

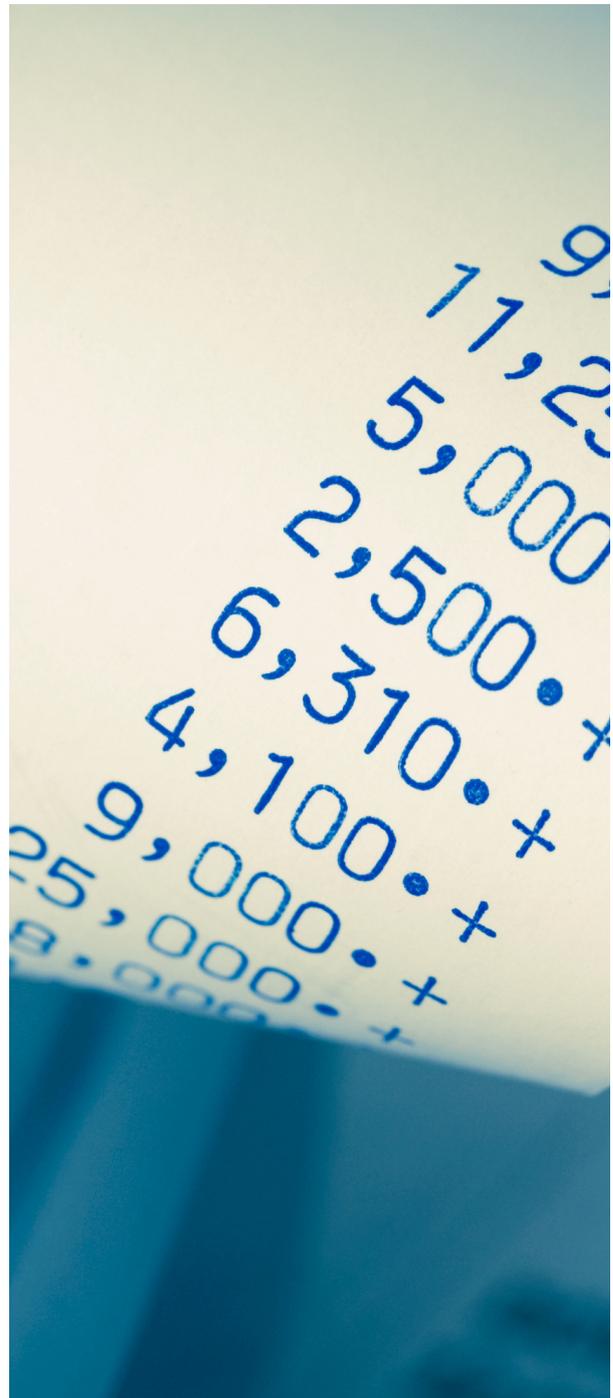
PANAMA'S SUPREME COURT DENIES JUDICIAL REVIEW OF DECISION INITIATING ADMINISTRATIVE INVESTIGATION INTO TAX FRAUD

BY PUBLIO CORTÉS

I have the opportunity to review a decision from the Third Chamber of the Supreme Court of Justice of Panama (**the Court**), issued on September 27, 2019 (File 748-16), within a Contentious Administrative Lawsuit of Full Jurisdiction against the General Directorate of Income (**DGI**). The plaintiff is a taxpayer who is asking **the Court** to declare null and void, as illegal, an order of the **DGI** that initiated an administrative investigation for possible tax fraud on income tax matters. This case is judged under the administrative sanctioning and procedural regulations that preceded the substantive inclusion of the crime of tax fraud in the Criminal Code of Panama, however, it must be taken into account because it could have an impact in the future, as explained below.

Management and arguments of the taxpayer plaintiff

The **DGI** issued an order to initiate an administrative investigation in case of possible tax fraud. Two corporations appear directly before **the Court** and submit a contentious administrative lawsuit of Full Jurisdiction, requesting that such administrative act be declared



null and void, as it is illegal.

The Justice of the admission decides not to admit the lawsuit. The plaintiff files an appeal before the rest of the Third Chamber of the Court, requesting his lawsuit to be admitted.

In the appeal the plaintiff alleges the following:

(1) Describes that the original ruling considered two arguments for not admitting the complaint: **(a)** that the complaint did not comply with the formalities of Article 44 of the Rules of the Contentious Administrative Procedure, which requires an authentic copy of the accused administrative act; **(b)** that the complaint was directed against a so-called "procedural" or "preparatory" act, when it should have been directed against acts called "final".

(2) The plaintiff invokes the need to comply with the substantive law and not to rely on "excessive formalism".

(3) On the issue of formalities, it alleges that the Justice of the admission relied on considerations "*far from the truth of the record.*" And this statement is based on the fact that, together with his claim, he provided the accused and confirmatory act, duly authenticated, included within the complete and authenticated copy of the administrative file provided, "*based on the legal advice of the General Directorate of Income.*"

(4) On the issue of the preparatory nature of the contested order, it says:



"The other point to be clarified in the ruling under appeal consists of the fact that the court considers that the plaintiff, in its lawsuit libel, presents a claim against an act of the so-called "procedural" or preparatory and does not straighten out its claim against final administrative acts".

.....

Therefore, the administrative act challenged is not a mere formality but, on the contrary, it is constituted in the administrative act that was subsequently issued in violation of the Law (SIC) to the very ones issued by the administration in this matter that see the rights of the appellants"

Motivation and Decision of the Court

The ruling does not contain any further information about the position of the Administration Attorney Office, except to state that it opposed the appeal. The following are **the Court's** reasons, which we summarize as follows:

(1) It is recorded that the judicial control of the Contentious Administrative Jurisdiction only applies against,

"Definitive rulings of the Administration". It also affirms that one thing is effective judicial protection and another thing is the fulfillment of the minimum requirements that the Law demands to process the judicial actions.

(2) It agrees with the Justice of the admission, in that the plaintiff did not comply with the procedural rule that obliges the plaintiff to file an authenticated copy of the accused act, nor did he use the means of asking **the Court** to request it on his own.

(3) It disagrees with the assertion of the plaintiff, insofar as the copies of the contested act were in the authenticated administrative file of the **DGI**. On this **the Court** says:

"In this sense, it is worth clarifying that the copy of the Ruling of June 8, 2016, which is in said file, does not have the evidence of its notification, and it is not an act that ends the process, nor is it a final ruling or order of procedure that makes its continuation impossible, for that reason, it cannot be challenged before this Chamber, as required by article 42 of Law 135 of 1943, modified by article 25 of Law 33 of 1946, which establishes as an essential requirement to appeal a claim before the Contentious Administrative Jurisdiction, that the contested administrative ruling or act is final, or that in the case of procedural measures, they decide directly or indirectly the merits of the case ..."

(4) From the foregoing, it concludes that the administrative act challenged *"is a mere formality action that only has to initiate the Investigation Process, due to*



*the possible tax fraud in concept of income tax, against the taxpayer ... ". Further on, it adds that in the contested ruling of the **DGI** "it is noted that once the investigation is completed and the evidence gathered, the authority, through a reasoned ruling, will decide whether or not the fact related to tax fraud is established".*

(5) **The Court** cites a precedent of itself, where the same Third Chamber qualified as a preparatory act not legally enforceable, because *"it does not cause a state or create, modify or extinguish subjective rights"*, administrative actions to suspend and start investigations of public officials for suspicions of irregularities. In those cases, **the Court** maintains, if, once the investigation is over, they decide to dismiss the official, then there is a definitive administrative act that can be brought, after exhaustion of the governmental means, before the judicial control of **the Court**.

(6) Finally, **the Court** invokes as another reason for not admitting the claim, the fact that the plaintiff failed to comply with the formality of not appointing the Administration Attorney as representative of the defendant entity



and cites precedents in that sense.

Based on the foregoing considerations, **the Court** upholds the original order and does not admit the lawsuit.

Observations on the Taxpayer's actions

From what can be seen in the above-mentioned ruling, everything indicates that the decision of the **DGI** to initiate an investigation into possible tax fraud was the subject of an Appeal for Reconsideration, which was decided by confirmatory form. It seems that this was so because the plaintiff himself in the Appeal filed in **the Court**, states that he provided a copy of the complete file of the **DGI**, within which there was "*the accused and confirmatory order*".

Assuming the above to be true, we observe a serious error in the procedural management of the plaintiff. Inasmuch as, after exhausting the Appeal for Reconsideration, even in the case of a tax sanctioning procedure,

what was appropriate was an Appeal to the Administrative Tax Court.

Only the decision of the Administrative Tax Court exhausted the governmental route. I do not understand why the case was brought before **the Supreme Court** directly without complying with that *sine qua non* requirement of procedure, before to try to get the judicial review of the case.

We insist that we start from the premise that the case did not go through the Administrative Tax Court, because the ruling does not mention that Court at all, and the plaintiff only refers to a file that was at the **DGI**.

In addition, we have checked the website of the Administrative Tax Court and have not found any ruling of that Court dealing with this case, during the time that has elapsed between June 8, 2016 (date of the **DGI's** contested ruling) and December 6, 2016 (date on which **the Court's** issued the original ruling that did not admit the contentious-administrative action, a decision that has been appealed to the rest of the Chamber). If the facts were otherwise, this opinion would have to be reviewed.

Observations on the Court's ruling

I do not think the Court's action is defensible, regardless of whether the final result was correct. For three (3) reasons, namely:

(1) A not very thorough review of the Tax Procedure applicable, even to the sanctioning procedures on taxes under the competence of the **DGI**, indicates



that the action of the **DGI** was subject to appeal before the Administrative Tax Court and there the governmental channel had to be exhausted. This argument alone was sufficient to dismiss the lawsuit. However, it seems that **the Court** did not use this argument, which was the essence of the case, in order to use other factors that, in our opinion, were highly questionable and unnecessary.

(2) The Court says that the copy of the ruling in the **DGI** file, provided by the plaintiff taxpayer, "*does not have the evidence of its notification*". However, I wonder if this is not a typical case of notification for "conclusive conduct"? Obviously, the plaintiff-taxpayer was notified, insofar as he filed an appeal against such act and such appeal was decided by an act confirmatory. No one appeals against an administrative act about which they are not notified.

(3) Finally, it seems to us very serious that the initiation of a tax fraud investigation be qualified by the Court as a "*preparatory act*" of "*mere formality*". The Court assumes that "subjective rights" are only affected when there is a decision on the merits. I disagree: Isn't the name and reputation of a business a subjective right? What business would benefit from having its name involved in a tax fraud case, even at the level of an investigation? Of course, there is a direct impact on the subjective rights of taxpayers by the initiation of a tax fraud investigation involving them.

Therefore, the right to a judicial review of the administrative act that initiates the investigation of a tax fraud should be granted.

Final Comments

Since the facts of the case discussed, there have been substantial changes in the legislation on tax fraud in Panama. It is now considered a criminal offense when the damage to the Treasury is of US\$300,000.00 or more. Although the behaviors ambiguously defined in the Law are the same, below that amount the cases remain at the Administrative level.

However, one thing has not changed: the initiative to initiate an investigation, whether criminal or administrative, begins with an administrative action by the **DGI**. Therefore, if **the Court** considered the initiation of the investigation to be a "procedural" or "preparatory" act, it could consider it the same now with the new legislation.

If the Third Chamber of the Supreme Court were to walk down that path in future cases, denying access to judicial review by that route, what would happen is that the issue would be decided by **the Court**, en banc, by the way of an Action to get a Constitutional Injunction based on a breach of the Due Process of Law ("Amparo").

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