2004), p. 46.

[78] Article 4° ter of the TC.

2.6 Legal Effects of the Evidence

The legal effects of the evidence are the consequences that follow from the Tax Administration having provided enough evidence. In both legislations the effects are similar.

In case the evidence presented by the Tax Administration is enough to prove the elements that make up the GAAR modality whose application is intended, the legal effect is that the Tax Administration is enabled to collect the taxes tried to avoid,[79] with interest on arrears.[80] The interest is accrued from the expiration of the time limit for declaring the tax, without the taxpayer having duly done so. In Chile a fine is also to be applied.[81]

Exceptionally, it may occur that the elements making up the GAAR modality whose application is intended are proved and, regardless of it, the procedure does not move forward: this will take place if the overseeing action has prescribed. In the case of Chile, besides, it can happen that the minimum difference in taxes does not exceed the amount of 250 monthly tax units on the date on which the requirement has to be submitted,[82] which is the legally established threshold in Chile for tax avoidance to be prosecuted in virtue of a GAAR.

In case the evidence provided by the Tax Administration is not enough for proving the elements that make up the GAAR modality whose application is intended, the tax avoidance shall be deemed as not established and, therefore no taxes shall be collected from the taxpayer. In this sense, the burden of proof operates as residual rule, that is, since the burden of proof lies with the Tax Administration, the absence or insufficiency of evidence harms the interests or claims of the party responsible for providing evidence.[83]

2.7 Assessment of the Evidence

After the Tax Administration and, when applicable, the taxpayer, have provided evidence to proof their respective claims, the body in charge of declaring the tax avoidance must assess the supplied evidence. In the case of Spain this body is the Advisory Commission ["*Comisión Consultiva*"]; the Spanish legislation does not expressly establish this requirement, but it is understood that its report must be grounded. In Chile this body shall be the competent TTA.

The systems of evidence assessment are usually either systems of legally appraised evidence ["*prueba legal o tasada*"] or of free assessment of evidence ["*libre valoración de la prueba*"], depending on whether rules have been established for determining "the admissible evidence

[79] Article 15.3 of the LGT 2003 and article 4° ter subparagraph 3° of the TC.

[80] ALMAGRO (2019), pp. 71-73

[81] NAVARRO (2021), p. 295 argues that the matter is complex regarding the case of abuse of legal forms, since if it is about the failure to pay the tax within the time limit allowed, if it is about the hypothesis of non-verification of the taxable event, it would be necessary to assume that the judgment is declarative, not constitutive, of tax avoidance.

[82] The monthly tax unit (UTM) is an indexation unit of tax character which is determined on a monthly basis. Even before interpreted the concepts comprising such amount, ASTE (2015), p. 18, stated that the legal exchange transaction charges were excluded, so only the readjusted due tax was to be considered. This criterion was adopted by Circular SII Nº 65/2015, p. 21, instructing that "said amount does not include penalties or fines that may apply".

[83] HUNTER (2016), pp. 218-221.

and it is established when certain evidence is an element of judgement in favor of a certain fact"[84]. The outcome of the assessment of the evidence is "to establish the degree of confirmation reached by each of the hypothesis" in conflict.[85]

In the Spanish and Chilean legislations, the evidence assessment system used in tax procedures is, as a general rule, the system of free assessment of the evidence,[86] with the principle of non-limitation of the means of evidence;[87] the system of legally appraised evidence is used when a law expressly establishes it.[88] In the former system there is a greater scope of discretion than in the system of legally appraised evidence, but it does not allow arbitrariness. In fact, the body is required to adequately justify the grounds for its decision.

> The free assessment of evidence is only free in the sense that it is not subjected to legal norms that predetermine the result of said assessment. The operation of ascertaining the empirical support that a series of elements of judgement provide to a certain hypothesis is subjected to the general criteria of logic and rationality.[89]

The competent body for declaring tax avoidance must establish whether the evidence produced in the proceedings is sufficient for considering that a certain fact has been proved. The threshold above which a fact can be regarded as sufficiently proved is called "standard of evidence".[90]

> To establish the threshold above which the level of corroboration of an hypothesis is sufficient supposes to make a decision about the sharing of the risk of error. Indeed, if the standard of evidence in the criminal process is higher, this will lead to fewer false convictions and more false acquittals, whereas the effect will be exactly the opposite if the standard is set at a lower level of exigency.[91]

Neither the Chilean nor the Spanish legislations expressly establish what is the standard of evidence that must be used for declaring tax avoidance. Nevertheless, in Spanish[92] and Chilean[93] dogmatics it is considered that the collection of the avoided taxes, which is the legal effect of the declaration of tax avoidance, is not to be considered as a sanction and, therefore, the standard of "mere preponderance" is to be used, that is, it suffices that the probability that a certain fact took place is greater than the opposite probability.

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[84] OSORIO (2019), p. 190.

[85] FERRER (2007), p. 45.

[86] Article 106.1 of the LGT 2003 and article 160 bis of the TC.

[87] PÉREZ; CARRASCO (2020), p. 261.

[88] DELGADO y OLIVER (2008), p. 90.

[89] FERRER (2007), p. 45.

[90] OSORIO (2019), p. 191.

[91] FERRER (2007), p. 81.

[92] PÉREZ; CARRASCO (2020), pp. 369-370.

[93] As an example, in Chile, UGALDE (2018b), pp. 82 & ff.

CONCLUSION

We conducted a comparative analysis of the procedural aspects of the Chilean and of the Spanish GAAR based on the similarity of their regulations, in order to benefit from the experience of the Spanish legislation regarding the complex legal activity involved in applying a GAAR.

In Spain the competent authority for declaring tax avoidance is the Tax Administration, as it is usually the case in comparative law. Regarding the conflict of application of the tax norm there is a special administrative procedure which requires a favorable report by an Advisory Commission ["*Comisión consultiva*"]; concerning the case of simulation, there is no special procedure. In Chile the competent authority for declaring tax avoidance due to abuse of legal forms or due to simulation is the Tax and Customs Tribunal ["*Tribunal Tributario y Aduanero*"]. To this end, a procedure is needed, that has an administrative stage and a judicial stage; the latter is initiated by a duly founded requirement by the Director of the Internal Tax Service ["*Director del SII*"].

In both legislations the evidence for proving tax avoidance must be provided by the Tax Administration. In Spain, by applying the general rule regulating the burden of proof in tax procedures; in Chile, by applying a special rule. The existence of the elements that make up the modality of GAAR intended to be applied must be proved. Here is where most similarities between both legislations are noticed.

Spain and Chile use the system of free assessment of the evidence ["*libre valoración de la prueba*"], with the standard of mere preponderance. If the evidence offered by the Tax Administration is sufficient for proving the elements that make up the modality of the GAAR that is intended to be applied, the legal effect is that the Tax Administration is empowered to collect the taxes that the taxpayer tried to avoid, with interest on arrears.

Tax avoidance entails complying with the principle of legality from a formal perspective but infringing it from a substantive perspective. The determination of the competent body for declaring tax avoidance is a legitimate tax policy choice. What is important is the regulation of a special procedure, that contemplates the intervention of a collegiate body and respects the rights of the taxpayer in the complex legal activity involved in declaring tax avoidance.

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Circular N°41/2016 del Servicio de Impuestos Internos, de 11 de julio de 2016, modificaciones introducidas por la Ley N° 20.899, que simplifica el sistema de tributación a la renta y perfecciona otras disposiciones legales, introducidas a los artículos 26 bis y 100 bis del Código Tributario y al procedimiento administrativo de calificación de actos o negocios como elusivos, incorporado en materia de medidas antielusivas por la Ley N° 20.780.

Decreto con Fuerza de Ley N° 7 del Ministerio de Hacienda, de 15 de octubre de 1980, fija texto de la ley orgánica del Servicio de Impuestos Internos y adecua disposiciones legales que señala.

Decreto Ley N° 830, de 27 de diciembre de 1974, Código Tributario.

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