

Spain

Government Pressured to Collect Unpaid Tax From 2012 Amnesty

As the minority government of Spanish Prime Minister Mariano Rajoy struggles to piece together a budget package for 2017, a controversial amnesty plan that was concluded four years ago has become an improbable chess piece in a political battle over the government's alleged lax attitude toward past corruption.

The government announced the amnesty decree law in 2012, when Rajoy's People's Party (PP) enjoyed an absolute majority in parliament and during the height of a fiscal crisis that afflicted Spain and much of the rest of the world. When enacted, the program required payment of a 10 percent tax on any undisclosed assets, whether held in Spain or offshore.

"The government said it was a regularization measure," said a tax lawyer in Madrid. "They didn't want to call it an amnesty, but that's how everyone refers to it." The lawyer, who asked not to be identified, said his first interpretation of the decree law was that it required payment of 10 percent on any undisclosed assets, including any income earned on those assets. "That seemed a decent amount to pay; nothing outrageous," he said.

That opinion wasn't shared by a number of delinquent taxpayers and their advisers, who quickly applied pressure on the government to tone down the amnesty. "The government, through the General Directorate of Taxes [DGT], reinterpreted the decree law to make it more appealing and said that what was meant was that the 10 percent tax was only due on income from the undisclosed assets," the lawyer said. "A key feature of the individual income tax law is that losses can be deducted against capital gains, which is not normally allowed under Spanish tax law for any other sort of income. That was very important because from 2007 through 2011, there were a lot of losses in the undisclosed portfolios."

"The problem is that the law says one thing and the DGT criteria has been very flexible with this matter," said Sílvia Gabarró Font of the GM Tax Consultancy in Barcelona. "This generated an important political controversy."

Ciudadanos Causes Complications

The revision to the amnesty plan led to widespread criticism and was adopted as a campaign theme of Ciudadanos, a relatively new party that gained popular support in part by denouncing public corruption across the Spanish political spectrum. Ciudadanos, which is an important pillar of support for the PP's minority government, included in its party platform a demand for the recovery of an estimated €2.8 billion of addi-

tional tax from the individuals and companies that took part in the amnesty. Gabarró Font said Ciudadanos is demanding that the government require amnesty participants to pay the 10 percent tax on the value of the undisclosed assets. "Bear in mind that some of the people who applied for the tax amnesty were relatives of politicians," she said.

The PP was only able to form a minority government in October with the assistance of Ciudadanos after the Socialist Party ended a 10-month legislative stalemate by abstaining from the vote for a prime minister, which was won by Rajoy. (Prior coverage: *Tax Notes Int'l*, Oct. 31, 2016, p. 461.)

The Madrid lawyer said the most influential Ciudadanos deputy on matters of tax policy is a former auditor at the State Agency for Tax Administration (AEAT), which is responsible for conducting taxpayer audits. He added that the DGT, which drafts tax legislation and issues taxpayer guidance, is a separate arm of the Ministry of Finance and is independent of the AEAT. "The AEAT has always been very vocal in its opposition to the DGT's interpretation of the amnesty," the lawyer said. "It was a brilliant political idea based on a technical interpretation of the law to collect more income in a way that does not harm most people. The problem is that, while the idea may be brilliant, almost nobody in Spain believes it can be done."

Statute of Limitations

The calendar is the most immediate problem for the government. Gabarró Font said the statute of limitations for the four years covered by the amnesty program runs out on November 30. It's not clear whether a letter sent recently by the Ministry of Finance to taxpayers who participated in the program will have any legal effect. "It's ridiculous for the government to try to start auditing thousands of returns in one go, almost on the last day before the statute of limitations runs out," the Madrid lawyer said.

Practitioners say taxpayer morale could also be affected by a change in direction by the government well after the fact. "If the DGT changes the criteria, the [scant] confidence that people have in the Spanish tax administration will disappear altogether," said Gabarró Font.

Expansion, a Spanish newspaper, published on November 22 a copy of the letter that it said was being sent to amnesty participants as "informative advice" about the status of the government's reviews of the program. "The letter says effectively nothing," said the Madrid lawyer. "It's very political, informing those who benefited from the amnesty that the agency has analyzed the risk and has done audits based on potential mismatches. But it does not create any kind of obligation and will not, in any way, change the November 30 statute of limitations."

The lawyer said it is unlikely that a failure to pursue the tax on the value of unreported assets will cause Ciudadanos to drop its support for the government. “It’s only one of 150 points that formed the agreement between the two parties,” he said.

Another issue for the government if it tries to pursue tax on the value of the assets reported in the amnesty program is that such a move could be a possible violation of the principle of legal certainty. “From a legal point of view, it’s doubtful that anything can be done in the last week, four years after the returns were filed,” the lawyer said. “An argument that could be used is that it’s a violation of legal certainty. When you have abided with an official interpretation, why should you be charged with additional tax four years later?”

The lawyer said that the government can’t resolve the issue by simply issuing another emergency decree law extending the statute of limitations on the amnesty. “It would have to be justified by an emergency,” he said. “Emergency decrees are not typically used to create taxes.”

Despite the criticism that the PP took over the years for the amnesty, the lawyer said the government is content with the results of the revised decree law. “They did it on purpose to make [the] amnesty work,” he said. “The intent wasn’t so much the money they collected at the time, which, by the way, was not bad. They also incorporated into the annual tax base €40 billion of unreported assets, which broadened the tax base with income-producing assets for future years.”

When the amnesty decree law was first made public, the government also issued another decree requiring that anyone with over €50,000 in foreign assets file a Form 720 on an annual basis to report their offshore holdings. The European Commission opened an infringement procedure against Spain last year because the fines for either failing to file the form or for inaccurate reporting appeared disproportionate. Also, the commission said the lack of a statute of limitations for the filing requirement might also violate EU law.

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