

Constitutionality and Legality in Administrative Procedures of Customs Matters

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Abstract: The Secretariat of Finance and Public Credit has the authority to permanently inspect and watch over the handling, transport or possession of merchandise in the foreign trade zone and audited fiscals, national waters and beaches, the attached economically exclusive zone, territorial waters, airports and a two hundred kilometer range parallel from the border and a fifty kilometers range parallel to the beaches. Inside these places, possession, transport or handling of foreign merchandise must be backed up with proper documentation at all times, such as weigh to import or legally issued invoice. Its activities involve the reviewing of any acts realized by the taxpayers with knowledge of their operations in national territory, be it import or export. If the customs authority detects an irregularity, it will then initiate an Administrative Procedure in Customs Matters which, the majority of the time lacks the established requirements in applicable laws to function properly, preventing the confusion between “Constitutionality” and “Legality”.

Key words: procedure in customs matters; constitutionality; legality

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1. Introduction

The Secretariat of Finance and Public Credit has the authority to permanently inspect and watch over the handling, transport or possession of merchandise in the foreign trade zone and audited fiscals, national seas and beaches, the attached economically exclusive zone, territorial waters, airports and a two hundred kilometer range parallel from the border and a fifty kilometers range parallel from the beaches. Inside these places, possession, transport or handling of foreign merchandise must be protected with proper documentation at all times, such as weigh to import or legally issued invoice.

Tax credits are any and all tax liabilities of the taxpayer, that is, they are economic sanctions issued by tax authorities to any taxpayer that does not comply with their fiscal obligations, which are supported by fiscal law. Said tax credits are carried out by not carrying out a tax liability. Therefore, the tax authority will be able to penalize the taxpayer responsible, based on the constitutionality and legality to impose and recover from perjury caused by the taxpayer by not carrying out a legal obligation.

On the matter of external trade, any person that carries merchandise for external trade must import them or

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show the documentation needed for legal possession inside the country; failure to do so will give the tax authority the faculty to make an act of nuisance towards the taxpayer and require him to issue a license to import or a legally issued invoice. If the taxpayer does not have the aforementioned documentation, the tax authority will proceed to preemptively seize said merchandise by means of an Administrative Procedure in Customs Matters, in which the tax authority manifests that it audited a taxpayer in possession of foreign merchandise and by reason said person did not show the legal documentation that protects said merchandise, be it by weight to import or a legally issued invoice.

Ensenada has little knowledge about this administrative procedure, by reason of which the taxpayers, who are penalized by the authorities, do not know the reaches of said authority and, above all, that said procedure must comply to a series of requirements and formalities to be able to proceed against the citizen. The present work analyzes the Political Constitution of United Mexican States, the Customs Law and the Federal Fiscal Code to provide the governed with instructions to consult, in clear detail, the Constitutionality and Legality of the Administrative Procedure in Custom Matters.

2. Literary Review

2.1 Background

The majority of the administrative procedures in customs matters, issued by tax authority, lack the legal and constitutional requirements that limit the rights of the taxpayers. Currently, the taxpayers are faced with a situation of constant fiscal and legal changes. Because of the aforementioned, they require information about their rights and the reaches of tax authority; it is the case of the Administrative Procedure in Custom Matters, on its most prosecuting stage that is the seizure of merchandise with economic insolvency, from the moment in which the treasury authority enforces its coactive competence to collect what is due, for causing damages in perjury to Federal Treasury. With the above mentioned, it is necessary to let know to the government a way to make sure that the tax authority is acting according to the Constitution and the Law of Administrative Procedure in Custom Matters, so that the taxpayers are in the capacity of a better fiscal defense in consequence of an unconstitutional or illegal act of authority.

2.2 Justification

This investigation is of great importance since it is based radically in the acts of authority of the fiscal office towards the citizen, which stems administrative acts that regularly lack legal and constitutional value, resulting in vicious acts that affect the rights and, by consequence, the assets of the citizen. Within the Administrative Procedure in Custom Matters, most of the time, the tax authority acts arbitrarily, compromising the civil liberties of the citizen granted in the articles 14 and 16 of the Constitution, which establish that no one will be deprived from his liberties or state, possessions or rights, but by means of a trial followed by previously established tribunals, which meets the essential formalities of the procedure and, according to the laws issued previous to the fact, nobody can be attacked on its person, family, address or possessions, but by means of a warrant written by a competent authority that funds and motivates the legal cause of the procedure.

2.3 General Objective of the Study

Provide the taxpayer with clear and detailed consulting material, gathering legal grounds established in the Political Constitution of the United Mexican States, the law and the jurisprudence, by means of which it is specified how the Custom Tax Authority should behave when dealing with an Administrative Procedure in

Custom Matter, and the means the Citizen has for legal and administrative assistance, in order for the particular to have the knowledge how to carry out the authority in foreign trade and intervene with a means of legal defense during or after the act of nuisance. In order to accomplish the established objectives, this work will apply the qualitative methodology, focusing on the research-action where a taxpayer is seized by tax authority and, by consequence, will look for a means to solve it through various constitutional and legal procedures in order to give an appropriate and adequate legal defense.

In this order of ideas, the investigation will be descriptive, given the need to describe the predicament to analyze it and give a correct interpretation in a legal context, which will then need and explanation. The scope of this work is based on the administrative acts made by the tax authority in the territory of the city of Ensenada, Baja California.

2.4 Theoretical Framework

2.4.1 Concept of State as a Tax Regulating Body

The State undertakes several activities for the execution of its objectives. It develops the activity designed on the realization of public services and the satisfaction of the general needs through the Executive Power. Therefore, it is logical that the administration of State has to utilize personal means, materials and legalities to achieve the performance of its ends, where it results that one of the most important sectors of the administrative activity is made up precisely by the management of economic interests.

This activity, which has a primordial importance in the modern State, has received the name of Financial Activity which, according to Donato Giannini, is carried out by the State to administrate the patrimony, to determine and collect taxes, to maintain, assign or invest the integrated sums, and it distinguishes itself from the other activities in the sense that it does not constitute an end on itself, which means that it does not directly address the satisfaction of a single need of the community, but it fulfills an instrumental function of essential importance, being its normal development an indispensable condition to carry out the rest of the activities.¹

The origin of the word “Fisc” comes from the Latin root “Fiscus”, and was used by the Romans to name the sovereign treasury in contrast to the public funds, which was the treasury of the State; later the term was used to also span the treasure of the treasury of the State, when the princes got disposition of the public treasure. The former Castilian laws gave the name “Fisco” (Fisc in Spanish) or “King’s Chamber” to the treasure or patrimony of the royal house, and the name public funds to the public or the treasury of the State. Nowadays, both in America and in Spain, both words are considered synonymous.²

The word Finance also has Latin roots, deriving from the verb “facera”, but some argue that it also derives from the Arabian word “ckásena”, which means treasure chamber. Combined with the adjective “Public”, Finance comprehends all economic life of the public entities and makes strict mention of all their incomes, belongings and expenditures. The Finance Office, as a governmental body and as a concept in the positive Spanish positive law, appears for the first time when King Felipe V creates the Secretariat of Public Finance inside of the Administrative Organization of the Spaniard Kingdom. From there it arrives to Mexico and Latin America, where the Federal Government Branch in charge of carrying out the financial activities of the state was known traditionally as Secretariat of Finance, adding “and Public Credit” to its title.³

The word Fisc is known in Mexico, according to the Supreme Court of Justice of the Nation, as: “the branch

¹ Achille Donato Giannini, *I concetti fondamentali di diritto tributario*, Italia, 1956.

² Sergio Francisco de la Garza, *Derecho financiero mexicano*, México, 1979.

³ Sergio Francisco de la Garza, *Derecho financiero mexicano*, México, 1979.

of Public Finance that is formed from the contributions, taxes and claims, where the Tax Authority intervenes in legal enforcement situations, whenever there are Financial Authorities that are not Tax Authorities, since even though it has the faculty to act in Finance Matters, they do not have the faculty to collect taxations, which is the characteristic of Tax Authorities, Articles being the character of Financial authority and species being the character of Tax Authority”.

The Constitutional Tax Liability also exists, as mentioned in the article 31, section IV, where it says: “they are the duty of Mexican people, to contribute to the public expenditures, as well as the Federation, like the Federal District or the State and Municipality in which they reside, in a proportionate and equitable manner that is arranged by the law.”

This instrument not only is the grounds of the Tax Liability of the Mexican people, it also encompasses foreigners and legal entities called “Moral”, whether national or foreign, when their activities correspond to the hypothesis contemplated by tax norms. The Constitutional text designs the applicable laws in tax liability, according with the following principles: the destination of taxes, the tax justice and the tax formality.

Inside the same constitutional right, the taxes can only be destined for defray the public expenses of the Federation, its federative entities (Federal District and States) and the municipality where the taxpayer lives. Therefore, a tax or contribution has no value when it is destined to cover the provision of a public service or the expenses related to the development of the assignments, projects and public programs.

In every judicial system there has existed, and still exists, tax liabilities; this came to be because of the necessity of sustenance of the State and the social organization. This existential necessity to collect taxes imposed the obligation to define a way to carry it out. The taxes cannot be established arbitrarily; they must always be submitted to certain equitable rules, from which two imperatives stand out that enforces the bodies that make tax, rights, products, and exploitations, in the following manner: all tax burdens must be proportionate and equitable. The Constitution demands the proportionality and equity in the tax liabilities; the criteria of equity is what Aristotle defined as “the geometrical proportionality; in arithmetic, the proportion is numeric, quantitative and takes no notice of the qualities of the person or goods it means to benefit or affect”. Because of that, the Aristotelian principle of the distributive justice orders the same treatment for the equals and a dissimilar treatment for the unequals, for a uniform treatment for the unequal is unfair.⁴

According to the Mexican Constitution, the only perpetrator of the tax liability is the State, as the article 31, section IV, of the Political Constitution of the United Mexican States (CPEUM by its initials in Spanish), by establishing the obligation to contribute to the public expenditure, mentions only the Federation, States and Municipality.

From the expected taxpayers in the Mexican legislation, only the Federation and the States have full legal taxation power, that is, not only can they freely dispose of the tax they collect, but they can also give them to themselves by means of their respective legislations. In exchange, Municipalities can only freely administer their finances but under no circumstances establish their contributions, a task that is entrusted to the legislatures of the States.

The taxpayer is the person with tax liabilities that according to the law, must fulfill a particular service in favor of the Fisc, whether suitable of someone else, or a substantive or formal tax liability. While studying the taxpayer of the tax liability, it is found out that it is not always the person the law appoints, but someone else that serves as such.

⁴ Sergio Francisco de la Garza, *Derecho Financiero Mexicano*, México, 1979.

3. Methodology

The Qualitative methodology was applied for this investigation, focusing on the action research, where a problem is identified within a social collective and a way for its solution is planned with several systematic and reflective procedures, for the transformation of a specific situation in a social collective. This collective in this investigation are the taxpayers of the city of Ensenada, which constitute the force of work in society, individuals and legal entities.

In this order of ideas, the investigation was descriptive, given the need to describe the problem to analyze it and give a correct interpretation in a legal context, which will then need and explanation. All of this is based on a bibliographic-documental methodology supported by laws, Books of Fiscal Law, Customs and Administration, and Thesis from our Supreme Tribunal, to carry out an analytic investigation, to present the solution of the predicament.

First of all, we identify the problem, how the taxpayer makes sure that the administrative procedure in customs matters complies with the Fundamental Law of Mexico and subsequent to the laws, by which will be based on the reading as an information gathering instrument, this reading must be carried out through a scientific method: Systematic, objective, replicable and valid. Therefore, a reading of the following will be made: Political Constitution of the United Mexican States, the Fiscal Code of the Federation, the Federal Administrative Litigious Procedures Customs Matters several Administrative and Fiscal Law Books, as well as investigations realized about the Administrative Procedure in Customs Matters.

As of the aforementioned, the social collective that represents the predicament of this investigation is made up of the taxpayers of the city of Ensenada, which represent the force of work of the society, legal entities and individuals, which comprehend up to 60,000 taxpayers in the city.

From the following ordinances, the following articles were analyzed:

- Political Constitution of the United Mexican States. Articles: 8, 14 and 16.
- Tax Code of the Federation. Articles: 3, 5, 6, 17-A, 18, 19, 21, 42, 53, 63, 70, 75, 123, 130, 134, 135, 136, 137, 138, 139 and 141.
- Federal Code of Civil Procedures. Articles: 79-218
- Customs Law. Articles: 36, 41, 43, 44, 46, 51, 52, 53, 54, 56, 64, 79, 80, 81, 83, 90, 144, 146, 150, 151, 153, 154, 155, 156, 157, 176, 178, 183-A, 197 and 203.
- Federal Administrative Litigious Procedure Law. Articles: 40, 41, 42, 43, 44, 45 and 46.
- Federal Taxpayer Rights Law. Articles: 2 and 23.
- Regulation of Customs Law. Articles: 179, 180, 181 and 182

General Character in Customs Matters on External Trade Regulations

4. Description and Interpretation of the Results

First: The Administrative Procedures in Custom Matters (PAMA by its initials in Spanish) refers to a series of acts provided in Customs Law, connected in a linear matter, in order to emit a condemning or absolute resolution, derived from the incidents detected by customs law while exercising their faculties in External Trade operation verification, respecting the individual guaranties of the taxpayer by valuing the proofs and analyzing the arguments they pretend to prove when they import, possess, or place a foreign good in national territory or when

they export national merchandise.

Second: PAMA will be carried out when with reason of custom surveillance, second surveillance, verification of merchandise and vehicles in transport of foreign origin that is transiting, domestic visit or any other act of verification, they detect irregularities that lead to preemptively seize the merchandise of national or foreign origin, according to the regulations established in the article 151 of the Customs Law (CL).

Third: The Customs Authority will proceed to preemptively seize the merchandise when PAMA is in effect, as established in the article 151 of the CL. In the event that the tax address or name of the supplier or importer stipulated in the petition or receipt are false, or when the supplier cannot be localized in the tax address stipulated in the documentation provided, a list of seize orders will be consulted which will provided periodically by the Central Administration of Customs Supervision (ACFA by its initials in Spanish), and a list of inexistent suppliers provided by the Central Administration of Customs Investigation (ACIA by its initials in Spanish)

Fourth: The Customs Authority will issue an official record at the start of PAMA, as stipulated in the article 150 of Customs Law, while fulfilling the following requirements:

(a) State the facts and circumstances of time, manner, and location that caused the start of PAMA, elaborating a precise relation of the events that were presented;

(b) State the place, hour and date where the diligence, and any other circumstance that aids the precision of the act, takes place;

(c) When the PAMA deviates from the custom surveillance, said circumstance will be stated in the Business Report and Information System (SIREM by its initials in Spanish) and the Case Tracking, Registry and Evaluation System (SIRESI by its initials in Spanish), respectively, registering the case code that corresponds with the one detected that initiated PAMA;

(d) In that case, the order of verification or domestic visit must be annotated in detail, with issue date, official letter number and legal grounds of the order issue:

(1) Base the competence of the customs authority to carry out the start of PAMA, in addition to the detailed quotation of the data of the identification evidence of the customs officer that practices the procedures (Issue date and official letter number, identification, occupation, the authority he carries, validity and legal grounds of the

(2) Request the interested party to appoint two witnesses, making notice that failing to do so, or if the appointed do not accept to carry out the order, the authority will appoint someone else.

(3) Demand the interested party to appoint the address to hear and receive notifications inside of the territorial district of the competent authorities to process and resolute the corresponding PAMA, unless it is the case of foreigners, in which case they will be able to appoint an address out of said territory.

In this case, the interested party will be made aware that the notification, of personal nature, will come in effect by notification list, in the case where no address is appointed, appointing an address that does not correspond to the interested party or his representative, if the interested party vacates the appointed address without notifying the competent authorities or appointing a new address that does not correspond the interested party or his representative or if he opposes the diligences of notification of the acts related with the procedure or if he refuses to sign the following: records issued, the verification of merchandise for transport, having the seal of approval of the customs administrator, who elaborates the notification list record.

(4) Notify the interested party that he has a ten day term, beginning the day after he is notified of the record, to offer proofs and formulate arguments that benefit him, as well as the competent authority to receive them, and his address. Said term will be calculated in agreement with the article 153 of the Customs Law. The authority that

elaborates the respective record must deliver the interested party, in the same act, a copy of the procedure start record, which will be the moment the party will be notified.

(5) Elaborate an inventory of the seized merchandise, stating the physical state and description of the same at the moment of seizing by the authority (description, nature, origin, quantity, serial number, brand, model, and physical condition). Depending on the volume of the inventory, the contents of the record or paperwork may contain, with detail and signed by the acting personnel, the owner possessor or handler of the merchandise and the witnesses that will participate in the act, which will be included inside the respective record.

(6) Pass judgment or, depending on the case, attach the tariff classification, contribution and appraisal of the seized merchandise.

(7) If necessary, some samples and items of proof will be secured to raise funds that will enable whichever adequate resolution is dictated.

(8) Provide legal justification to the preemptive seizure of merchandise, taking into account that only the initial record of the PAMA, motive of seizure of merchandise, and the presumed violations acknowledged in each situation.

(9) Describe with detail the circumstances in how the merchandise was discovered.

Fifth: Whenever the seized merchandise is comprised of perishable goods, easy to decompose, live animals or automobiles and trucks that are object of preemptive seizure that are not legally proved to stay or be possessed within the country by the end of their probation term (ten days for perishable goods and forty five for transports) the SAT (the Mexican equivalent to IRS) will then proceed to destroy, donate, designate or sell the seized merchandise, whose product will be invested in certificates of the Treasury of the Federation, with the intention to enact the corresponding resolution, to prepare the application of the product and performance as it proceeds.

Sixth: In the case the irregularity is detected by Customs surveillance, the inspector must follow the procedures previously mentioned and will capture the initiation of the PAMA in the SIRESI system.

Seventh: Addressing the PAMAs initiated during the domestic visit, they must also be settled in the initial record, as established in the article 155 of the Customs Law as a legal basis.

Eighth: PAMA initial records must be signed by the authority enforcing it, the witnesses and the person of interest. If any or all of the participants refuse to sign it, the denial will be settled in the record, without invalidating the act of customs authority and the notification will be carried out by the court.

Ninth: During the development of PAMA, the Customs Authority must grant the following right to the person of interest, according to the established in the article 2 of the Federal Law of Taxpayers' Rights (LFDC in Spanish):

Tenth: The person of interest, his legal representative, the customs agent or the customs representative, manager or legal assistant or, when necessary, the carrier, will be given a copy with the signatures of the involved in the initial record of PAMA, as well as the integral documents that make it up, who by signing proof will be notified of said initiation, which must be established in the respective record.

Eleventh: Documents that must be personally notified:

(1) The Record that contains the order of verification of merchandise in transport or visit (when it doesn't deviate from custom surveillance or second survey);

(2) Official Document that contains the start of PAMA;

(3) If necessary, the record that attaches the start of PAMA, directed to the parties appointed in the last paragraph of the article 41 of the Customs Law

5. Conclusions

From the analysis of the Political Constitution of the United Mexican States, it is determined that every act of authority that weakens or restricts the legal sphere of the citizen, it must be well founded and justified it also must be signed by the competent public servant to emit said act of authority. From the Customs Law and Legal Code of the Federation, it follows that the proceeding formalities inside the Administrative Procedure in Customs Matters, complying with the legality of this procedure. From the Federal Law of Litigious Administrative Procedures, several measures of defense must be exerted before the authority, when this, arbitrarily or with basis, affects the interests of the taxpayers, especially two; the revocation resources and the null judgment. From the Appealing Law, it follows that this constitutional control, is enforced when the administrative authority attempts against individual guarantees (now called human rights) in the previously mentioned administrative procedure.

The Administrative Procedures in Custom Matters is a series of acts supervised by the Customs Law, linked in a sequential order, with the intention of emitting a punishable or absolute resolution, derived from the incidents detected by customs authority while exercising their faculties of verification of external trade operations, respecting the guarantees of the individual by valuing the evidences and analyzing the argumentations that mean to approve the legal introduction, possession, handling or placing of merchandise of foreign origin in national territory or the exportation of national merchandise, where a series of acts that affect the patrimonial sphere of the taxpayers occur. Therefore, as it has been mentioned in the investigation, there is no absolute truth; authority can be fought to avoid a tax liability that lacks, for most of the time, constitutional and legal value, resulting in vicious acts that affect the rights, and by consequence, the patrimony of the citizen.

This legal defense, which consists primarily in suspending the preemptive seize of merchandises, to afterwards pay or analyze the legal credit for its possible cancelation, is provided by means that must be known so that the fighting the authority, as well as its acts, are carefully stuck to the law.

The Result is the ideal petition of revocation and/or nullity action as a means of legal defense, for the solution of the predicament, becoming the best way to suspend the administrative procedure in customs matter so that it does not seize. This, in accordance to the Legal Code of the Federation, must file said petition of revocation and/or nullity action, being able to opt to file them at the same time, one or the other, that protect the taxpayers of the imposition of authority.

6. Recommendations

It is imperative to analyze the acts of authority, tending to what is ordered by our Magna Carta. Any act of authority must be justified, motivated, and signed by a competent civil servant, from whom the taxpayer, the majority of the times, while being in presence of an authority, is intimidated, and this should not happen, for the human rights must be known by the parties involved to enforce them before the Judiciary of the Federation. It is recommended to take into account what is stipulated in the Customs Law and the Legal Code of the Federation, to make sure the administrative authority, apart from adhering to the Constitution (regarded as an act of authority), adheres to these legislations, because they classify the formalities to carry out in this type of procedure.

In the Federal Law of Litigious Administrative Procedures, which allow that, with motive of procedure followed before a legal administrative litigious tribunal, filed to disprove a tax liability, from which the authority came to that decision, that generally are astronomically exorbitant penalties, which affects the legal patrimonial sphere of the State.

Currently, the majority of the individuals and legal entities, regrettably, do not know the PAMAs, which makes them vulnerable to acts of fiscal authority, because once the PAMA starts, the authority will have to resolve the legal situation of the intervened, dictating an administrative resolution where a notoriously excessive penalty will be imposed and finally, a seize of goods for not having monetary liquidity.

The Mexican legal system is inquisitive. Nevertheless, with the elevated tax burden the taxpayer has to endure, the tax authority will look for a way to intervene the taxpayers by means of acts of nuisance, which are permitted by the Constitution, as long as they fulfill the requirements it establishes. On the contrary, it would be attempting against his human rights, which the citizen must know their fundamentals, just like the laws that must be obeyed to give formality to said acts of nuisance.

In addition to the aforementioned, if the tax authority complies to what is established in our Magna Carta, to bother the citizen, said citizen must verify that the established procedure against him is legal, that is, that it fulfills the stipulations of the law and, by consequence, must not confuse the term “Constitutionality” with the term “Legality”.

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