

EXPANDED ABSTRACT

Indicators of tax liability in foundations covered by Law 49/2002. Special reference to the National Law of Foundations

Objectives

The current configuration of foundations as genuine economic operators, directly or through their participation in commercial companies, has led to a widening of the extent of their responsibility. In this paper, tax liability indicators are formulated as a mechanism for the prevention of tax contingencies that may fall on these foundations and, consequently, on their patrons or sponsors.

Design / Methodology / Approach

With the above objective in mind, we analyze the sources of regulations whose contravention could extend their responsibility. To this end, after referring to the responsibility of the Patrons established in the National Law of Foundations (LF), we focus on Law 58/2003 General Tax (LGT), the Law on Prevention of Money Laundering and on financing terrorism (LPBC), Law 27/2014 on Corporate Income Tax (LIS) and, lastly, Law 49/2002 on Taxation of non-profit organizations and tax incentives for patronage (LRF) -ENL). We will thus be able to formulate the indicators that give title to this work and to establish the resulting conclusions.

The Spanish Association of Accounting and Business Administration (AECA) defines indicators as "instruments of measurement of both quantitative and qualitative aspects, which can be used as a guide for comparison or measurement so as to order, control or evaluate some reality, attribute or information (...)". Using the methodology established by the AECA in its Document "Indicators for Non-Profit Organizations", we carry out our formulation, adding a descriptor to the indicator model developed in the reviewed document: the regulations that support them.

Results / Research Limitations / Implications

In the field of taxation, the law considers both the principal debtors and other persons or organizations (article 43.1 LGT) as being responsible for tax debt, whether it be jointly or severally.

Thus, art. 42.1.a) of the LGT grants the condition of joint and several responsibility for the tax debt to those who cause or actively collaborate in the execution of a tax infraction, thus extending their responsibility. Similarly, art. 42.2 includes a series of joint and several liability assumptions concerning those responsible for the depletion of an asset to the detriment of the payment of taxes and where reimbursement is demanded.

Regarding the regime of subsidiary liability, the LGT considers the legal or de facto administrators of legal organizations to be jointly and severally liable, as it is now in the interests of and in accordance with certain assumptions (Articles 43.1 a) and b) and 43.2).

Thus, points g) and h) of art. 43.1 LGT, through the application of the doctrine of lifting the corporate veil, establish the responsibility for debts and tax penalties as being with the persons or organizations in control and, similarly, the responsibility of the latter and other non-corporate organizations for the debts of the former.

The LGT defines taxpayers as those agents succeeding natural and corporate persons because of the outstanding tax obligations of the latter. In the case of individuals, it is assumed that on the death of the taxpayer, the outstanding tax obligations will be transmitted to the heirs. Acceptance of inheritances by foundations is understood to be done always with benefit of inventory. This circumstance does not exempt them from the obligation of the organization, resulting in application, and if applicable, the requirement of liability of the patrons that could be derived from art. 1024 CC.

In the case of successors of legal organizations, the LGT distinguishes between: the outstanding tax obligations of companies and legal organizations dissolved and liquidated (depending on whether or not the law limits the liability of shareholders); those cases of extinction or dissolution without liquidation of companies and organizations; and those cases of dissolution of foundations. After the dissolution, the outstanding tax obligations are charged to the recipients of the assets and rights.

In the scope of the LPBC, it is established that foundations, as taxpayers, must analyze the main risks that they may face and that may vary according to the type of business, products and clients with whom they establish business relations.

Crucially, foundations must comply with the requirements laid down in the LF or in the corresponding regional regulation. Once recognized as a foundation, it should come under the application of Law 49/2002. This regime is applicable to foundations that, in compliance with the established requirements, opt in and communicate this option to the Ministry of Finance. The contravention of such requirements will mean the organization has the obligation to pay all the corresponding payments along with the applicable interest arrears.

At the same time, the administrative body could incur subsidiary or joint and several tax liability from its status as patron if it is charged with active collaboration in the deviation from the law by the foundation.

Lastly, donors and sponsors must regularize the unpaid tax amount as well as default interest payments corresponding to their tax return self-assessments that may result from the loss of the especially privileged ENL status.

In other respects, foundations, as payers of corporation income tax, will determine the tax base of corporate tax, based on the accounting result (surplus) quantified in accordance with the General Accounting Plan for non-profit organizations corrected by the implementation of the adjustments established both in the LIS and, given its special Law status, in Law 49/2002. In this proceeding, particular attention must be paid to the general principle of substance over form with special consideration for the effects that the absence of profit motive has on the determination of the prices of these organizations and, in particular, the delimitation and quantification of so-called transactions between related par-

ties. Depending on the circumstances in each case, their delimitation will require dealing with: Patrons, founders, investees and persons or organizations where there is a link defined by the existence of a significant influence.

Lastly, the LRF-ENL regulates the tax incentives applicable to gifts, donations and contributions (irrevocable, pure and simple) that are made in favor of the so-called "patronage beneficiaries", as well as the tax regime of so-called "other forms of patronage"; namely: agreements for business collaboration in activities of general interest, expenditure on activities of general interest and programs to support events of exceptional public interest.

After this overview of legislation, the indicators which are the objective of this paper can be developed; their definition, purpose, formulation, data origin, unit of measurement, reference base, periodicity and sources of verification having already been explained in the main body of the article. Thus:

First.- Are there sections specified in the report which include information required by the tax legislation in order to be able to qualify as non-profit organizations for the purposes of Law 49/2002?

Second.- Are all operations carried out with related parties detailed and quantified, expressing the policy of prices followed and recording active and passive interests which have accrued, if any?

Third.- Is there sufficient evidence of possible tax contingencies in the main office of the companies or with their administrator?

Fourth-One.- Are the gifts, donations and contributions received irrevocable, pure and simple, and do they lead to an increase in wealth for the foundation?

Fourth-Two.- Are the requirements for the acquisition of inheritances or legacies being fulfilled to the benefit of inventory?

Fourth-Three.- Are there outstanding tax obligations in the organizations which benefit from assets as a result of dissolution of the organization now dissolved?

Fourth-Four.- Are there records kept with the identification of all persons who contribute or receive funds or resources free of charge from the foundation and is a correct reason given for them in the informative statements?

Practical conclusions and original value

The indicators formulated constitute a mechanism for the prevention of tax contingencies that could fall on foundations, their patrons or sponsors. At the same time, their significance, bearing in mind the different users of the information to be provided (on their websites or in their informative publications) will improve the visualization of their action. In our formalization of unique indicators of tax liability, we have followed the system established by the AECA. This is justified both in the success of the construction of the existing indicators and in the desirability of maintaining a formal coherence with them. The indicators now developed (exclusively in the area of taxation) complement the existing literature (focusing on global, management, financial, transparency, project, structural and corporate social responsibility aspects) and their observance will increase transparency, security and confidence in those who deal with foundations.

KEYWORDS: Foundation, Patrons, Tax Responsibility, Transparency, Indicators.