

DOI: 10.5281/zenodo.11425259

# VIOLATION OF THE PRINCIPLE OF LEGALITY IN THE DETERMINATION OF TAXES ON A PRESUMPTIVE BASIS IN APPLICATION OF THE TAX CODE APPROVED BY SUPREME DECREE NO. 133-2013-EF

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Received: 11/11/2025

Accepted: 18/12/2025

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## ABSTRACT

*The analysis focuses on the infringement of the principle of legality in the assessment of taxes on presumptive bases in Peru, in accordance with the provisions of the Tax Code that was approved by Supreme Decree No. 133-2013-EF. The primary objective of this study was to examine the manner in which the Tax Administration employs tax presumptions and whether these actions are aligned with the limits established by the relevant regulations. A qualitative approach was employed, entailing the implementation of dogmatic methods, systematic approaches, and case studies, which were based on a comprehensive review of the Tax Court's decisions. The findings indicate that the Tax Administration has committed a violation of the principle of legality by not adequately justifying the objections, incorrectly applying tax rates, ignoring expenses, and not providing a technical justification for the methods used to determine taxes on presumptive bases. In a multitude of instances, the Tax Court has annulled or revoked administrative decisions due to a paucity of substantiation, an absence of objective evidence, and the misuse of fiscal powers granted by law. It is evident that the acts of presumption must be strictly restricted to unreported assets, income, or expenses, applying the corresponding rates of Income Tax (29.5%) and IGV (18%), in addition to a fine of 50% and regulated interest. This approach avoids complicated calculations that increase litigation and cause nullities. The analysis indicates the necessity of implementing a uniform presumptive procedure, fortifying administrative action in accordance with the principle of legality, and enhancing regulatory clarity to curtail discretion and guarantee legal certainty.*

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**KEYWORDS:** Presumptive Basis, Determination of Tax, Nullity, Principle of Legality, Reparation, Revocation and Violation.

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## 1. INTRODUCTION

The identification of the tax obligation constitutes a fundamental step in the National Tax System, as it enables the establishment of both the existence and the amount of the tax that the taxpayer must pay in accordance with the taxable event defined by law. In the Peruvian context, this process is subject to the principle of legality, which stipulates that the State is obligated to act in accordance with regulations that are legally binding in the domain of taxation. This fundamental principle is embedded within the framework of Article 74 of the Political Constitution of Peru, which stipulates that the exercise of tax authority must be in accordance with the principles of reservation of law, equality, and the fundamental rights of individuals.

The central question guiding this study is: In what ways does the principle of legality appear to be violated in the context of taxes on presumptive bases as outlined in the Tax Code, as stipulated in Supreme Decree No. 133-2013-EF? This question is salient because, while tax presumptions are efficacious tools to combat tax evasion, their improper use can result in administrative decisions that lack a legal foundation and significantly compromise the legal certainty of the taxpayer.

The Tax Court's various resolutions suggest that the Tax Administration has committed significant errors in its establishment of presumptive bases, including inadequate justification, the failure to recognize legitimate costs, and the application of criteria that are not stipulated by law (Tax Court, RTF 699-4-97; RTF 190-2-1998; RTF 169-2-1998). Consequently, numerous securities issued by SUNAT have been deemed null and void or revoked due to their noncompliance with the formal and material requirements of the principle of legality.

The situation is further complicated by the lack of clear operational guidelines on how the Administration should implement the presumptions mentioned in Articles 64 and 65 of the Tax Code. In practice, this has resulted in the tax liability being established on the basis of total revenue, without taking into account related costs or expenses, which affects the ability to contribute – an essential principle in tax matters – and generates excessive economic burdens. This predicament underscores the necessity for a comprehensive review of the regulatory and administrative framework, with the aim of preventing arbitrary actions or actions that are not aligned with the law.

From a methodological perspective, the research is carried out with a qualitative approach, which facilitates understanding of the legal and

administrative context through the analysis of cases and the interpretation of regulations. This approach is rooted in the conceptual framework developed by Hernández (2014), who asserts that qualitative research methodologies prioritize the interpretation of phenomena within their natural contexts. Additionally, Charaja (2004) underscores the capacity of this research approach to facilitate a comprehensive examination of documents, thereby enabling the description of specific realities. Moreover, dogmatic, systematic, and case study methods are employed, with consideration given to resolutions of the Tax Court and pertinent tax regulations.

Moreover, theoretical contributions are incorporated, including those of Robles, Flores, and Gutiérrez (2009), who assert that the Tax Administration's supervisory, identification, collection, and sanctioning capacities must be exercised within the boundaries established by law, thereby underscoring the significance of legality in administrative action.

In this framework, the research has two aims. First, it seeks to identify the reasons and consequences of the violation of the principle of legality in determinations based on assumptions. Second, it seeks to propose measures that help standardize the operational criteria of the Tax Administration and improve the legal certainty of the taxpayer. This includes the necessity of precise adjustment of the stipulated amounts to the legal requirements, and the application of only the corresponding rates (29). The rate is 5% in income tax and 18% in IGV, and it avoids complex or discretionary calculations that could be annulled by the Tax Court.

This research makes a theoretical and practical contribution to the enhancement of the tax system in Peru. It emphasizes the significance of respect for legality as the fundamental axis of tax law and as an essential guarantee in the legal-tax relationship.

## 2. THEORETICAL FRAMEWORK

### 2.1. Principle of Tax Legality

The principle of legality constitutes a foundational element within the framework of Tax Law, stipulating that the establishment, modification, or elimination of a tax is contingent upon the existence of a supporting legislative framework. In the case of Peru, this principle is enshrined in Article 74 of the Political Constitution, which stipulates that the power to tax must be exercised in accordance with the reservation of law, equality, and the fundamental rights of the individual. The implementation of this system ensures that the creation of taxes and the administrative acts that define tax obligations are based on legal norms.

The significance of this principle has been

underscored by numerous authors. According to Robles, Flores, and Gutiérrez (2009), legality constitutes a fundamental limit in the exercise of the functions of control, determination, collection, and sanction exercised by the Tax Administration. Rigorous adherence to the law is instrumental in preventing abuses and safeguarding the legal security of the taxpayer. In a similar vein, the jurisprudence of the Tax Court has underscored that any action by SUNAT must be substantiated by clear rules. The absence of justification or regulatory basis can invalidate the administrative act (RTF 01241-1-02; RTF 00737-1-02).

The principle of legality is also manifested through sub-principles, such as the reservation of law, tax typicity, the legality of administrative acts, and respect for the rights of the taxpayer. These components function as filters that ensure that the Administration acts within the regulatory frameworks and with rigorous respect for the content and form established by law (Tax Court, RTF 169-2-1998; RTF 190-2-1998).

### **2.2 Establishment of the Tax Obligation**

The establishment of the tax obligation constitutes the procedural framework through which the existence and amount of the tax to be paid by the taxpayer according to the taxable event as defined by law is recognized. According to the Tax Code, taxpayers have the option of conducting their own self-assessment, or the Tax Administration may initiate an audit in the event of potential inconsistencies, faults, or indications of evasion.

Robles et al. (2009) have noted that this institution is a fundamental power of the Administration and is part of its exclusive and inalienable competence. This process may be supported by accounting data, supporting documentation, verifications, data cross-referencing, and assumptions, provided that such assumptions are explicitly permitted by law.

The doctrine stipulates that the establishment must strictly adhere to the principle of legality. That is to say, it must be founded on prevailing tax regulations, objective criteria, and evidence that substantiates the occurrence of the generating event. The absence of a legal or evidentiary basis constitutes a transgression of the principle of legality, in its formal and substantive aspects (Hernández, 2014; Charaja, 2004).

### **2.3 Assumption-Based Establishment**

Assumption-based settlement constitutes an exceptional procedure that enables the Tax Administration to ascertain tax liability in instances where there is evidence that the taxpayer's reports or returns do not accurately reflect the reality of its

activities. The rationales for its implementation are delineated in Articles 64 and 65 of the Tax Code.

The jurisprudence of the Tax Court dictates that the application of the determination by assumption is permissible under certain conditions. Firstly, the specific causes indicated by law must be proven to exist. These causes include, but are not limited to, the lack of income indicated on the return, significant errors in the accounting records, or the absence of supporting documentation (RTF 699-4-97; RTF 224-2-98; RTF 190-2-1998).

**In addition, the Tax Court has established clear criteria**

- The Administration must explain precisely the reasons for applying the assumption, detailing why it considers that the information presented does not correspond to reality (RTF 190-2-1998).
- Methods that are not established in the law may not be used or assumptions may not be extended beyond what the rules allow (RTF 9562-4-01; RTF 00737-1-02).
- The assumption-based approach should not be employed for taxes other than those for which the law permits it (RTF 1654-3-2002).

In this context, the determination on a presumptive basis must be rigorously applied to unreported assets, income or expenses, and be calculated using the applicable rates of Income Tax (29.5%) and IGV (18%), avoiding arbitrary calculations or extrapolated methods.

### **2.4 Powers of the Tax Administration and their Restrictions**

The Tax Administration (SUNAT) has powers to carry out the inspection, establishment, collection and imposition of penalties, powers that the law grants it to ensure that tax obligations are met (Robles et al., 2009). However, these powers are limited by constitutional and legal norms, the most important principle being that of legality.

**SUNAT cannot**

- Setting taxes without a clear legal basis.
- Applying presumptive criteria to taxes that are not contemplated in the law.
- Ignoring taxpayers' rights without a regulatory basis.
- Generating administrative acts without adequate justification.

The jurisprudence reinforces these restrictions, indicating that the absence of motivation, the misuse of presumptions and the lack of supporting documentation are violations of the principle of legality that can lead to the annulment of the

securities issued (RTF 02129-10-2015).

### 2.5. *Contributory Capacity and Non-Confiscatory*

While Article 74 of the Constitution does not explicitly address the principle of ability to contribute, it can be inferred from the principles of equality and the commitment to uphold the fundamental rights of taxpayers. It is hypothesized that an assessment of gross income that does not account for potential costs, expenses, or deductions may contradict the aforementioned principle by imposing unequal economic burdens.

Arancibia (2018) posits that disregarding the ability to pay and implementing excessive presumptions can result in confiscatory effects, which is in direct opposition to the constitutional principles established by prohibiting taxes of a confiscatory nature.

Tax jurisprudence has also emphasized that the assessment must comply with criteria of reasonableness and proportionality. This ensures that the obligation generated does not exceed the true economic capacity of the taxpayer (RTF 169-2-1998).

## 3. OBJECTIVES

### 3.1. *General Objective*

To evaluate the violation of the principle of legality in the determination of taxes on a presumptive basis in application of the Tax Code approved by Supreme Decree No. 133-2013-EF.

### 3.2. *Specific Objectives*

**Specific Objective 1** Identify the causes of the violation of the principle of legality in the determination of taxes on a presumptive basis in application of the Tax Code approved by Supreme Decree No. 133-2013-EF.

**Specific Objective 2** To identify the effects of the violation of the principle of legality in the determination of taxes on a presumptive basis in application of the Tax Code approved by Supreme Decree No. 133-2013-EF.

**Specific Objective 3** Propose a legislative initiative to determine taxes on a presumptive basis in application of the Tax Code approved by Supreme Decree No. 133-2013-EF.

## 4. METHODOLOGY

### 4.1. *Research Approach*

The present study was conducted using a qualitative approach, as its objective is to comprehensively understand, interpret, and analyze the Tax Administration's actions concerning the

establishment of taxes on a presumptive basis. The qualitative approach enables the analysis of phenomena in their authentic environment, without altering variables, and with a focus on interpretative analysis (Hernández, 2014). Furthermore, it enables the examination of the legal, doctrinal, and administrative criteria that influence the implementation of the principle of legality.

According to Charaja (2004), the application of qualitative research is appropriate in circumstances where the objective is to describe a specific reality through an exhaustive review of documents. This methodological approach is particularly relevant when considering the resolutions of the Tax Court, regulations, and tax doctrine.

### 4.2. *Type and Design of Research*

The research is classified as a qualitative approach without intervention, as the events are reviewed as they are presented in the administrative management, without any intervention. A case study was conducted, enabling an exhaustive examination of various resolutions of the Tax Court that address evaluations based on assumptions and their relationship with the infringement of the principle of legality.

This approach facilitates the identification of patterns, discrepancies, and criteria that are consistent across the actions of SUNAT. Additionally, it enables the discernment of the arguments employed by the Tax Court to annul or revoke the determined values.

### 4.3. *Research Methods*

Three main methodologies were used to carry out the research

**Dogmatic method** It was applied to study the tax laws that govern the way in which taxes are determined, as well as the corresponding constitutional principles and the specialized doctrine regarding legality in the tax field.

**Systematic method** It facilitated the organization and linkage of the normative, doctrinal and jurisprudential components, making it possible to identify the logical structure of the principle of legality and the procedures related to the determination on presumptive bases.

**Case study method** It was used to analyze specific resolutions of the Tax Court in which the observations made by SUNAT are reviewed on a presumptive basis. This analysis helped to recognize patterns of violation, repeated administrative criteria, and legal grounds used to overturn or overturn decisions.

#### 4.4. Population and Sample

The population was composed of all the decisions made by the Tax Court related to the determination based on presumptions, applying the Tax Code that was approved by Supreme Decree No. 133-2013-EF.

The sample was chosen intentionally or based on criteria, a typical characteristic of the qualitative approach, selecting those decisions that:

- Show the implementation of tax presumptions,
- Have important observations from SUNAT,
- Resulted in annulment or revocation for violating the principle of legality.

Revised decisions include RTF 699-4-97, RTF 224-2-98, RTF 190-2-1998, RTF 169-2-1998, RTF 9562-4-01, RTF 1654-3-2002 and RTF 02129-10-2015.

#### 4.5. Methods and Tools for Data Collection

Two main methods were used

- Review of documents, which served to analyze resolutions of the Tax Court, theories on taxes, academic studies and current laws.
- Organized documentary observation, using a template created to write down significant data on the causes applied, bases of the Tax Administration, justifications for administrative acts and reasons for cancellation or revocation.

These tools facilitated the organization of the information collected and ensured the traceability of the analysis.

#### 4.6. Data Analysis Process

The analysis was carried out inductively and comprehensively, following the steps detailed below:

Detailed review of regulatory documents, covering the Tax Code, the Political Constitution of Peru and the rules related to the determination on a presumptive basis.

Selection and organization of resolutions of the Tax Court, classifying them according to the type of

presumption used, the reasoning of the Tax Administration and the arguments presented for nullity or revocation.

Thematic coding through categories such as

- Normative basis,
- Justification of the administrative act,
- Limits to the principle of legality,
- Tax presumptions,
- Violation of the ability to pay and reasonableness.

Synthesis and interpretation of the results, connecting the jurisprudential findings with the doctrinal and normative framework to detect patterns of violation of the principle of legality.

#### 4.7. Rigor and Validity of the Study

To ensure the reliability and validity of the results, the following criteria were implemented

- Normative, doctrinal and jurisprudential triangulation, comparing administrative actions with the theory and decisions of the Tax Court.
- Traceability of the analysis, ensured through the use of documentary records.
- Theoretical saturation, achieved by identifying the repetition in the grounds for nullity or revocation of the acts of the SUNAT.

### 5. RESULTS

#### 5.1. Identify the Causes of the Violation of the Principle of Legality in the Determination of Taxes on a Presumptive Basis in Application of the Tax Code Approved by Supreme Decree No. 133-2013-EF

In this section, four (04) casuistry are analyzed, resolved by the Tax Court, in 2020, issues related to the determination of taxes on a presumptive basis.

**Table 1: Tax Court Resolutions.**  
Note. Tax Court-Prepared by the Executor.

No	Date	Records	Tax Court Resolutions	Origin
1	10/01/2020	2565-2018	00473-11-2020	Tumbes
2	29/01/2020	8246-2018	01107-2-2020	Freedom
3	06/11/2020	1133-2020	06473-3-2020	File
4	09/09/2020	11270-2019	04679-8-2020	Junín

Table 1 details the Resolutions of the Tax Court, which is the subject of study by the different dependencies of the Tax Administration at the national level.

In Table 2, we identify the controversial points

and mainly determine the violation of the principle of legality, in an extreme that corresponds to depreciation expenses. Table 3, presents the depreciated assets and find the property "Wooden feet screw formwork", with an impact on the

principle of legality.

### Tax Court Resolution No. 00473-11-2020

**Table 2: Controversial Points.**

Note. Prepared by the executor.

Tax Court Resolution	Controversial points of the administration's act	Violation of the Principle of Legality	
00473-11-2020	Costs and expenses paid without using means of payment.		No
	Presumption of omitted sales or income due to difference in accounts opened in companies in the financial system.		No
	Excess depreciation expenses.	Yes	
	Excess depreciation expenses		No
	Unsubstantiated provisions.		No

### Excess Depreciation Expense

**Table 3. Depreciation Expenses.**

Note. Prepared by the executor.

Tax Court Resolution	Depreciation expenses	Violation of the Principle of Legality	
00473-11-2020	Good "Komatsu brand hydraulic excavator".		No
	Well "Wooden feet screw formwork.	Yes	
	Good "Tramontina Peaks"		No

### Repair of the Good Wooden Feet Screw Formwork

**Table 4: Year 2015-Asset Value and Depreciation.**

Note. Prepared by the Executor.

Tax Court Resolution	Value of the property "Wooden feet screw formwork" S/	%	Depreciated Amount S/.
00473-11-2020	Taxpayer (A) 450 000.00	20%	90 000.00
	SUNAT (B) 450 000.00	10%	45 000.00
	Objection/Difference (A)-(B)		45 000.00

In Table 4, the property "Wooden feet screw formwork" is identified, from the verification of the Fixed Asset Registry No. 1, it is found that its book value was S/ 450,000.00 and, in 2015, it was depreciated by the taxpayer applying the rate of 20%,

for which it considered a depreciation in that year of S/ 90,000.00; however, according to the Tax Administration, the rate of 10% is applied, resulting in S/ 45,000.00, so it proceeds to repair the excess of depreciation that amounts to S/ 45,000.00.

### Violation of the Elements of the Principle of Legality

**Table 5: Requirement of the Elements of the Principle of Legality.**

Note. Prepared by the Executor.

Requirement to determine tax	Norm	SUNAT	Elements of the Principle of Legality	Qualification	Compliance with legal standards
"Wooden feet screw formwork".	Subsection b) of Article 32 of the Regulations of the Income Tax Law, approved by Supreme Decree 122-94-EF, establishes a depreciation rate of 20%	There is no rule and 10% depreciation applies	Formal legality	Minimum degree of legality (substantial observance of the formal procedure)	Not compliant
			Substantive legality	Maximum legal scope (Jurisdiction)	Not compliant
			Theological legitimacy	Fulfillment of Goals Set (Doctrine)	Not compliant

In Table 5, in the property "Wooden feet screw formwork", the violation of the principle of legality,

when the Tax Administration does not comply with the requirements of the elements of legality that correspond to the formality, substantive and theological.

*Principle of Legality in the Determination of Taxes on a Presumptive Basis in Application of the Tax Code Approved by Supreme Decree No. 133-2013-EF.*

**5.2. To Identify the Effects of the Violation of the**

**Table 6: Acts Resolved by the Tax Court.**

Note. Prepared by the Executor.

No	Fecha	Resolución del Tribunal Fiscal	Procedencia	Sumilla
1	10/01/2020	00473-11-2020	Tumbes	Revocar y Confirmar
2	29/01/2020	01107-2-2020	La libertad	Nula e Infundada
3	06/11/2020	06473-3-2020	Lima	Revocar y Confirmar
4	09/09/2020	04679-8-2020	Junin	Revocar y Confirmar

Table 6 identifies the effects of the Resolutions of the Tax Court, in which the acts of the administration are revoked, declared null and void and confirmed.

**Tax Court Resolution No. 00473-11-2020**

The taxpayer manages to get the Tax Court to revoke the appealed resolution on one end. That with regard to the property "Wooden feet with screws formwork", a verification of the Fixed Assets Register No. 1 (p. 125) shows that its carrying value was S/ 450,000.00 and, in 2015, it was depreciated by the complainant at the rate of 20%, for which it considered a depreciation in that year of S/ 90,000.00;

however, according to the Administration, the correct thing to do was to apply the 10% rate, resulting in S/ 45,000.00, so the excess depreciation amounting to S/ 45,000.00 was repaired. That subsection b) of Article 32 of the Regulations of the Income Tax Law, approved by Supreme Decree 122-94-EF, provides for a depreciation rate of 20% for machinery and equipment used by construction activities, except furniture, appliances, and office equipment. In the present case, SUNAT has no regulatory basis to apply the 10% depreciation.

**Table 7: Classification of the Violation of the Principle of Legality.**

Note. Prepared by the Executor.

Resolution	Case	Taxpayer	SUNAT	Tax Court
RTF 00473-11-2020	Wooden Feet Screw Formwork	Depreciation rate of 20% applies	Depreciation rate of 10% applies There is no rule.	This End resolves Revoke

In table 7, the Tax Court, not finding the legal protection or norm that supports the 10% depreciation rate applied by SUNAT, resolves to revoke this point.

**Tax Court Resolution No. 01107-2-2020.**

The taxpayer manages to get the Tax Court to declare the nullity of the appealed Resolution on one point. That the appellant challenged the issuance of the securities, however, from its content it can be seen that the Administration omitted to issue a pronouncement on the objections to the tax credit of the General Sales Tax from January to April, July and December 2015 and January 2016, for non-reliable

operations without Remittance Guides – Carrier and without the use of means of payment, as well as the reparation to exports shipped from April to June, August to October and December 2015 and February and April 2016 and the exports invoiced from April and June 2015 and March 2016 for differences in exchange rate and credit notes not recorded, as well as did not rule on the determination of refunds in excess of the balance in favor of profit in the periods on which determination of refunds in excess of the balance in favor of the benefit in the periods of September 2015 and April 2016, despite the fact that such objections and concepts were challenged. That,

consequently, since the established legal procedure has not been observed, in application of the provisions of numeral 2 of Article 109 of the Tax Code, it is appropriate to declare the nullity of the

appellee, however, since there is sufficient evidence to issue a pronouncement on the merits of the controversy, as provided for in Article 150 of the Tax Code. (p. 2).

**Table 8: Classification of the Violation of the Principle of Legality.**

Note. Prepared by the Executor.

Resolution	Case	SUNAT	Norm	Tax Court
RTF 01107-2-2020	Repairs	It does not support	Numeral 2 and 4 of Article 64 of the Tax Code	Resolves to declare the nullity in this regard.

In Table 8, the Tax Court, not finding support for the objections made by SUNAT, resolves to declare the nullity of the case.

**Tax Court Resolution No. 06473-3-2020.**

That the taxpayer gets the Tax Court to revoke one end of the appealed resolution. That the payments made were accounted for as remunerations in favor of the appellant, it is observed that the

Administration has not distorted that the cash payments that appear in the Account come from said remunerations, so that the funds in the amounts of S/ 5,270.00, S/ 4,000.00, S/ 5,520.00 S/ 6,000.00, S/ 4,000.00, S/ 4,100.00, S/ 3,000.00, S/ 6,000.00, S/ 4,317.10, S/ 4,190.00, S/ 5,000.00 and S/ 6,500.00 are excluded from the unjustified capital increase.

**Table 9: Classification of the Violation of the Principle of Legality.**

Note. Prepared by the Executor.

Resolution	Case	SUNAT	Norm	Tax Court
RTF 06473-3-2020	Unjustified increase in assets	It does not support The unjustified increase in assets	(Subsection g) of Article 60 of the Regulations of the Income Tax Law, approved by Supreme Decree 122-94-EF and amending	This extreme Revokes.

In Table 9, the Tax Court, not finding the basis for the unjustified increase in remuneration, applied by SUNAT, resolves to revoke this point.

**Tax Court Resolution No. 04679-8-2020.**

The administered party manages to revoke the appeal resolution in one extreme. From Annex No. 2 of the Determination Resolution (p. 202), as well as from Annex No. 01 of the Regulations (p. 110), it can be seen that the Administration determined presumed net income for purposes for the determination of income tax for 2016, adding to the net taxable income determined by the complainant through the Income Tax Affidavit for 2016, Form PDT 704 the result of applying the average net income of three similar companies that, according to the Administration, would have the same activity as the appellant (ISIC 45207), located in the same

district, province and department (Ubigeo Code) and that would have declared a higher resulting tax. That however, the record does not show the documentation that supports the aforementioned selection and that allows the verification of the conditions invoked by the Administration, and existing in the audited year and, therefore, that support the determination on the presumed basis made, the calculation made of the determination on the presumed basis contained in Annex No. 01 of the Request (...) where it refers to the companies that qualify as similar and its factors that would be comparable, and the supporting documentation that would allow its verification is not found in the file; consequently, the procedure for determining on a presumptive basis used by the Administration is not in accordance with the law (...).

**Table 10: Classification of the Violation of the Principle of Legality**

Note. Prepared by the Executor.

Resolution	Case	SUNAT	Norm	Tax Court
RTF 04679-8-2020	Average net income of three similar companies	It does not support the procedure followed	Numeral 3 of Article 64 of the Tax Code and numeral 3 of Article 93 of the Income Tax Law	Repeal on this point

In Table 10, the Tax Court, not finding the basis of

the average Net Income of three similar companies to

determine the tax on a presumptive basis, applied by SUNAT, resolves to revoke this point.

### **5.3. Propose a Legislative Initiative to Determine Taxes on a Presumptive Basis, in Application of the Tax Code Approved by Supreme Decree No. 133-2013-EF**

BILL AMENDING THE TAX CODE APPROVED BY SUPREME DECREE NO. 133-2013-EF.

#### **Article 1. Object**

The purpose of this legislative decree is to repeal Articles 64 to 72 of the Tax Code approved by Legislative Decree No. 816, whose Single Harmonized Text has been approved by Supreme Decree No. 133-2013-EF, in order to optimize the procedures that allow the application of the presumed base to be unified.

Article 2. Reference, for the purposes of this Legislative Decree, the Tax Code shall be understood as the one approved by Legislative Decree No. 816 whose Single Harmonized Text has been approved by Supreme Decree No. 133-2013-EF.

Article 3. Repeal Articles 64 to 72 of the Tax Code. Incorporate into the Tax Code the Single Application of the Calculation to Presumptions

Total, Omitted Asset According to Valuation = 29.5% I.R. + IGV 18%

Total Income or Expenditure Omitted = 29.5% I.R. + IGV 18%

- Gradualness: Fine 50% of the Omitted Tax
- Interest Approved by the Tax Code
- Monthly 0.9%
- Daily 0.03%

**Explanatory Statement** That the current Tax Code develops the presumptions from Articles 64 to 72, these have been generating confusion in their application, in any case it is appropriate to standardize the presumptive application. Puno, July 31, 2023

## **6. DISCUSSION**

Identify the causes of the violation of the principle of legality in the determination of taxes on a presumptive basis in application of the Tax Code approved by Supreme Decree No. 133-2013-EF.

That as can be seen from Table 22, the tax administration is not complying with the provisions of Article IV, paragraph 1.1 of Law 27444 of the General Administrative Procedure Law, which states: "The administrative authorities must act with respect for the constitution, the law and the law, within the powers attributed to them and in accordance with the purposes for which they were conferred." We find, as a result of his actions,

ignorance of his faculties.

(EXP. N 00197-2010-PA/TC, 24/08/2010, P, FJ. 2,3,4,) indicates: "(...) 2. The principle of legality constitutes a constitutional guarantee of the fundamental rights of citizens, enshrined in Article 2, paragraph 24, paragraph d), of the Constitution, which reads as follows: "No one shall be prosecuted or convicted for an act or omission which, at the time it was committed, was not previously expressly and unequivocally qualified by law, as a punishable offence; nor punished with a penalty not provided for in the law." 3. The principle of legality in matters of penalties prevents the commission of an offence from being attributed if it is not previously determined by law, and also prohibits the application of a sanction if it is not determined by law. As this Court has stated (Cf. File No. 010-2002-AI/TC), this principle imposes three requirements: the existence of a law (lex scripta), that the law is prior to the sanctioned act (lex praevia), and that the law describes a strictly determined factual situation (lex certa). 4. It has also been established that "This principle includes a double guarantee; the first, of a material nature and absolute scope, both referring to the strictly criminal field and to that of administrative sanctions, which reflects the special importance of the principle of legal certainty in these limiting fields and implies the imperative need for normative predetermination of the infringing conduct and the corresponding sanctions; that is, the existence of legal precepts (lex praevia) that make it possible to predict with a sufficient degree of certainty (lex certa) those conducts and to know what to expect in terms of the attached liability and the possible sanction; the second, of a formal nature, relating to the requirement and existence of a norm of adequate rank and which this Court has identified as a law or norm with the rank of law". (Cf. Judgment of the Spanish Constitutional Court No. 61/1990). (...)"

This position is corroborated by Pérez (2018) in his thesis, in the second conclusion he indicates: Although the principle of legality prevails in all our legal systems, its consequences are particularly severe in tax matters because it is not only a notoriously public rule, but also inaccessible and inalienable to the parties, especially to state regulatory bodies. Yes, it imposes strong tax requirements. Forms for adopting, modifying or cancelling tax provisions.

This position is corroborated by (RTF 00737-1-02) which states: "The Tax Administration may not use, to determine the tax obligation on a presumptive basis, presumptions not established in regulations with the status of law".

That in this line as a result we have: That the Tax Administration (SUNAT), according to Table 22, violates the principle of legality, in the determination of taxes on a presumptive basis, by omitting a pronouncement on the objections, by not applying the rate correctly, ignoring the payments of remunerations and not supporting with documents, the companies that qualify as similar and their factors that would be comparable, proving that the powers granted by law are not adequately complied with.

To identify the effects of the violation of the principle of legality in the determination of taxes on a presumptive basis in application of the Tax Code approved by Supreme Decree No. 133-2013-EF.

That as can be seen from Table 28, the tax administration, by not complying with (Law 27444 General Administrative Procedure Law) in paragraph 1.1 of Article IV indicates: "The administrative authorities must act with respect for the constitution, the law and the law, within the powers attributed to them and in accordance with the purposes for which they were conferred." We find, as a result of his actions, the violation of his acts by the Tax Court.

(EXP. NO. 04293-2012-PA/TC, f12) On the "principle of congruence", although it has been explained that it is part of the constitutionally protected content of the right to due reasons for judicial decisions and that it guarantees that the judge resolves each specific case without omitting, altering or exceeding the claims made by the parties (See, STC No. 08327-2005-PA/TC, ground 5), in administrative headquarters, this procedural principle is made more flexible, to the extent that in the iter of the administrative procedure it must be harmonized with the general power of invalidation of the Public Administration.

That the tax administration, in accordance with Tax Court Resolution No. 01107-2-2020, omitted to rule on one point, this fact violates the principle of procedural congruence.

(STC 02050-2002-AA/TC, f8): "(...) The principle of legality in sanctioning matters prevents the commission of an offence from being attributed if it is not previously determined by law, and also prohibits the application of a sanction if it is not also determined by law. As this Court has stated (Anti-Terrorist Legislation Case, Case No. 010-2002-AI/TC), the principle imposes three requirements: the existence of a law (*lex scripta*), that the law predates the sanctioned act (*lex previa*), and that the law describes a strictly determined factual situation (*lex certa*). As has been pointed out, "This principle includes a double guarantee; The first, of a material

nature and absolute scope, both referring to the strictly criminal field and to that of administrative sanctions, reflects the special importance of the principle of legal certainty in these limiting fields and implies the imperative need for normative predetermination of the infringing conduct and the corresponding sanctions, that is, the existence of legal precepts (*lex previa*) that make it possible to predict with a sufficient degree of certainty (*lex certa*) those conduct and know what to expect in terms of the attached responsibility and the eventual sanction; the second, of a formal nature, relating to the requirement and existence of a rule of appropriate rank and which this Court has identified as..." law or norm with the rank of law. (STC of Spain 61/1990)".

That the Tax Administration, in accordance with Tax Court Resolution No. 00473-11-2020, does not issue its pronouncement in accordance with the law (*lex scripta*), that is, to apply the provisions of subsection b) of article 32 of the Regulations of the Income Tax Law, approved by Supreme Decree 122-94-EF, provides for a depreciation rate of 20% for machinery and equipment used by construction activities, except furniture, appliances and office equipment.

(RTF No. 03392-3-2014), states: these funds must include real and not fictitious income, since only real income increases the taxpayer's assets and can sustain an acquisition or expense that the taxpayer has made, and which is classified by the Administration as an increase in assets. That the Tax Administration, in accordance with Tax Court Resolution No. 06473-3-2020, did not prove that the funds come from fictitious income.

That, in the determination of taxes on a presumptive basis, the provisions of numeral 3 of Article 64 of the Tax Code were applied, which empowers the Administration to determine the tax obligation on a presumed basis. In the present case, there is no document that supports the selection of similar companies that would have, the same activity located in the same jurisdiction and that would have declared a higher resulting tax. In this sense, the Tax Court through Tax Court Resolution No. 04679-8-2020. Orders that it be revoked in that regard.

Propose a legislative initiative to determine taxes on a presumptive basis, in application of the tax code approved by Supreme Decree No. 133-2013-EF.

The proposal aims to collect tax on a presumptive basis by applying the following: To omitted assets, omitted income or expenditures, for income tax 29.50% and IGV 18%, in both cases with a fine of 50%, plus interest regulated by the Tax Code, without falling into cumbersome procedures and

calculations, that in the long run the acts issued by the SUNAT, is declared null and/or revoked, by the Tax Court.

## **7. CONCLUSION**

The study's findings indicate that the implementation of the determination on presumptive basis by SUNAT exhibits significant deficiencies, constituting a recurrent infringement of the principle of tax legality. The normative, doctrinal, and jurisprudential evidence gathered indicates that the Tax Administration frequently applies the presumptions of Articles 64 and 65 of the Tax Code without adequately justifying the reasons established by law. This practice leaves room for actions that exceed the limits established by the Constitution and the law in the exercise of tax authority. This problem is exacerbated by the absence of adequate justification in administrative acts, as the values determined frequently lack a robust, technical, and legally sound foundation with respect to the methodology employed to ascertain the purported tax obligation. Consequently, the Tax Court has repeatedly annulled or revoked such acts.

Furthermore, it has been ascertained that the Tax Administration employs calculations, rates, and formulas that are not stipulated in current regulations. This has a direct impact on taxpayers' ability to pay and distorts the taxable base. The practice of taxing gross income without considering justified costs or expenses can generate inequitable outcomes, potentially resulting in confiscatory measures. This approach not only contravenes substantive legality but also infringes upon the principles of equality, reasonableness, and non-confiscatory as established by the Constitution. Consequently, the administrative action deviates from the constitutional principle of proportionality in the determination of tax obligations.

The analysis also reveals the lack of consistent criteria within SUNAT in the application of the presumptive determination. A review of the rulings indicates an absence of a uniform rule on how to apply presumptions. This absence of a uniform rule leads to contradictory decisions and a high number of disputes between the Administration and taxpayers. This absence of uniformity has been demonstrated to have a deleterious effect on legal certainty and engenders a considerable degree of uncertainty in the tax relationship. This, in turn, has been shown to negatively impact confidence in the tax system and to render it difficult to comply with tax obligations voluntarily.

In light of this reality, it is imperative to

implement a regulatory reform that clearly defines the limits, scope, and procedures for the application of the presumptive basis determination. It is imperative to establish uniform methodological criteria, mandatory technical guidelines, and specific conditions that limit the discretion of the administration and ensure the correct interpretation of the principle of legality. Consequently, it is imperative to implement institutional enhancements within SUNAT, encompassing specialized legal training methodologies, more rigorous internal control mechanisms, and prior review systems for administrative acts to prevent the issuance of inappropriate securities.

The study's findings substantiate the notion that the Tax Court plays a pivotal role in the supervision and assurance of compliance with the principle of legality. The jurisprudence of the Tax Administration plays a pivotal role in regulating its actions and safeguarding the rights of taxpayers, thereby contributing to the establishment of a more equitable and rational tax system that aligns with the principles of the Constitutional Rule of Law. The findings of this study underscore the necessity of fortifying this function and fostering enhanced congruence between administrative actions and the legal principles that govern the tax realm in Peru.

## **8. RECOMMENDATIONS**

In light of the findings, it is recommended that a comprehensive enhancement be made to the existing set of regulations and procedures that govern the calculation of taxes on presumed bases in Peru. First, it is imperative that the legislator undertake a thorough review and elucidation of Articles 64 and 65 of the Tax Code, meticulously delineating the underlying principles, limitations, and ambit of the utilization of tax presumptions. This necessitates the establishment of uniform methodological guidelines that circumvent extensive or arbitrary interpretations, as well as the creation of mandatory technical criteria for the calculation of the presumed base, thereby ensuring that the rates and formulas applied comply with current regulations. Such a change would help to reduce the margins of discretion and to reaffirm the principle of legality as the foundation of the tax system.

At the institutional level, it is recommended that SUNAT implement continuous training programs aimed at enhancing the legal, technical, and methodological competencies of officials responsible for the inspection and determination of taxes. These programs must emphasize absolute respect for the constitutional principles of taxation, especially those

of legality, ability to pay, and reasonableness, as well as the correct justification of administrative decisions. Furthermore, the establishment of internal quality control mechanisms is imperative to ensure a comprehensive review of securities prior to their issuance, thereby preventing unsubstantiated observations or those based on methodologies not stipulated in the law.

The creation of binding institutional manuals and guides is also recommended, with the aim of defining clear and consistent procedures for the application of the presumptive determination. The implementation of a comprehensive set of internal guidelines would contribute to a substantial reduction in the observed inconsistencies in administrative actions, thereby fostering greater uniformity in the interpretation and application of tax regulations. This standardization would also help to reduce legal conflicts and improve the management of administrative and judicial resources.

Conversely, it is recommended to promote the

transparency and accessibility of the criteria utilized by SUNAT through the regular publication of internal resolutions, reports, and technical statements that elucidate the methodology employed in cases of presumptive determination. This measure would facilitate taxpayers' understanding of the criteria established by the Administration, thereby fostering an environment of greater predictability and legal certainty in relation to taxes.

Finally, it is recommended to strengthen the function of the Tax Court as a guarantor of the principle of legality. This can be achieved by encouraging the dissemination and systematization of its jurisprudence so that its criteria are known and applied uniformly by the Administration and taxpayers. A more robust corpus of jurisprudential doctrine will facilitate the establishment of a tax system that is more coherent, transparent, and respectful of fundamental rights. This will enable the presumptive determination to be applied exclusively within the limits strictly permitted by law.

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