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"Recause or sanction? a dilemma" studies on tax regularization and its necessary modification to prevent tax fraud

Abstract

The Tax Regularization in the commission of tax crimes, emerges as a solution that neutralizes the depreciation of the action and the result, through the complete and truthful declaration, as well as the full payment of the tax debt. Given this, having committed the crime, taxpayers who have defrauded the Tax Administration can regularize their situation without being criminally punished to the extent that they meet certain circumstances. However, problems arise regarding the criminal repression of the crime of tax fraud, thus establishing the need to modify tax regularization with the aim of generating positive impacts on the tax and/or criminal system. Taking as a reference for this purpose, doctrine accepted mostly for having scientific evidence.

Keywords: tax regularization, collection, tax administration, tax fraud, special criminal legislation and modification

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Introduction

Knowing about the regularization of the tax situation is of useful importance, because the purpose of the lawyer from the legal perspective is to support the reasons for its institutionalized application as a material cause of exclusion from punishment in the commission of tax crimes, proposing alternatives that improve your performance. In this order of ideas, it should be mentioned that the investigations that precede the present investigation reach the conclusion that the tax regularization is conceived as the reverse of the crime that neutralizes the devaluation of the action and the result, through the complete and truthful declaration, as well as the full payment of the tax debt. Given this, having committed the crime, taxpayers who have defrauded the Treasury can regularize their situation, without being criminally punished, to the extent that they meet certain circumstances.

In this sense, keep in mind that tax fraud is one of the types of tax crimes in Peru (contemplated in the Criminal Tax Law approved by Legislative Decree No. 813 and its respective amendments) understood as any action or omission in by virtue of which a tax rule is premeditatedly violated, that is, acts with intent using artifice, deception, ruse or other fraudulent forms to obtain a personal benefit or for third parties.

However, it should be noted that the purpose of the regularization Tax Policy is found in the state objective of ensuring that unpaid taxes are effectively collected, and its dogmatic foundation lies in repairing the damage caused to the Tax Administration, converging for the purposes of punishment -both retribution and prevention.

Reason for which, the need to study the legal figure called tax regularization is ratified, since there is a series of legal investigations at the national and international level -specifically in Spanish legislation-, it is urgent to know its regulation in depth.

Literature review

Current context of tax regularization

The ideal moment in which only the exclusion of criminal responsibility proceeds is when the perpetrator of the tax offense regularizes his tax obligations (originated by carrying out conduct constituting a tax offense) before the Public Ministry initiates the investigation or, in the absence of this, the Tax Administration initiates the auditing process related to the tax and the period in which the criminal conduct was carried out.

Given these considerations, it should be specified that the tax regularization in the different international jurisdictions has the following characteristics:

In Austria, the tax regularization is embodied in article 29 of the tax law of that country, which conditions the lifting of the sentence to the fulfillment of certain requirements.[1]

For its part, Germany classifies said Legal Institution as "Fiscal Regularization or Self-Denunciation" which is included in article 371°. Specifying that the German doctrine recognizes it as an acquittal excuse for lifting the penalty on the merit of a behavior subsequent to the commission of the crime that annuls the punish ability that the illegal act deserved in principle.[1]

In turn, Spain, includes the Tax Regularization in section 4 of article 305 of the Penal Code, whose new wording allows the taxpayer not to be punished for the commission of a crime of Tax Fraud in which after the consummation of the crime and before the beginning of the inspection activities by the Tax Administration, proceed to regularize and catch up on the payment of their taxes to the Public Treasury. That is, despite having actually committed a criminal offense, the legislator, for reasons of Criminal Policy, decides not to impose a penalty on the taxpayer or, failing that, proceeds to lift the penalty, leaving his conduct "unpunished".[1]

In Argentina, spontaneous regularization is provided for as an acquittal excuse, established in article 16 of the Criminal Tax and Social Security Law No. 24,769. It must be specified that, although it omits reference to "payment", the Supreme Court of Justice of the Nation in the seminal case "Sigra SRL" (dated September 25, 1997) made a broad interpretation of the concept of "regularization", establishing that compliance involves the presentation and payment of the tax debt.[1]

However; according to the laws (especially criminal), whoever commits a crime must be prosecuted and subsequently punished with

a penalty. (Pariona, undated, p.1). However, in Peruvian criminal law this rule has an exception, which deals with tax crimes. In this area, whoever commits a crime (Typical, Unlawful and Guilty Behavior) can get rid of the criminal sanction if he regularizes his tax debt.

Given this (Reaño, sf) points out that article 189 of the Tax Code establishes the prohibition of making a complaint, and in its case the inadmissibility of criminal action, when the perpetrator of the tax crime has regularized his debt before the start of the investigation. fiscal or any requirement of the Administration related to the tax and the period in which the crime was carried out. (...). In property, the Tax Code grants liberalizing effects of punishment (...), which escapes the rationality of the General Part of the Penal Code. (p.294).

In this sense, García (2015) affirms that Tax Regularization is understood as the Payment of the Totality of the Tax debt (Including the Tribute, the Interest and the Fines imposed) or, where appropriate, the return of the refund, balance in favor or any other tax benefit improperly obtained. (p.41).

In turn, Pariona (nd) understands that: "Regularizing implies, according to our legal system, paying the entire tax debt (tax, interest and fines) or returning the tax benefit improperly obtained, that is, the one that has been " originated by the performance of any of the behaviors constituting a tax crime. This waiver of criminal prosecution has been expressly established by the Peruvian legislator in article 189 of the Tax Code, stating that: "the exercise of criminal action by the Public Ministry, nor the communication of evidence of a tax offense by part of the Tax Administration Body when the tax situation is regularized". (p.1).

Reason why it should be mentioned that the purpose of the Regularization Tax Policy is found in the state objective of ensuring that unpaid taxes are effectively collected, and its dogmatic foundation lies in repairing the damage, converging with the purposes of Penalty -both retribution and prevention.[2]

Nevertheless; García (2015) when referring to the Criminal Tax Policy, states that the importance of Tax Crimes in the discussion of Current Criminal Law, is a product of the evolution of economic activities, and as a result of these income is generated that must be supported by the Condition; Given the impossibility of dealing with this evolution to combat illicit activities, it is necessary to reconsider and evaluate new forms of criminal policies that allow for the adequate protection of said activity and reduce the commission of tax crimes. (p.2). Especially, if said Regulation constitutes a totally Collection Policy, forgetting the qualification that corresponds to Tax Crimes.

Note that the Tax Regularization is understood as an assumption that prevents the imposition of the corresponding criminal sanction for the commission of a Tax Crime, therefore, it must be taken into account that this penalty exclusion mechanism obeys a strictly dogmatic foundation. penal.[4]

Likewise, it should be borne in mind that through Legislative Decree No. 813 of the year 1996, the Criminal Tax Law was approved (and its amendments by Legislative Decree No. 1114 of the year 2012), under the protection of the delegation that the Legislative Power granted to the Executive Branch through Law No. 26557. The purpose of this Law was to regulate the figure of tax offenses in a special criminal law and not so much in a normative body such as the Tax Code.[5]

It should be noted that in the crime of Tax Fraud, article 189 of Supreme Decree No. 133-2013-EF that approves the Single Ordered Text of the Tax Code, contains the criminal legal institution called "Exclusion of Penalty", indicating that the exercise of criminal action by the Public Ministry, nor the communication of indications of a tax offense by the Tax Administration Body when the tax situation is regularized in relation to the debts originated by the performance of any of the behaviors constituting a tax offense contained in the Criminal Tax Law until before the Public Ministry orders the initiation of the corresponding Investigation or, in the absence thereof, the Administrative Body of the Tribute initiates any control procedure related to the Tribute and period defrauded.

Consequently

It must be understood that the Peruvian legislator decided to go in another direction and pardon the penalty for those who comply with paying the tax debt originated by the crime. Well, keep in mind that the legal systems of other countries provide similar regulations, of which Germany and Spain are a clear example of this trend. Given that for the State, tax collection turns out to be a priority issue, since it seeks to collect the Taxes that were not paid as a result of the crime rather than punish the person who has committed it.

For these reasons, (Pariona, sf) states that: "Given the conflict of two legitimate interests of the State: I) Punish the offender or II) Repair the damage caused to the victim; has preferred to attend to the most pressing for society. Therefore, the Tax Regularization is the result of an adequate Political-Criminal intervention of the State". (p.2).

Tax regularization in peruvian legislation

It is understood as the payment of the entire tax debt (Includes the Tax, Interest and Fines Imposed) or, where appropriate, the return of the refund, balance in favor or any other benefit improperly obtained. At the criminal level, tax regularization produces the effect of preventing criminal prosecution for tax crimes committed to stop paying the regularized tax debt.[4]

Pariona (nd) points out that regularizing implies: "(...) Paying the entire tax debt (tax, interest and fines) or returning the tax benefit unduly obtained, that is, the one that has been "originated by the performance of any of the conduct constituting a tax crime. (p.1)

Reaño (cited in villavicencio, sf) understands that tax regularization within a tax process is:

One of the manifestations of the administration of the tax area, responding to the criterion of efficiency in collection. It is thus framed within a criminal policy of effective collection for the social function that the State fulfills, leaving as a consequence the function of the sentence without any effect, that is why we are faced with a cause for lifting the sentence, having scope through the personal causes of cancellation of punish ability, understood as those acts that occur after the crime, and are presented after the commission of the crime. The "regularization" does not imply that the behavior, for example, tax fraud, is not a crime, because it does not cover any of the three elements of the crime (typicity, illegality and culpability), rather, it only excludes the possibility of imposing a criminal sanction (punish ability) for a tax crime when the agent carried out the tax regularization process. This action is protected in questions of criminal policy, mainly fiscal policy, therefore, the function of the sentence is without effect. (p.4)

Likewise, said legal institution is expressly regulated by the legislator in article 189 of the Tax Code.

Fundamentals

With the creation of the Tax Regularization, it was sought to fulfill a purpose of Tax Policy, in the sense that with this legal institution

it would be sought to ensure that the unpaid taxes are effectively collected. However, trying to base the regularization on tax crimes from the aspect of the tax policy mentioned above, would become unsatisfactory, since this would violate the Principles of Criminal Law and, consequently, could not explain the various legally established assumptions.

Therefore, the temporary requirement of the regularization of the tax situation would not seem logical, because if what matters is to make effective the credit of the payment of the taxes in debt, it would make no sense to limit the regularization until before the start of the investigation by the Public Ministry or the Tax Control Procedure by the Tax Administration. For these reasons, various specialized studies on the matter, hold the task of establishing the foundation of tax regularization on merit to criminal criteria.

Foundation at the political-criminal level

It was intended to recognize the regularization of the tax situation, as an assumption that eliminates the imposition of the penalty. Well, it is mentioned that the Tax Administration, with the logistics available, would not be able to discover the fraud machinations used by tax debtors, in such a way that it would find it necessary to investigate such harmful conduct.

In such a situation, Tax Regularization is presented as a logical political-criminal measure, since it would raise awareness of the citizen's contribution to detect tax fraud. Therefore, such justification should be warned that it would not express the need to pay the tax debt. Well, if what it is about is to discover the tax illicit, it would be advisable to order the self-reporting of the fraudster.

However, attempts have also been made to justify the Tax Regularization from the logic of the so-called "Golden Bridge", which consists of allowing the perpetrator of the tax crime to return to the path of legality and repair the victim. This has been the object of questioning, of which the one that stands out is that it considers that after the regularization of the tax situation has been carried out, the taxpayer really returns to tax sincerity.

For these reasons, and without the intention of ignoring the political-criminal purpose in the creation of said legal institution (Tax Regularization) as a budget that prevents the imposition of the corresponding criminal sanction for committing a tax crime, it will be taken into account that the correct organization of such a penalty exemption mechanism will necessarily be achieved if it is based on a strictly penal dogmatic foundation.

Foundation at the level of the unjust criminal

Basically, it is due to the fact that the evil of the crime would be eradicated with the good of the payment of the debt in debt. Being the object of questioning, for considering, in principle, the dogmatic possibility of compensating the unfairness of a crime with other correct actions, as if they were simple private debts. But above all, the mere fact of not applying this same principle of compensation to other similar crimes, such as property crimes, is criticized.[4]

Consequently, if compensation for the crime is possible, there would be no reason to limit it exclusively to tax crimes.

Basis at the enforceability level

The Regularization of the tax situation constitutes a necessary way to avoid requiring the perpetrator of a tax crime to report himself under threat of penalty, having the duty to notify the Tax Administration of new facts derived from the tax crime. Which has no legal basis, because the benefit of the Tax Regularization can be accepted even in tax fraud that will in no way generate any other tax-relevant event in the future.

Grounds at the level of the punishability category

A considerable sector of the criminal doctrine states that the Tax Regularization fits perfectly into the withdrawal, so it would have to be based criminally with the same criteria that is given to the figure of the crime theory. Being that this opinion would not be harmonious, because the withdrawal is part of social behaviors that turn out to be still revocable, and the tax regularization is exercised with respect to completely consummated tax crimes. Moreover, if it is observed in the tax regulations that the Tax Regularization is voluntary in order to release exoneration effects, in such a way that it would proceed equally, even when the taxpayer has paid the tax debt for fear of an occasional criminal complaint.

It is established that this exemption from punishment is not based on the author's repentance either.[4]

Grounds at the absolute excuse level

What this foundation intends is to establish the criminal effects legally established by the Tax Regularization. In this sense, it should be specified that according to Cerezo (cited in García, 2015) regarding the acquittal excuse, he points out that: "(...) it excludes the punishability of a conduct for reasons of criminal policy, convenience or opportunity, which would give a dogmatic entrance to the political-criminal figure of Tax Regularization".[4]

However, there is a specific criterion that prevents the Tax Regularization from being established as an acquittal excuse, because said legal mechanism has a personal nature, applying only to the participants who attend.

Therefore, if what is regulated in article 189 of the Tax Code, approved by Supreme Decree No. 133-2013-EF, is observed, it is corroborated that the penalty exemption held by the Tax Regularization arises from an objective fact which is the payment and Not in a personal circumstance. Consequently, it becomes unreasonable to consider the Tax Regularization as a course of extinction of the sentence as an acquittal excuse.

Foundation at the function of the penalty level

It pleases to re-establish the validity of the defrauded norm. Then, the penalty-excluding effect of the Tax Regularization may be based at the criminal level if the conduct of regularization produces a recovery of trust in the transgressed norm that makes the communication that carries out the imposition of the penalty unnecessary.

Thus, García (2015) states the following:

The assumption of guilt for the act as the first communicative expression of the Tax Regularization and the effective repair of the damage caused to the collection interests of the State, where, for the rest, administrative fines are included, will produce a restabilizing effect that turns the imposition of the penal sanction is unnecessary. (p.45-46).

It is a reparation of the damage that integrates the orientation to the victim in the logic of the function of Criminal Law.[4]

Legal-criminal nature

The Tax Regularization in national legislation is a material cause of exclusion from the penalty, as manifestly stated in Plenary Agreement

No. 02-2009/CJ-116, in its foundation number six. Sustaining this on two main arguments, of which, the first refers to the need to differentiate the causes of exclusion and suppression of punishment; the second is linked to the characteristics of the normative regulation of Peru regarding the effects of the Tax Regularization.

In this sense, regarding the first argument, it should be pointed out that there is no normative reason that justifies such treatment and differentiation of concepts, especially if it is observed that the Tax Regularization, even when it has been carried out after the tax crime, is also a cause penalty exclusion.

Regarding the second argument, the normative regulation of the Tax Regularization establishes that the exercise of criminal action by the Public Ministry, nor the communication of indications of tax crime by the Tax Administration Body, is not appropriate; which clearly links the effect of exclusion of punishment to the crime and not to the participants.

For these reasons, tax collection is satisfied with the regularization of the full payment of the tax debt, even if it has been made exclusively by one of the participants.

Area of application

The Tax Regularization can be presented in all the tax crimes conceived in the Criminal Tax Law approved by Legislative Decree No. 813, as long as they have meant a non-payment of taxes or an improper obtaining of tax advantages.

Requirements

Article 189 of the Tax Code breaks down a set of necessary requirements so that those responsible for having defrauded a tax in a criminally relevant manner can be exonerated from the criminal sanction. Being two essential requirements: Voluntary regularization through self-reporting and Payment of the tax debt.[4]

Therefore, if these requirements are not sufficiently met, the exoneration of the penalty will not proceed and as such, the criminal prosecution bodies will be empowered to investigate and impose the corresponding criminal sanctions. Noting that such requirements must be objectively present.

Voluntary regularization through self-denunciation

Tax regularization cannot be offered permanently, since it would make the criminal prohibition less effective. For this reason, article 189 of the Tax Code establishes that the Tax Regularization proceeds only until before the corresponding investigation is initiated by the Public Ministry or, in the absence of this, the tax administration body initiates any control procedure reacted to the Tribute and period in which the criminal behaviors were carried out. Therefore, if the debt is subsequently paid, it may be assessed solely for the purpose of enabling a mitigation of the sentence, but it will not exempt the perpetrator from a criminal sanction.[6]

Note that when reference is made to the Tax Investigation, it should not be understood as the formalization of the Preparatory Investigation, but rather the initiation of the corresponding Preliminary Investigation would suffice. However; With regard to the Tax Control, it turns out that it is not necessary to make a specific statement on the defrauded Tax, but it is enough to refer to the period in which the tax crime was carried out.

Nevertheless; García (2015) considers that: "It is perfectly possible for a Fiscal Regularization to exempt from criminal liability to operate when the fiscal investigation or administrative audit concludes without having determined any irregularity of the Taxpayers". (p.52).

Finally, Regularization cannot be caused by any act of coercion or threat, but voluntarily and spontaneously, otherwise it would vitiate its configuration. But in addition, it is required that such conduct must occur within a certain time, being limited before the start of the investigation by the Public Ministry, or, where appropriate, before the Tax Administration notifies any requirement. Being to specify that in many cases it is not enough for the tax debtor to pay the tax debt or return the benefit obtained unduly, but that, in addition, he will have to repair the damage caused, which comes to be the interest generated (as can be deduced from article 189 ° of the Tax Code, in its fourth paragraph). For these reasons, "regularization" is also called "self-denunciation", always at the initiative of the tax debtor.[7]

However, from the previous paragraph, it must be taken into account that, if the regularization excludes the tax debtor for adopting the regularization process, this is personal and not transferable or communicable to the other participants of the tax criminal event, thus, for example, if three subjects evade the payment of some taxes using a front company, and then only one of them regularizes their tax situation, restoring both the benefits obtained and the interests from such criminal conduct, will not exclude or prevent the remaining two subjects from being can initiate criminal proceedings for the commission of a tax crime.[7]

Payment of tax debt

The tax legislation states that only the full payment of the tax debt or the full refund of the benefit artificially received, can lead to a Tax Regularization that excludes the penalty. It is understood that the payment of the tax debt is that caused by the performance of a conduct constituting a tax crime. The partial payment or the promise of payment will not have liberating effects. A tax division is not allowed either.[6]

For this reason, García (2015) recommends that: "Whoever makes the payment, specify what tax debt the Tax Administration must allocate said payment, otherwise the supplementary rules contained in article 31 of the Tax Code will be followed. (p.50).

Effects

Article 189 of the Tax Code proscribes that the Tax Regularization makes inadmissible the exercise of criminal action for the Tax Crime committed, based on the lack of punishability of the conduct. For these reasons, in the case of an objective cause of exclusion from punishment, a criminal proceeding could not be initiated for the tax offense whose defrauded tribute has been paid in full by the perpetrator of the crime, and if a criminal proceeding was improperly initiated, that must be dismissed once the tax regularization has been demonstrated in a timely manner. In addition to this, said exclusion from the penalty also covers possible accounting irregularities and other instrumental falsehoods that have been committed exclusively in relation to the tax debt subject to Regularization.

Therefore, given the conflict of two legitimate interests of the State: I) Punish the offender or II) repair the damage caused to the victim; He has preferred to attend to the most pressing for society. Therefore, the Tax Regularization is the result of an adequate Political-Criminal intervention of the State.[6]

Penalty exclusion

Legal Basis number 6 of Plenary Agreement No. 02-2009/CJ-116 states that the material cause of penalty exclusion is procedurally

conceived as a procedural impediment, the effect of which is, on the one hand, to exclude the punishability of the typical, unlawful act and guilty, and, on the other hand, prevent the initiation of criminal proceedings. This is corroborated by the second paragraph of article 189 of Supreme Decree No. 133-2013-EF.

Which approves the single ordered text of the tax code, stating that:

The exercise of criminal action by the Public Ministry, nor the communication of indications of tax crime by the Tax Administration Body when the tax situation is regularized, in relation to the debts originated by the performance of some of the conducts constituting a tax crime contained in the Criminal Tax Law, before the corresponding investigation is initiated by the Public Ministry or in the absence thereof, the Tax Administration Body initiates any control procedure related to the tax and the period in which the behaviors were carried out. Marked.

Consequently, the objective perspective of tax regularization stands out, that is, the scope of application, the requirements and the effects of regularization, as is evident, refer to the act or unjust guilty party, not to the author. Such a consideration is, by the way, compatible with the very literal tenor of article 189° CT, which ultimately prevents any possibility of submitting to criminal proceedings for the punishable acts subject to regularization. (Legal Basis No. 9 of Plenary Agreement No. 02-2009/CJ-116) two. Brief notes on Tax Regularization in Spanish legislation.

The introduction of the tax regularization in the spanish legal system was strictly due to reasons of an administrative-tax nature.

In this sense, there are four theses that the doctrine has sustained about the legal nature of the tax regularization clause. These positions are: The absence of regularization as a negative element of the type, regularization as a justification cause, regularization implies the exclusion of the typicity of the tax conduct and regularization as an acquittal excuse.[4]

It is necessary to note that the thesis of Tax Regularization as an acquittal excuse is the most recognized and dominant by the Spanish doctrine. Reaching the point of considering the tax regularization clause as a true acquittal excuse for lifting the sentence, then, the taxpayer who, after committing the criminal offense, regularizes his tax situation by complying with all the requirements and without having had If none of the three blocking situations takes place, the penalty that would actually correspond to him will be lifted, that is, the punish ability of his action will be erased.

Now, regarding the requirements so that this acquittal excuse can be appreciated, there are two: The first is the communication to the public administration of the previously falsified or omitted data; and, the second is debt income.

Regarding the first requirement, it should be noted that said communication, despite practically lacking formalities, needs to comply with requirements such as; clarity, veracity or completeness. Regarding the second requirement, it must be stated that it is a necessary requirement to understand that the Tax situation is regularized.

However, it must be taken into account that the doubts of constitutionality that the tax regularization clause has raised have been many, and especially they have been based; In the first place, in the fact that self-reporting in the field of the crime of tax fraud excludes criminal conviction, and yet, in other analogous figures it is only a mitigating factor.[4]

Finally, Bustos (2017) fundamentally points out the following:

Criminal doctrine does not usually differentiate between grounds and purpose of regularization. The objective pursued by the legislator through the approval of a specific norm should not be confused with the foundation that inspires and explains it. The purpose of the regularization is clear: to make it easier for the Social Security Administration to collect fees from the fraudster, making their collection effective, which implies a clearly tax collection interest.[8]

Even constituting this the purpose, we do not believe that it can be the foundation of the norm. The reasons that moved the legislator to establish the figure of regularization in the Criminal Code may constitute the intended purpose, but in no case do they prejudge the foundation of the institution, which must be established in accordance with the principles of the criminal order: in this case, in the political-criminal interest in reparation, and in the reduced need for punishment that, in response to preventive-general and preventive-special criteria, are revealed by this behavior, which, accompanied by the principle of minimum criminal intervention explains what is the basis of the rule.[8]

Collection of taxes in tax policy in relation to the legal figure of tax regularization

Taxation is the only practical means by which revenue is collected to finance public spending on goods and services that most people demand. Given this, it should be noted that Tax Policy is a branch of fiscal policy, therefore it includes the use of various fiscal instruments, including taxes to achieve the economic and social objectives that a politically organized community wishes to promote. Being guidelines that guide, direct and support the tax system.[9]

For his part, Bravo (cited in Amasifuen et al, 2014) points out that:

Tax Policy is part of Fiscal Policy or Public Policy. A Public Policy is presented in the form of a government action program in a sector of society or a geographical space, in which the State and civil society are articulated. The State actively participates in the so-called Tax Policy.[9]

In this sense, Tax Policy is the way in which citizens organize themselves to achieve the Common Good.

However, regarding the characteristics of the tax policy, the following should be noted:

Infer as little as possible in the effective allocation of resources; Show off a simple and cheap Administration; Be flexible in responding to changes in economic, political and social circumstances; Respect the Principles of Equity and Proportionality; Y; Show transparencies in each activity carried out by the State.

For these reasons, the Tax Policy must be based on three taxes, which are: Income Tax (in its five categories), General Sales Tax, and the Selective Consumption Tax.

Finally, García and Villavicencio (cited in Plenary Agreement No. 02-2009/CJ-116, 2009) point out that:

The purpose of the tax policy in the regularization is found in the state objective of ensuring that the unpaid taxes are effectively collected, and its dogmatic foundation lies in the repair of the damage, and, as such, with entity to converge with the purposes of punishment, both in retribution and prevention. (p.4).

Sarmiento (cited in Medina, 2017) regarding tax policy, states:

The State has as a major goal, to provide welfare to the society that is constituted as a whole. For this purpose, it is necessary for

the State to guarantee order in its territory and offer the means to promote the integral development of its inhabitants. For this, the State needs economic resources; and one way to obtain them is through tax collection. The foundation of the existence of tax revenues lies in the solidarity of taxpayers to contribute to the requirements of citizenship, represented by the State. (p.2).

Thus, tax revenues usually represent, in the context of state revenues, the main contribution in quantity and the one that sustains the stability of a national economy in a healthy way.[3]

Four. Proposal to amend article 189 of Supreme Decree No. 133-2013-EF to prevent tax fraud.

Article 189.- criminal justice

The Ordinary Criminal Justice is responsible for the investigation, trial and application of penalties in tax crimes, in accordance with the legislation on the matter.

The exercise of criminal action by the Public Ministry, nor the communication of indications of tax crime by the Tax Administration Body when the tax situation is regularized, in relation to the debts originated by the performance of some of the conducts constituting a tax crime contained in the Criminal Tax Law, before the corresponding investigation is initiated by the Public Ministry or in the absence thereof, the Tax Administration Body initiates any control procedure related to the tax and the period in which the behaviors were carried out. indicated, in accordance with the regulations on the matter.

The inadmissibility of the criminal action contemplated in the previous paragraph, will also reach possible accounting irregularities and other instrumental falsehoods that have been committed exclusively in relation to the tax debt subject to regularization.

Regularization is understood as the payment of the entire tax debt or, where applicable, the return of the refund, balance in favor or any other tax benefit improperly obtained. In both cases, the tax debt includes the tax, interest and penalties.

The use of the Tax Regularization will not proceed when the same taxpayer has reiterated the evasive conduct regarding his tax obligation, where the Tax Administration Body, upon observing said illegal conduct contained in the Criminal Tax Law, must immediately notify the Public Ministry, in order that the latter, exercise the corresponding criminal action.

Methods and strategy

Research type and design

According to Hernández (2018), the research has three (3) approaches, where the most objective and complete is the mixed one, since it implements quantitative and qualitative methodology. (p.287).

Likewise, descriptive-applied research is one that is interested in the description, analysis and application of a proposal to a problem identified in reality (Bernal, 2010, p.187).

Due to the above, this research has a mixed approach, due to the use of statistics when processing the questionnaire, which belongs to the quantitative approach. And qualitative when using the analysis of documents and observation guide.

The research is descriptive, because the influential factors of tax fraud are identified, and applied, because the modification of Article 189 of Supreme Decree No. 133-2013-EF is proposed to prevent tax fraud.

Study stage

It will be within the framework of Peruvian Legislation, specifically in the city of Chiclayo in order to achieve the modification of Article 189 of Supreme Decree No. 133-2013-EF that approves the Single Ordered Text of the Tax Code.

Characterization of Subjects

Population and sample

They are the Lawyers Specialists in Tax Law and the Administrative Staff of the Regional Administration of SUNAT-Lambayeque, both located in the city of Chiclayo.

Results and discussion

Regarding the results obtained in question 01, in considering that the Tax Regularization is the ideal legal mechanism for the Tax Policy to fulfill its purpose and objective, it is observed that 54% of the respondents state that they totally agree with consider this, as well as 42% agree with that premise, however, 4% choose not to comment on it. Articulating said result with the following national background: Medina (2017), in its Legal Publication entitled "Regularization as an acquittal excuse in the commission of Tax Crime" in the Law Firm "Mariscal & Galdos Abogados" reached the following General Conclusion: Our The legal system, regarding criminal tax law, focuses on a policy aimed at collection, adopting a patrimonial theory, where the fundamental reason of the Criminal Tax Policy is only the fulfillment of the Tax Obligation. (p.4). Consequently, it is evident that there is a solid position in considering the Tax Regularization as the ideal legal mechanism so that the Tax Policy fulfills its purpose and state objective of ensuring that the unpaid Taxes are effectively collected.

Regarding the results obtained in question 02, in arguing that if the requirements of the Tax Regularization are not met, the Public Ministry would be empowered to initiate the corresponding criminal process, it is reflected that 50% of the respondents state that they totally agree with the aforementioned premise, while 48% agree with it, however, 2% choose not to comment. Said result must be articulated with the following international background: CNBC (2017), in its Publication called "Comparative Analysis of Tax Crime in Panama and in other Countries" when referring to Tax Regularization as a reason for lifting the sentence or acquittal excuse in Panama , I arrive at the following Conclusion: Despite having carried out the illicit, taxpayers who have defrauded the treasury can regularize their situation, without being criminally sanctioned, to the extent that they meet certain circumstances (Requirements). Especially, if in most cases, the regularization must be carried out prior to the start of any tax inspection, observation or complaint procedure. If the regularization were to materialize later, in many cases it would only be possible to reduce the sentence (...). (p.5). In addition to this, it should be noted that the Tax Regularization cannot be imposed, but rather, as indicated in Plenary Agreement No. 2-2009/CJ-116, it must be carried out voluntarily, by means of a self-report and full payment of the tax debt or refund for the tax benefits improperly obtained through fraudulent means (Tax Regularization Requirements). Being that the performance of the tax debtor should not be subject to coercive events, or influences beyond his will. It is the tax debtor himself who must account for his criminal acts and the serious consequences that he entails for the social purpose of the State, and not through the tax or criminal authority (...). (Villavicencio, nd, p.7-8). Being reflected that there is a valid position in maintaining that if the requirements of the Tax Regularization are not objectively met, the Public Ministry would be empowered to initiate the corresponding criminal process or failing that.

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Regarding the results obtained in question 03, regarding the fact that Article 189 of the Tax Code states that the Tax Regularization has the effect of rendering the exercise of criminal action inadmissible for the Tax Crime committed, it is observed that 42% They state that they totally agree in considering it, as well as 47% indicate that they agree with that premise, however, 11% choose not to comment on it. Consequently, this result is articulated with the following national background: García (2015), in his Legal Publication entitled "Tax Regularization in Tax Crimes" for the Center for Legal and Political Studies and Research Iustitia Legis of the Pedro Ruiz Gallo National University expressed the following Conclusion: Article 189 of the Tax Code makes inadmissible the exercise of criminal action for the tax crime committed. Although the positive regulation refers more to the procedural aspect than material, the inadmissibility of the exercise of criminal action is based, as we have already indicated in the preceding sections, on the lack of punishability of the conduct. As it is an objective cause of exclusion from punishment, a criminal proceeding may not be initiated for the tax offense whose defrauded tribute has been paid in full by the perpetrator or participant in the crime, and if a criminal proceeding was improperly initiated, it must be dismissed once Once the timely Tax Regularization has been demonstrated. (p.52).

With regard to the results obtained in question 04, on whether tax regularization is a clear example of an adequate political-criminal intervention of the State, it can be seen that 41% of the respondents state that they totally agree in sustaining it, likewise, 31% indicate that they agree with that premise, however, 18% maintain that they disagree, while 10% choose not to give an opinion. Therefore, said result is articulated with the following national precedent: Pariona (nd), in its Legal Publication entitled "Tax Regularization in Criminal Law" for the Pariona Lawyers Law Firm in the city of Lima, made the following General Conclusion: Faced with the conflict of two legitimate interests of the State, punish the offender or repair the damage caused to the victim, It has been preferred to attend to the most pressing for society. Therefore, tax regularization is a clear example of an adequate political-criminal intervention of the State. (p.2).

Regarding the results obtained in question 05, to consider that with the modification of Article 189 of Supreme Decree No. 133-2013-EF, Justice will be generated, because the Tax Regularization would prevent Tax Fraud in Criminal Legislation In particular, it is observed that 45% of those surveyed state that they totally agree with it, as well as 47% agree with the premise mentioned at the beginning of this paragraph, however, 8% choose not to give an opinion. Articulating said result with the following national background: Muñoz (2019), in his legal article called "Economic criminal law: Tax law", with the aim of identifying the need to have good operators of tax law, For this, the qualitative methodology was used with instruments such as an interview guide and content analysis. The population was made up of 5 criminal lawyers and 5 taxpayers. The author concludes that the law is not only civil and criminal, but there are others, of equal importance, such as the tax law, since it not only serves for collection, but also to prevent possible crimes, such as tax fraud, which It has a negative impact on the development of a society. (p.17) which has a negative impact on the development of a society. (p.17) which has a negative impact on the development of a society. (p.17)

In addition to this, it is necessary to reflect on the general preventive function of criminal law, in that criminal policy that seeks to protect society against crime and also on the use of more effective mechanisms that prevent the future commission of this type of crime, that in the long run will produce counter-productive effects, becoming a license to defraud. (Quiroz, 2018, p.86). Demonstrating the need to modify Article 189 of Supreme Decree No. 133-2013-EF, in order to generate Justice, because the Tax Regularization would prevent Tax Fraud in the special criminal legislation, so that the Law Criminal maintains its validity Punitive against behaviors that violate criminally protected legal assets, resorting to the imposition of penalties, for this.

Regarding the results obtained in question 06, referring to the fact that the Proposal for the modification of Article 189 of the Tax Code, will generate Objectivity in the Pronouncement of the Superintendents and Intendants of SUNAT and/or representatives of the Public Ministry of Chiclayo, it is reflected that 48% of those surveyed state that they totally agree with that modification proposal, as well as 38% consider that they agree with it, however, 14% choose not to comment on it. Well, being the essence of this investigation, such a proposal translates as follows: Given the reiteration of fraudster taxpayers with their Tax Obligation, the investigation should be in charge of the criminal jurisdiction through the Public Ministry, who holds the exercise of criminal action and the judicial power in order to determine, based on the background of this type of criminal act, who should be subject to a punishable sanction, guaranteeing the prevention of these types of crimes, and although the cost that supposes for the tax administration the initiation of a criminal process for a tax offense may be higher than accepting a regularization with the total payment of the debt and fulfilling the collection purpose of the tax administration for the benefit of the Public Treasury, leaves them a cost that it even becomes detrimental to the tax administration from its perspective (...) (Quiroz, 2018, p.86). Establishing the need to modify Article 189 of Supreme Decree No. 133-2013-EF.

Regarding the results obtained in question 07, in pointing out that Tax Fraud is one of the modalities of Tax Crimes, it is estimated that 41% state that they fully agree with the aforementioned premise, while 54% maintain agree with it, however, 5% choose not to comment. Said result must be articulated with the following national background: Róger and Sánchez (2018), in the legal article called "Critical analysis of criminal policy and the type of unjust tax crime in Peru", the research methodology is qualitative of inductive-historical method, with an instrument of doctrinal analysis. The investigation concludes that there is no criminal tax policy design in Peru at any level of government, and that this largely explains the low levels of tax collection and criminal execution of criminal tax crimes. (p.254)

Being established that Tax Fraud is indeed one of the modalities of Tax Crimes contemplated in the Criminal Tax Law (Approved by Legislative Decree No. 813).

Regarding the results obtained in question 08, in considering that the legal asset protected in Tax Fraud is the "Income and Expenditure Process by the State", it is observed that 43% of the respondents state that they are totally in agreement. agreement in considering it, likewise, 45% maintain that they agree with that premise, however, 12% choose not to comment on it. Articulating said result with the following: It is considered that the legal asset protected in Tax Crimes is the expectation that the State will receive the income generated by the different internal taxes. That is to say, it protects the "Process of Income and Expenditures in charge of the State". (Quiroz, 2018, p.45).

With regard to the results obtained in question 09, in maintaining that in tax crimes, the Public Ministry will order the formalization of the Preparatory Investigation after a reasoned report from the Tax Administration Body, it can be seen that 47% state that they are totally in agreement. agree to support it, likewise, 43% say they agree with it, however, 10% choose not to give an opinion. Consequently, said result is articulated with the following local antecedent: Quiroz (2018),

in his Undergraduate Thesis entitled "Tax Fraud: Limit between Administrative Infraction and Criminal Offense" at the Santo Toribio de Mogrovejo Catholic University in the city of Chiclayo, I reach the following Conclusion: The Tax Regularization established in Article 189 of the Tax Code and reaffirmed by the Supreme Court of Justice of the Republic in Plenary Agreement No. 2-2009/CJ-116, violates the right to exercise the criminal action of the prosecution and It allows the Tax Administration, justifying itself in its specialization and technical competence, to exempt taxpayer fraudsters from the treasury from being criminally sanctioned in the face of criminal and often repetitive behaviors, which go unpunished and become provisions with totally collection policies, losing the function characterized by the prevention of crime and that ultimately do not contribute to dissuading the commission of crimes such as Tax Fraud. (p.85-86). Therefore, although it is true that in tax crimes.

Conclusion

The proposal to modify article 189 of Supreme Decree No. 133-2013-EF will safeguard the legal nature of tax regularization, betting on suitable mechanisms that seek to prevent tax fraud, with the aim of resolving the existing problem in terms of to the use of the Tax Regularization by the same taxpayer who has reiterated the evasive conduct regarding his tax obligation.

The crime of Tax Fraud and its modalities in special criminal legislation, has influential factors, among them, the most outstanding is that in article 189 of Supreme Decree No. 133-2013-EF that approves the Single Ordered Text of the Tax Code , contains the Legal Institution called "Tax Regularization", indicating that the exercise of criminal action (Exclusion of Penalty) by the Public Ministry will not proceed,nor the communication of indications of a tax offense by the Tax Administration Body (SUNAT) when the tax situation is regularized in relation to the debts originated by the performance of any of the conducts constituting a tax offense contained in the Criminal Tax Law (Decree Legislative No. 813) until before the Public Ministry orders the initiation of the corresponding Investigation (Preliminary Investigation) or, failing this, the Tax Administration Body initiates any control procedure related to the Tax and period defrauded.

Finally, the possible results that the implementation of the modification of article 189 of Supreme Decree No. 133-2013-EF will generate, will establish a new system that sets limits to the use of Tax Regularization by the same taxpayer who has reiterated the evasive behavior against to their tax obligation, in order for Criminal Law to maintain its punitive validity against conduct that violates criminally protected legal rights, resorting to the imposition of penalties, in order to re-aware society that committing a crime is a reprehensible act and therefore therefore, deserving of being punished.

Recommendation

With the modification of article 189 of Supreme Decree No. 133-2013-EF, the Government of the Republic of Peru must bet on suitable initiatives and mechanisms that seek to prevent Tax Fraud, since the different governments in power have directed all their actions to increase collection, transforming consummated intentional crimes and even in the process of criminal investigation, into simple tax debts, with contradictory versions on how to deal with the "Regularization of the Tax situation" in criminal and administrative jurisdiction, respectively.

It is appropriate to recommend a more exhaustive study of the Tax Fraud regulated in the Criminal Tax Law (approved by Legislative Decree No. 813 (with its respective amendments to Legislative Decree No. 1114)), in the sense that what is reflected in the present investigation does not it is not intended to be a topic that exhausts the debate, but, on the contrary, serves to incite it.

Although it is true, the crime of Tax Fraud and its modalities in the special criminal legislation, has influential factors; It is necessary to recommend that the Tax Regularization, being a legal mechanism of penalty exclusion, will not become a license to defraud, since it will enjoy an explicit legal criterion that limits its repetitive use by the same taxpayer.

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Conflicts of interest

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