International Journal of Law and Society
2022; 5(1): 143-148
http://www.sciencepublishinggroup.com/j/ijls
doi: 10.11648/j.ijls.20220501.26
ISSN: 2640-1894 (Print); ISSN: 2640-1908 (Online)

Tax Deductions Related to an Environmental Accident According to the Peruvian Legislation

Gonzalo Alonso Escalante Alpaca[1, 2]

[1]Law and Political Science Department, Saint Paul Catholic University, Arequipa, Peru

[2]Tax Advisory, Zegarra Aguilar Attorneys at Law, Arequipa, Peru

Email address:
gescalante@zegarralaw.com

To cite this article:
Gonzalo Alonso Escalante Alpaca. Tax Deductions Related to an Environmental Accident According to the Peruvian Legislation. *International Journal of Law and Society*. Vol. 5, No. 1, 2022, pp. 143-148. doi: 10.11648/j.ijls.20220501.26

Received: February 11, 2022; **Accepted**: March 1, 2022; **Published**: March 9, 2022

Abstract: In January of 2022 the coast of Peru was affected by the leak of over eleven thousand barrels of oil into the sea. The company responsible for the leak (Repsol) has taken measures in order to compensate the environmental damage caused but there are also fines to be applied against such entity. The aforementioned measures include the cleaning of the ocean as well as the donation of provisions to the population that has been directly affected by the environmental accident, among others. Considering the expenses that come as a direct consequence of an environmental accident it is important to analyze the tax treatment that applies to them. This analysis develops from the premise that according to the Peruvian Tax Law (PTL) an expense that complies with the causality principle (CP) can be deducted in order to determine the net taxable income. The CP implies that an expense can be deducted as long as it takes place with the objective of maintaining the source of taxable income or to create the source of such taxable income. For the current analysis, the legislation, doctrine and the jurisprudence have been considered. This has allowed us to conclude that even though the Peruvian legislation considers the CP as parameter to determine whether or not an expense can be deducted, there are some expenses related to an environmental accident which cannot be deducted to determine the net taxable income.

Keywords: Causality Principle, Fines, Donations, Expenses

1. Introduction

It is sad to admit it but the environmental accidents are becoming a regular issue in the world. Peru has been affected by several oil leaks in the recent years, among which the one with more media coverage is the leak of over eleven thousand barrels of oil into the sea that took place on January of 2022. This leak is responsibility of the company Repsol.

These kind of incidents bring as an immediate consequence that the companies responsible have to incur in several disbursements in order to reduce the negative impact of such accidents on the environment as well as on the life of the people that live in the compromised area.

Each of those disbursements have a different objective. Donations in favor of the affected population seek to compensate for the damage produced on the environment that affects the development of their family and work activities. The fines payment on the other hand, correspond to the sanctions applicable according to the legislation. We could consider as well each expense assumed by a company responsible for an environmental accident that are directly related to recover the area affected by the contamination.

It is also necessary to consider that for an expense to be deducted, it most fulfil the requirements established by the CP, according to which the deduction is conditioned to the relation that must exist between the disbursement and the maintenance of the income source or its creation. Even though the article 37 of the Peruvian Income Tax Law (PITL) contains a list of expenses that are considered deductible and the conditions that have to be accomplished for that purpose, the CP has to be interpreted broadly allowing the taxpayers to deduct an expense if it fulfils the principle´s requirements even without being specifically contained on the previously mentioned article. The Peruvian Tax Court (PTC) has established on the sentence 04867-5-2020 that the CP is "the existing relationship between the disbursement and the generation of the taxable income or its maintenance, this is, that every expense must be necessary for the developed activity (…) [1]."

Nevertheless, it is also important to take into account that the article 44 does include a specific list of expenses that cannot be deducted. Even with the existence of such list, it must be considered that the main premise for an expense not to be deducted is that it does not comply with the CP.

Considering the environmental accidents which have taken place in Peru in recent times, it is important to comprehend the tax treatment that applies to the expenses on which a company responsible for this sort of incidents incurs.

Therefore, it is necessary to analyze if the expenses related to the containment, recovery and compensation that come as a consequence of an environmental accident can be deducted in order to identify and determine the net taxable income. This analysis will allow us to determine if the PC is fulfilled by the expenses that come as a direct consequence of producing a negative impact on the environment which would also imply that they can be deducted, and it will also lead us to identify if any of those disbursements is forbidden according to PITL.

We have not identified nor found any study that focuses on the relation between the CP and the expenses assumed by a company that have been caused by an environmental accident considering the different kind of disbursements made by an entity involved in these sort of events.

For the present analysis, our hypothesis is that not all of the expenses whose origin is an environmental accident can be deducted to determine the net taxable income according to the PTL, since some of them are subject to a specific prohibition or do not fulfill the CP.

The present investigation is of the legal – propositional kind, regarding the deduction of expenses caused by an environmental accident. The method used is the hypothetic – deductive to establish whether the suggested hypothesis turns out to be true or not.

The study is divided in four sections. The first one corresponds to the CP contained on the PITL, the second one regards the expenses related to the containment of the damage produced by the accident, the third one considers the fines that apply against the company responsible for the accident, and the fourth one is related to the donations provided by the company responsible to the people that live in the affected area.

2. The CP

2.1. The CP and the Deduction of Expenses

To understand the CP, it is necessary to start by explaining that this principle is contained on the article 37 of the PITL and has the objective of allowing the taxpayers who develop a business to deduct the expenses on which they have incurred in order to create the source of taxable income or to maintain such source. This is the pillar that sustains the expenses deduction according to the PTL. Nevertheless, the aforementioned article includes a list of deductible expenses that are not always related to the maintenance of the income source but are feasible to be deducted in order to determine the net taxable income, such as the donations which constitute a liberality but still can be deducted according to the paragraphs x) and x.1) of the article 37 of the PITL. Even considering the existence of this list, an expense could not be contained on it but still be deducted as long as it complies with the CP premise. The list included on article 37 mainly contains several requirements that have to be comply with for the expense to be deducted, as in the case of the financial expenses (interests) where a limit is established according to which the net interests cannot be deducted in a fiscal year if they exceed the 30% of the EBITDA that corresponds to the previous fiscal year; or for example in the case of the payments granted to the members of the board of directors where the limit to be deducted by such concept cannot exceed 6% of the commercial profit obtained on a fiscal year. Finally, this article also contains other conditions to be considered such as the obligation to sustain an expense on the corresponding invoice.

At the jurisprudential level, the PTC on the sentence 16591-3-2010 has established that: "(…) the causality principle cannot be analyzed restrictively, but broadly, including every expense that is related not only to the income production, but also with the maintenance of the source, this relation can be direct or indirect, since the expenses have to be analyzed on the latter case according to the reasonableness and proportionality principles. [2]"

Following this argument, on the sentence 07339-8-2018 the PTC has considered that: "(…) the relation of need referred on the article 37 of the Income Tax Law must be understood broadly, therefore the expenses that are relatively related to the taxable activity are admitted (…). [3]"

According to these pronouncements it is clear that an appropriate reading of the article 37 of the PITL does not limit the expenses that can be deducted to those included on each of the paragraphs of such article, but considers that any expense that fulfills the requirements of the CP can be deducted as well.

On this matter Picón points out that "It is necessary to determine if the requirement established in the rule refers to the fact that an expense, to be deductible, must be necessary, that is, essential for the generation of taxable income. If the answer were yes, we would be facing a complicated situation, because a person outside the company and, probably, without any knowledge of the business, could question whether the expenses were really necessary. Seen in another way, the rigor on what is essential can give rise to ignoring valid expenses, directed to the business (such as the purchase of better quality armchairs for the company directories, or televisions for the reception). [4]"

It is also important to understand that the expenses to be deducted may not imply an economic gain on the taxpayer, but still be deducted if they have the potential to provide the taxpayers of earnings through the creation of the income source or its maintenance. For example, if a taxpayer made an investment to open a restaurant on February of 2020,

considering the quarantine that was established broadly on March of the same year, it would imply that the expenses on which the taxpayer incurred to open the restaurant will probably not render any gain on this fiscal year, but as long as these disbursements had the objective of resulting on a tangible gain they must be considered as deductible.

Regarding the reasonableness and proportionality principles previously mentioned we must consider that the first one is observed when a transaction is regularly used o usually takes place in the line of business on which the taxpayer is involved, for example if a company administrates a building and rents its units to third parties, it is normal that it pays the property tax related the building that constitutes the income source. On what concerns the proportionality principle, this requirement is considered to be fulfilled when the expense is not excessive regarding the objective to be reached by the disbursement, for example if a company has two hundred workers and it purchases security equipment to be distributed among them, it would not be proportional if the amount of equipment that the company bought is five hundred. Both of these principles are complementary to the CP, since the latter is considered to be the main requirement to be observed to admit a certain expense as deductible, which does not mean that those two other principles can be omitted by the taxpayer during its analysis but that they need to be revised once the expense is qualified as deductible according to the CP. The exercise to determine if an expense is deductible must begin by analyzing if the expense fulfills the CP and then move forward to examine if the reasonableness and proportionality principles are also complied with.

2.2. The Forbidden Expenses

The main consideration to identify an expense as forbidden or not deductible is to analyze it according to the parameters established by the CP. Therefore, if an expense is not related directly or indirectly to the creation of an income source or to its maintenance it will not be deductible. After this analysis has been fulfilled, the following step would be to determine if the expense complies with the requirements considered on the article 37 of the PITL as long as it is included on any of its paragraphs, as well as if it complies with the reasonableness and proportionality principles.

Through the analysis it is also necessary to determine if the disbursement is not contained on the article 44 of the PITL where a list of forbidden expenses has been included.

Among the forbidden expenses we can find the amortization of intangible assets if they do not comply with several requirements or the fines issued by the National Public Sector. Another example would be the granting of liberalities since they do not comply with the CP.

The consequence of incurring on a forbidden expense and including it on the Income Tax Affidavit is not only that the Income Tax will have to be paid to the Tax Administration (TA) including the corresponding interests, but it also implies that the taxpayer will be sanctioned with a fine equal to 50% of the unpaid tax debt plus interests.

3. The Containment of the Environmental Damage

We must understand that for this part of the analysis, containment encompasses the measures taken in order to stop the damage caused by the environmental accident to continue and spread its effects, as well as every action needed to restore the ecosystem to its pre-accident conditions.

On the sentence 03981-1-2004 the PTC analyzed a case on which the deduction of expenses related to the environmental remediation on which a mining company had incurred establishing that these "(…) constitute an expense of the appellant, even more so when, since there was business continuity, it had to assume the obligations of the transferor of the assets, so that while the aforementioned mining tailings deposits, (…), are part of or have been generated in the exploitation of the assets and rights transferred to the appellant, said expense should be recognized as deductible. [5]" The same criteria have been considered on the sentence 03821-1-2004 issued by the PTC.

It is recognized on this pronouncement that the expenses related to the remediation of the environmental effect that a certain activity produces are considered as deductible in order to determine the net taxable income as they comply with the maintenance of the income source.

On the sentence 11021-4-2019 issued by the PTC the analysis regards the deduction of the legal expenses of a taxpayer that was sued by the persons affected by a mercury leak. This pronouncement established that "(…) the appellant's participation in the aforementioned civil actions brought before the District Court of (...) is proven in the case file, as well as the actions of the foreign lawyers in its defense, whose expenses were transferred to her by (...) those which are related to the maintenance of the income source, comply with the causality principle, a conclusion that is not undermined by the fact that no legal services contract had been presented with them, nor an acceptance document of competence or pronouncement by the indicated court, since the documentation included in the records sufficiently proves the need and destination of the non-accepted disbursements.[6]"

The quoted sentence is really important since it considers on its analysis that the legal expenses related to a legal procedure caused by the company´s intervention on an environmental accident are deductible. The approach considered by the PTC to resolve the case implies a direct application of the CP understood as a principle that has a broad application that is not only limited to the concepts consigned on the paragraphs of the article 37 of the PITL. Therefore, it is considered that the legal expenses are deductible, since they are destined to reduce the economic implications of having a law suit against the company, which would also help to maintain the income source. This is because a legal pronouncement against the company that establishes a considerable debt in favor of the plaintiffs could have a significant effect on the continuity of the company´s operations.

In the aforementioned pronouncement the facts that lead to

the beginning of the legal procedure against the company (mercury leak), are a subsidiary element to be considered, since the main analysis falls on the relation between the legal expenses and the maintenance of the income source. Nevertheless, for this work it is important to observe this reasoning of the court since the precedent could allow us to sustain that in following cases the legal expenses corresponding to the defense of a company involved in an environmental accident would be considered as deductible. This will apply, considering the court´s criteria, even if the company has already taken measures to provide food, water and provisions to the people affected by the accident, but then these persons start a legal procedure against the company responsible for the accident in order to obtain a more significant compensation.

The subject discussed is not if the compensation granted to the population is deductible, as it will be discussed on the fifth point of the present work, but if the expenses that have the objective to reduce the amount of the compensation, such as the legal expenses, are deductible or not. And as it has already been explained, the acceptance of this sort of expenses seems to be the understanding of the PTC.

As questionable as it may be, the PTC considers that a legal expense is deductible as it provides the company that incurs in them, the opportunity to reduce the risk of having to assume a greater disbursement if their position is not adequately defended on a legal procedure. This is because the smaller the amount of compensation is, the greater are the chances of the company to maintain its income source. Whether or not the legal expenses are related to compensate the damaged provoked by an environmental accident on which the company had an active role appears to be secondary according to the previously exposed criteria.

Both of the sentences previously quoted consider that as long as an expense fulfils the CP, as it is related to the maintenance of the income source, it can be deducted. If a certain case under analysis implies that a company is incurring in several remediation expenses regarding an environmental accident caused by this entity, these disbursements can be considered as deductible if the relation to the maintenance of the income source is proven.

4. Sanctions Caused by the Environmental Accident

The paragraph c) of article 44 of the PITL establishes as a non-deductible expense the "Fines, surcharges, default interest provided for in the Tax Code and, in general, sanctions applied by the National Public Sector. [7]"

Regarding the taxable treatment of the fines, Medrano considers that "are not deductible (...) the sanctions applied by the national public sector. It is important to note that the provision includes only this type of penalties and not those arising from a contract between individuals. [8]"

The PTC has established on the sentence 07944-4-2016 that "(…) according to subparagraph c) of article 44 of the income tax law, fines, which is the case of antidumping duties, are not deductible for the determination of third category taxable income; (…) [9]".

The same criteria have been included on the sentences issued by the PTC 02218-5-2016, 10126-1-2017 and 01303-5-2019.

Under the previously exposed ideas and quoted jurisprudence we consider that in the case of a company that has an active role on the occurrence of an environmental accident the fines issued by the National Public Sector cannot be considered as deductible to determine the net taxable income.

It is also true that the prohibition to consider the fines as deductible expenses could be discussed from a certain point of view, which we do not share, since the payment of such sanctions will allow the company to continue with its activities, and therefore complies with the CP since the payment constitutes a mean to maintain the income source.

Nevertheless, since there is an express prohibition no further analysis is necessary as the payment of fines cannot be considered as deductible according to the paragraph c) of the article 44 of PITL.

5. Donations Granted to the Affected Population

5.1. Donations as a Deductible Expense

On this regard it is important to start by saying that the paragraph x) of the article 37 of the PITL establishes that are deductible the "Expenses for donations granted in favor of entities and dependencies of the National Public Sector, except companies, and non-profit entities whose corporate purpose includes one or more of the following: (i) charity; (ii) social assistance or welfare; (iii) education; (iv) cultural; (v) scientists; (vi) artistic; (vii) literary; (viii) sports; (ix) health; (x) indigenous cultural historical heritage; and others for similar purposes; provided that said entities and dependencies have prior qualification by SUNAT. The deduction may not exceed ten percent (10%) of the third category net income, after the compensation of losses referred to in article 50. [7]"

On the same order of ideas, the paragraph x.1) of the article 37 of the PITL establishes that are deductible the "Expenses for donations of food in good condition that have lost commercial value and are suitable for human consumption that are granted to donations recipient entities, as well as the necessary expenses that are linked to said donations. The deduction for these cases may not exceed 1.5% of the total net sales of food for the fiscal year carried out by the taxpayer, food for these purposes being understood as any edible substance suitable for human consumption.

The aforementioned donations are not considered transactions subject to the market value rules referred to in article 32 of this Law. [7]"

On both cases it is a condition for the donation to be deductible for it to be granted through entities that are part of the National Public Sector or non-profit entities registered before the TA as donations recipients. It is important to

consider that in the case consigned on the previously quoted paragraph x.1) the amount of the donations accepted as deductible are calculated considering the limit of 1.5% of the total net sales of food related to the fiscal year on which the donation takes place.

Nevertheless, none of the subjects contained on paragraphs x) and x.1) of the article 37 of the PITL are analyzed on the present article, since the donations considered on this work are those granted directly to the people affected by an environmental accident caused by companies involved in activities that imply a mayor environmental risk, and are also donations on which neither the National Public Sector or a non-profit entity are involved.

Considering this, it is important to determine whether or not the donations that are granted directly to the population affected can qualify as a deductible expense in order to determine the net taxable income, since they do not fulfill with the general requirements established on the aforementioned articles. This will be put to analysis on the following section.

5.2. Taxable Treatment of the Donations Directly Granted to the Affected Population

For this part of the present work we must take under consideration that the PTC has already analyzed several cases on which a company has granted donations directly to the population affected by an environmental accident.

The PTC concluded on the sentence 03720-3-2017 that the donations from a company in order to provide provisions to the population affected by a leak of oil into the Marañon river comply with the CP and therefore, are deductible. On this sentence the PTC considered the same arguments contained on the sentences 11969-3-2014 and 03316-1-2015. The latter pronouncements on their part, collect the argument included on the sentence 21908-4-2011 where de PTC established that "(…) the expenses incurred by the appellant had the specific purpose of compensating for the damages caused by the oil leak in the waters of the Marañon River caused by the sinking of the barge A/F 346 contracted by the appellant for the transportation of its oil, as it has been previously exposed, alleviating, through the delivery of water, food and medicine, the impossibility of the affected populations that live on the riverside communities of the mentioned river, of the consumption of its waters and its hydro biological products, as warned by the report of the (...) taking into account the responsibility that corresponded to it in the aforementioned oil spill. [10]"

In this order of ideas, we have to consider that the PTC has also pronounced on the same sense on the sentence 03544-3-2014, where it considered that the donations provided to the population can be deducted as they comply with the CP. [11]

The leak of oil and the donation of provisions caused by it as an expense has as well been analyzed on the sentence 04754-3-2014 issued by the PTC where it quoted the argument included on the sentence 16591-3-2010 to sustain that such donations could be deducted, according to the following detail, "Thus, in the present case, this instance considers that the expenses incurred by the appellant did not respond to a simple liberality, since they were not incurred without an specific purpose being sought with it, but rather on the contrary, they were incurred to avoid social conflicts that could directly affect the normal functioning of its deposit and other facilities, being important to mention that although the oil wells were not seized during the period in question, due to the characteristics of the activity carried out by appellant and the area in which it was carried out, such a possibility was evident, so much so that in later periods it occurred, having motivated the paralysis of the appellant's productive activities and even the intervention of the Central Government, the Defense of the People and civil society in order to resolve the conflict situation. [12]"

The PTC has also issued the sentence 01707-3-2019 where the arguments of the sentence 12352-3-2014 were considered establishing that "(…) the expenses do not correspond to a simple liberality, but the opposite, those took place in order to avoid social conflicts that could directly affect the normal operation of its facilities (…) [13]"

On each of the pronouncements previously quoted we find that they follow the same criteria according to which a donation is deducible if it is granted to the population affected if the objective is to avoid further social conflict. Therefore, we can consider that such expenses qualify as a social responsibility expense, and this allows the companies that grant the donations to consider them as deductible, since the main objective is to avoid any conflict with the population that could derive on the paralysis of the company´s activities.

The PTC has established on the sentence 11000-1-2017 that "Regarding social responsibility, in sentences 18397-10-2013 and 03766-3-2016, this Court has indicated that it is part of a business strategy and constitutes a business vision whose objective is to increase the profitability of companies and guarantee the development of their projects in harmony with the community, being an enforceable conduct of a constitutional nature; in this sense, the expenses incurred for this concept constitute necessary tools to improve the competitiveness and sustainability of companies, they allow an adequate environment for income-generating activities and the continuity of business. [14]"

This Court has also issued the sentence 00431-3-2018 where it considered "That in this sense, following the aforementioned criterion, and as stated in the Sentences of the Tax Court 11969-3-2014 and 463-10-2016, even when in the audited year there had been no event or intervention carried out by the inhabitants of the native communities, which put at risk the continuity or normal development of the company's operations, it cannot be denied that such a possibility was latent, so it is ruled out that the disbursements questioned by the Administration respond to a mere liberality of the appellant. [15]"

The Peruvian Constitutional Court on the sentence issued on the file 0048-2004-PI/TC established that "(…) sustainable development requires social responsibility; this implies the generation of attitudes and behaviors of the

economic agents and the establishment of the promotion and the development of activities that, based on the exploitation or use of environmental assets, seek the common good and general well-being. [16]"

In this part, we indicate that, although these expenses can be considered as part of the company's social responsibility, it is debatable whether their deduction should be allowed since it could generate a perverse incentive for the companies not to be more careful regarding the protection of the environment through the development of their activities. However, it must be noted that, in the event that said expenses qualify as non-deductible, the immediate effect would be that the companies will not motivated to compensate to a certain extent the populations affected by the oil leaks or any other environmental accidents, and these persons will have to seek compensation resorting to the judicial system, which could take several years before a tangible result.

Finally, it is important to comment that the accident caused by Repsol provoked a response on the Peruvian congress. This response has come in the form of the legislative project 1208/2021-CR issued on January 27th of 2022, on which it is proposed to modify the paragraph z) of the article 37 of the PITL adding to it the following detail: "Expenses for remediation and compensation for environmental damage caused by oil spills and other polluting elements are not deductible. The costs of environmental deterioration are assumed by the cause of the damage, in accordance with the principle of cost internalization and environmental responsibility. [17]"

Even though it would have been more appropriate to consider that the addition of the proposed restriction on the article 44 of the PITL, it is important to identify that the prohibition has a wide range of application since it considers that each and every expense generated by the occurrence of an environmental accident is forbidden to be deducted in taxable terms. This implies that none of the disbursements that a certain company makes to mitigate the effects of the accident can be deducted in order to determine the net taxable income.

The legislative project has yet to be approved by the congress but still can be considered as an indicator of the repercussion that the environmental accident in the Peruvian coast currently has. Even if the project is not approved it constitutes an interesting precedent on the legislative measures that could eventually be taken when this sort of accidents take place.

6. Conclusions

The CP is the main concept to be analyzed in order to determine if an expense is deductible or not.

The CP has to be interpreted broadly, since any expense related to the creation of the income source or its maintenance can be considered as deductible.

The containment expenses related to an environmental accident are considered as deductible according to our jurisprudence, since they are destined to allow the company responsible for the incident to continue with its economic activities.

Fines caused by an environmental accident are not deductible since there is a restriction contained or the PITL.

Donations granted directly to the population affected by an environmental accident are deductible, since they qualify as social responsibility expense with the objective to avoid further social conflicts that could suspend the activities of the company involved in the environmental accident.

References

[1] Tax Court sentence 04867-5-2020.

[2] Tax Court sentence 16591-3-2010.

[3] Tax Court sentence 07339-8-2018.

[4] Picón. J. (2021). Who took my expense? The Law, the SUNAT or did I lost it…Dogma Ediciones. (Lima, Perú). 25.

[5] Tax Court sentence 03981-1-2004.

[6] Tax Court sentence 11021-4-2019.

[7] Peruvian Income Tax Law, approved by Supreme Decree 179-2004-EF.

[8] Medrano. H. (2018). Tax Law Income Tax: Significant Aspects. Essential Collection of Law 32. Pontificia Universidad Católica del Perú. (Lima Perú) 103.

[9] Tax Court sentence 07944-4-2016.

[10] Tax Court sentence 03720-3-2017.

[11] Tax Court sentence 03544-3-2014.

[12] Tax Court sentence 04754-3-2014.

[13] Tax Court sentence 01707-3-2019.

[14] Tax Court sentence 11000-1-2017.

[15] Tax Court sentence 00431-3-2018.

[16] Constitutional Court sentence issued on the file 0048-2004-PI/TC.

[17] Legislative Project 1208/2021-CR.