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The Importance of the Legal Advisor to the Board of Directors

Article 237 of the Spanish Companies Act (Ley de Sociedades de Capital) states that "all members of the management body who adopted the resolution or carried out the harmful act shall be jointly and severally liable, except for those who prove that, having not participated in its adoption and execution, they were unaware of its existence or, having known of it, did everything necessary to prevent the damage or, at least, expressly opposed it."

Consequently, the liability of a company's Management Body is not limited solely to the formal compliance with its duties and responsibilities. Rather, the law establishes that all directors are jointly and severally liable for any damage that may arise from their decisions, and must fully repair such damage with their own assets, both present and future. An exception applies only where one or more directors can rely on legally established grounds for exemption. To do so, they must demonstrate that they acted with due diligence and, in particular, that they clearly and expressly opposed the adoption of the decision that proved harmful.

For these reasons, it is essential that companies with Boards of Directors have appropriate protective mechanisms against these types of risks. In this regard, the procurement of directors' and officers' liability insurance has become indispensable.

Spanish law also recognizes the figure of the Legal Advisor to the Board. This is a licensed practicing attorney who provides legal advice to a company's management body. The relationship is strictly professional. The functions of the Legal Advisor include, among others, advising on the legality of the Board's resolutions and decisions, as well as the resolutions convening General Shareholders' Meetings. This role is regulated under Law 39/1975 of 31 October.

The appointment of a Legal Advisor is mandatory for companies that have: share capital equal to or greater than €300,000, annual turnover equal to €600,000, and/or a permanent workforce exceeding 50 employees.

To avoid potential liability issues, it is recommended that companies meeting the legally established requirements appoint a Legal Advisor who serves as a non-director Secretary of the Board of Directors. This strengthens regulatory compliance and ensures that the management body receives ongoing and specialized legal guidance. The liability of the non-director Secretary is limited to the correct performance of the functions assigned to them under the Companies Act and the company's internal regulations. They do not assume the responsibilities of the directors or the company itself, and are only liable in cases of culpa in vigilando, meaning omission or lack of diligence in supervising irregular actions of the Board, pursuant to Article 1902 of the Spanish Civil Code.

Failure to appoint a Legal Advisor is subject to legal sanction, since "the infringement will be expressly assessed in any proceeding regarding liability arising from resolutions or decisions of the management body." Having a practicing attorney as Legal Advisor not only satisfies a legal obligation but also adds value to corporate decision-making. Their involvement facilitates the adoption of sound resolutions, prevents corporate conflicts, and provides security in operations of particular significance such as capital increases, mergers, acquisitions, or amendments to the bylaws. It involves anticipating legal risks before they materialize, which means acting with foresight and professionalism, ensuring that every decision adopted by the management bodies is supported by solid and up-to-date legal criteria.

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"No one may benefit from their own mistakes," not even the Tax Authority.

This is precisely what the Spanish Supreme Court expressed in its recent judgment, STS 1201/2025 of 29 September, in which it rules out the possibility that the Tax Administration may have a "third attempt" after the annulment of two tax assessment acts.

The Supreme Court upheld the appeal filed by three taxpayers concerning the Inheritance Tax, overturning a previous ruling of the High Court of Justice of Galicia. The events date back to 2014, when the regional administration carried out an initial valuation review and issued the corresponding tax assessments. These were appealed by the taxpayers, and the Regional Economic-Administrative Tribunal of Galicia ("TEAR") annulled them for lack of reasoning, ordering the procedure to be restarted so that new, properly justified decisions could be issued.

In executing that decision, the Galician Tax Agency ("ATRIGA") issued a second set of tax assessments. However, ATRIGA itself declared the expiry of that procedure and chose to initiate a new one, this time through a limited review, which led to a third set of assessments. The judgment now under review partially overturned these latest assessments and ordered that new ones (a fourth set) be issued, using different valuation criteria and establishing a new amount for household goods.

The Supreme Court has determined that this course of action, based on issuing successive assessments, does not comply with the law. The Court reiterates and reinforces its prior doctrine, holding that such conduct violates fundamental principles such as good faith, legal certainty, administrative efficiency, and the prohibition of abuse of rights.

This judgment also seeks to establish binding case law aimed at strengthening legal certainty by clarifying and limiting the concept of the "double shot" rule (*doble tiro*). This rule allows the Administration to issue a new assessment replacing one previously annulled, but only subject to certain limitations: without restarting the entire procedure or supplementing its investigation, within the statutory time limits, provided that the claim has not prescribed, and without worsening the taxpayer's situation or repeating the same errors.

This legal doctrine of the "double shot" is grounded in respect for the limits of administrative procedure and the principle of res judicata, whether administrative or judicial. It establishes that, once a second resolution has been issued, the Administration cannot continue issuing new assessments or similar acts in an attempt to correct earlier mistakes, whether formal or substantive. "The Administration cannot be granted an indefinite opportunity to repeat burdensome acts until it finally gets them right, to the detriment of citizens."

With this ruling, the Supreme Court reminds the Administration of its obligation to act in accordance with the principles governing the rule of law, such as legal certainty, proportionality, and the prohibition of abusing rights, among others. As a public entity at the service of citizens, its actions must be guided by the public interest and cannot be justified by improper or repeatedly defective conduct. In this respect, the Court rejects any attempt to legitimize a supposed "right to error" on the part of the Administration, much less the notion that it may err continuously without accepting any consequences. The principle of accountability and the requirement for rigor in the exercise of public powers are, ultimately, unavoidable.

The Supreme Court clearly indicates that the absence of legal consequences for repeated errors or negligence in administrative activity cannot become normalized, particularly when such mistakes harm the rights of taxpayers. The Court recalls the old legal maxim: "no one may benefit from their own mistakes," not even the Tax Authority.

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Limits on the guarantee of indemnity for a worker who files a complaint for workplace harassment: “false complaints”

C As a result of recent reforms in both criminal and labor regulations in recent years, many of them promoted by European institutions, the role of internal whistleblowing channels has gained increasing importance in Spain.

A whistleblowing channel is a secure and confidential method (generally an email address) through which employees, customers, or third parties can report irregularities, misconduct, or regulatory breaches occurring within a company. Through this mechanism, the company can learn of these situations and take steps to correct, address, and eliminate them.

Workplace harassment is included among the types of conduct that may be reported through such channels.

In 2023, Spain enacted Law 2/2023 of 20 February regulating the protection of persons who report regulatory infringements and the fight against corruption, which transposes Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 concerning the protection of persons who report breaches of Union law (commonly known as the “Whistleblowing Directive”).

The primary objective of this regulation is to protect individuals who file reports through these channels, prohibiting any form of retaliation against whistleblowers. The goal is to encourage the use of these channels and reassure reporting persons of their reliability.

Article 3 of this Law, concerning the personal scope of application, states in its first subsection that this protection applies to informants working in either the private or public sector who have obtained information about infringements in a workplace or professional context. This explicitly includes public officials and employees working for others.

Since the purpose of the Law is to provide adequate protection against retaliation for those reporting violations, it is clear that workers who file workplace harassment complaints are protected from employer reprisals. In this context, the most significant aspect of the guarantee of indemnity is the fear of potential dismissal due to filing the complaint.

Consequently, in accordance with current legislation, dismissal of a worker as the direct result of exercising their labor rights (in this case the right to report harassment) implies that the dismissal is null and void, with the inherent consequences: (i) reinstatement of the worker, (ii) payment of back wages from the date of dismissal until reinstatement, and, very likely, (iii) the right to receive compensation from the company for damages suffered.

Since dismissal is the most drastic form of retaliation, the guarantee of indemnity also protects the worker from retaliatory actions such as unfavorable changes to working conditions: salary reductions, elimination of previously recognized benefits, or downgrading of duties or job positions.

Given the above, this protection raises a controversial issue: How far does whistleblower protection extend? What happens in cases of clearly false reports?

In this regard, the Preamble to the Law [1] itself gives a clue: “Good faith, the honest belief that serious harmful events have occurred or may occur, constitutes an essential requirement for the protection of the informant. This good faith reflects civic behavior and must be distinguished from other conduct that must necessarily be excluded from protection, such as sending false or distorted information, as well as information obtained unlawfully.”

Therefore, based on the literal wording of the Preamble, if a worker files a harassment complaint against a coworker based on events that are false and did not occur, and does so driven by malicious intent toward the coworker, the guarantee of indemnity will not apply.

Nonetheless, even if the guarantee of indemnity does not apply in such circumstances, companies have faced uncertainty regarding the ability to take disciplinary action against a worker who knowingly files a false complaint.

Courts have begun to allow companies to impose sanctions (including dismissal) on workers who knowingly submit false complaints.

A relevant example is a recent judgment of the High Court of Justice of La Rioja (Section 1) of 28 July 2025, No. 106.

The case concerned a disciplinary dismissal imposed by a company on a worker who had filed a fraudulent and disloyal complaint, knowing the accusations against a colleague were false. Following the company’s investigation, manifest bad faith in the complainant’s behavior was established.

[1] *An “exposición de motivos” is the preliminary text accompanying a law that justifies the reasons, context, and objectives behind it, and explains why the new regulation is required, detailing the social, political, and economic problems it seeks to address.*

In his appeal to the High Court of Justice, the worker sought annulment of the dismissal, relying precisely on the guarantee of indemnity supposedly afforded by the aforementioned legislation, arguing that the dismissal was based on the mere exercise of his right to report a coworker.

However, the Court ruled that the reason for the dismissal was not the act of reporting, but rather the falsity of the report. It concluded that "the dismissal is clearly lawful and simultaneously refutes the allegation of violation of the guarantee of indemnity (Article 24.1 of the Spanish Constitution), since there is no retaliatory conduct by the employer, but rather a justified and proportionate exercise of disciplinary authority in response to the worker's serious misconduct in falsely accusing a colleague."

Specifically, it states that "There is no business decision based on the mere fact of the report, but rather on the content of the report, the intent of the complainant, and the lack of justification, since the reported events did not occur, which due to its seriousness justifies the sanction of dismissal and, at the same time, excludes the alleged infringement of indemnity."

Therefore, the Court confirmed the lawfulness of the disciplinary dismissal imposed by the company, allowing the worker's bad faith in falsely accusing a coworker to serve as cause for dismissal.

This ruling logically interprets the regulation and enables the application of disciplinary measures against workers who knowingly file false workplace harassment complaints.

Further decisions from other courts, including the Supreme Court, are awaited. However, it appears that the limits of the guarantee of indemnity in cases involving false harassment complaints are being defined in this sense, which is welcome since the message should be clear that "not everything goes."

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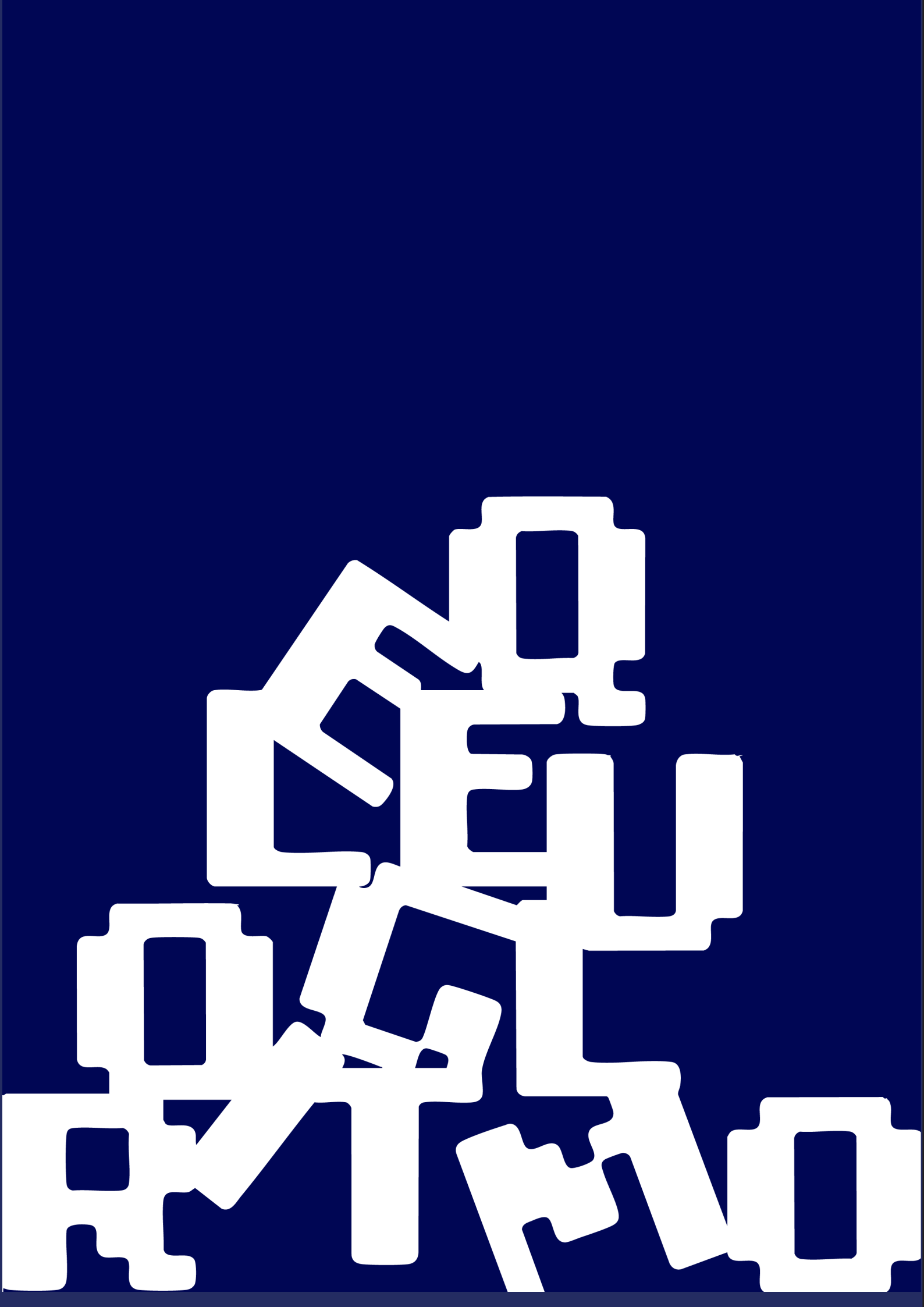

RESIDE Plan: Rebalancing Residential Use and Regulating Lodging in the General Urban Development Plan (PGOU) of Madrid

On 27 August 2025, the Governing Council of the Community of Madrid definitively approved the amendment to the General Urban Development Plan of Madrid (hereinafter, "PGOU"), which was published in the Official Gazette of the Community of Madrid (BOCM) on 22 September of the same year. The RESIDE Plan replaces the 2019 Special Lodging Plan (PEH), substituting the former three (3) ring division with a territorial structure consisting of two (2) large areas: (i) the Specific Planning Area APE 00.01 "Historic Centre" and (ii) the rest of the city outside APE 00.01, where lodging uses remain allowed but subject to stricter conditions.

The regulation of tertiary lodging use within the Historic Centre is structured according to the levels of uses assigned to each plot (A, B, C, D and E) and the existing primary use of the building (residential or non-residential).

- **Plots with existing non-residential use (levels A, B, C or D):** Lodging use is permitted as an alternative use in stand-alone buildings, requiring a Special Protection Plan when the building is listed with protection level 1 or 2. It may also be implemented as a complementary use in any situation for levels A and B, and only on upper floors for levels C and D.

- **Plots with existing residential use (levels A and B):** Lodging use is permitted exclusively in buildings listed with protection level 3, and only under the modality of tourist accommodation dwellings. The authorisation is limited to a period of fifteen (15) years, after which the property must return to residential use. In buildings listed with levels 1 or 2, implementation requires a Special Protection Plan as an authorisable use. In vacant plots or non-listed buildings, lodging use is prohibited.

- **Plots with existing residential use (levels C and D):** The introduction of tertiary lodging use is permitted as an alternative use, with the obligation to process a Special Plan if the building has protection level 1 or 2.

- **P Plots with use level E:** In this level, which is associated with single-family housing, tertiary lodging use is not permitted under any circumstances.

  Outside APE 00.01, the introduction of lodging use is governed by the specific zoning regulations and municipal ordinances applicable to each area. However, the RESIDE Plan introduces significant new provisions:

- **In mixed-use buildings** lodging establishments must have independent access from the exterior, including on the ground floor, avoiding the use of residential common areas (Articles 6.6.18, 6.9.3, 7.1.4 of the PGOU).

- **In the API zones**, in buildings where residential use is predominant, lodging use may only be introduced as a complementary use on basement, ground, and first floors. On land zoned for residential use with a single-family typology, tertiary lodging use will be deemed an authorisable use. On land zoned for residential use in multi-family buildings, tertiary lodging use will be considered an alternative use to residential use.

- **In Zoning Regulation 1**, tertiary lodging use is allowed as a complementary use on basement, ground, and first floors, provided that the plot lies outside APE 00.01, and also as an alternative use in levels B, C and D located outside that area.
- **In Zoning Regulation 3**, the possibility of introducing tertiary lodging as a complementary use on upper floors for levels B and C is eliminated.
- **In Zoning Regulations 4 and 5**, the implementation of tertiary lodging as a complementary use is restricted exclusively to basement, ground, and first floors.

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The Liability of the Participant for Lucrative Gain in Tax Offenses

In the field of economic criminal law, particularly in offenses against the Public Treasury, the determination of those obliged to repair the harm caused is not limited to those criminally responsible for the offense (perpetrators, instigators, or necessary accomplices). The legal system also considers the existence of civilly liable parties for restitution purposes, among which the participant for lucrative gain is included.

Article 122 of the Criminal Code regulates this form of civil liability for anyone who "has participated in the proceeds of a crime by way of lucrative title," obliging such a person to provide restitution or compensation up to the value of their benefit, with the objective of preventing the unjust enrichment of third parties who did not take part in the criminal conduct. The case law of the Supreme Court (hereinafter "SC") develops the requirements, limits, and methods for its application in offenses against the Public Treasury.

It is appropriate first to address the requirements established by case law and then to analyze their application in offenses against the Public Treasury, where the distinction between tax evasion and cases of actual enrichment becomes particularly significant.

The Second Chamber sets out the cumulative requirements necessary for applying this provision (SC Judgment No. 532/2000, 30 March, Granados Pérez, ECLI:ES:TS:2000:2609).

First, there must be a lucrative benefit consisting of a certain and gratuitous advantage, not merely an accounting entry or an apparent payment. In this regard, the SC has stated that the deposit of funds into bank accounts does not in itself establish lucrative benefit, and it is necessary to assess whether the transaction or bank movement constitutes the realization of the benefit or is merely an instrumental act to conceal the fraud (SC Judgment No. 287/2014, 8 April, Monterde Ferrer, ECLI:ES:TS:2014:2818).

Second, the third party must be unaware of the illicit origin of what was received. If the third party had sufficient knowledge of the criminal origin, the conduct could fall under the criminal offense of receiving, as set out in Article 298 of the Criminal Code. When distinguishing between mere suspicion and actual knowledge, the Court relies on indicia: undervalued prices, clandestine operations, implausible explanations, acts of concealment, and other objective elements permitting the inference that the third party was certain of the illicit origin of the goods. In that case, criminal liability for receiving would apply (SC Judgment No. 139/2009, 24 February, Berdugo Gómez de la Torre, ECLI:ES:TS:2009:609).

Third, the third party must not have taken part in the commission of the crime. If the third party participated in the execution or planning of the fraud, their responsibility would not fall under Article 122, but would instead be the proper criminal liability of participants (SC Judgment No. 287/2014, 8 April, Monterde Ferrer, ECLI:ES:TS:2014:2818).

SC Judgment No. 2919/2024, 22 May, Magro Servet, ECLI:ES:TS:2024:2919, confirms this case law and provides a practical example to illustrate the evidentiary requirements of Article 122 of the Criminal Code. In the case, the administrators of the implicated companies manipulated the purchase price declared in a public deed for a property that had previously been sold by private contract and simulated payments through the fictitious sale of commercial premises, in order to reduce the taxable base of corporate tax and defraud the Public Treasury. They therefore avoided paying taxes. The Supreme Court upheld their criminal conviction for an offense against the Public Treasury after confirming their deliberate and coordinated conduct to conceal the real price and evade tax obligations.

The Provincial Court had also declared several shareholders of the selling company to be participants for lucrative gain. However, the Supreme Court annulled their liability in that capacity due to the lack of evidence demonstrating actual enrichment or a direct transfer of assets arising from the offense. This decision emphasizes that the protection of the victim's patrimony requires proof of a real benefit causally linked to the unlawful act before restitution can be extended to third parties.

Having examined these requirements, the next step is to differentiate between types of tax offenses. In cases of tax evasion, the taxpayer obtains a fiscal saving or avoids paying a due amount. Such a "saving" does not always involve a cash flow capable of being transferred to third parties, since many evasion schemes involve non payment or artificial reduction of the taxable base without the transfer of funds to relatives or shareholders who receive an immediate benefit. For this reason, the SC, in decisions such as SC Judgment No. 277/2018, 8 June, Del Moral García, ECLI:ES:TS:2018:2056, has stated that it is generally impossible to apply Article 122 to third parties in tax evasion cases where no effective asset transfer exists.

As that judgment highlights, "one cannot participate in what a crime has not directly produced, but rather what has avoided a reduction in patrimony." For the restitution obligation under Article 122 to arise, an actual financial gain must have reached the third party. A different issue arises when the taxpayer sells or donates those assets to third parties in fraud of their creditor (the Treasury), which could constitute a new offense (for example, concealment under Article 257 of the Criminal Code) in which those third parties may be participants.

Conversely, in cases of undue receipt of tax refunds or subsidy fraud, the mechanism is different: the Administration has made a payment that results in a positive and verifiable gain, which therefore constitutes profit. When this improperly obtained income is transferred or donated to third parties, or when assets are purchased with those funds, the material condition of Article 122 is satisfied, since there is a real benefit causally linked to the offense. Restitution of that illicit gain is therefore required.

In conclusion, case law clarifies that, for the duty to return to arise, it must be proven that there was an actual transfer of assets from the perpetrator to the third party, that the third party ignored the criminal origin of the funds, and that the third party did not participate in the commission of the offense (SC Judgment No. 2919/2024, 22 May, Magro Servet, ECLI:ES:TS:2024:2919). Specifically regarding tax crimes, distinctions are made: in tax evasion cases, the benefit takes the form of tax savings with no transferable asset flow, which prevents the extension of lucrative liability; while in cases of undue refunds or subsidy fraud, where a real economic gain exists, unjust enrichment arises and restitution may be demanded.

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