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Administrative Silence in Tax and Administrative Litigation

El Silencio Administrativo En Lo Contencioso Tributario Y Administrativo

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Abstract

The Constitution of the Republic of Ecuador grants citizens the freedom to request petitions and challenge decisions that affect their rights. When exercising these rights and receiving no response from the entity, it is considered positive administrative silence. In tax matters, if the response were negative and rights were affected, it could be challenged through the ordinary process established in Article 320 of the General Organic Code of Procedures. On the other hand, in administrative matters, one can proceed directly to execution as provided in Article 370A of the General Organic Code of Procedures. So, why there is a difference in these processes? The objective of this work is to analyze why no law or regulation explains why one can proceed directly to execution or must follow an ordinary procedure. The method used for this analysis is qualitative.

Keywords: Positive administrative silence; Petition; Challenge; Execution.

Resumen

La Constitución de la Republica del Ecuador otorga a los ciudadanos la libertad de solicitar peticiones y poder impugnar decisiones que afecten sus derechos, al ejercer estos mismos y al no haber ninguna respuesta de la entidad se debe aceptar como un silencio administrativo positivo, que en materia tributaria si fuera negativa la respuesta y afecten derechos se puede impugnar por la vía ordinaria que se establece en el artículo 320 del Código Orgánico General de Procesos. Mientras que en la materia administrativa se va directamente a la ejecución que se establece en el numeral 370 A del Código Orgánico General de Procesos. Entonces, ¿por qué la diferencia de dichos procesos? El objetivo de este trabajo es realizar un análisis de por qué no hay ninguna norma o ley que establezca por qué directamente se va a la ejecución o se debe seguir un procedimiento ordinario. El método que se va a utilizar es de carácter cualitativo.

Palabras Clave: Silencio administrativo positivo; Petición; Impugnar; Ejecución.

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Introduction

This research is important because the state is primarily responsible for addressing petitions effectively and taking action on the issues raised. There is a problem within institutions when they fail to respond to a user's request, treating it as positive administrative silence, which occurs in various tax and administrative procedures.

Javier Robalino discusses administrative silence and declares that “administrative silence results in the expiration of the administration's competence, which implies the loss of that competence due to the passage of time, and consequently, the administration's inability to review or revise its own act.” (Robalino, *El Silencio Administrativo Positivo*, 2000)

This tacit expression of the administration's will, when conceived in a positive sense, means that what has been requested from the administration has been granted. In this case, it is called positive administrative silence. Positive administrative silence was introduced into Ecuadorian legislation with the enactment of the Law on State Modernization, Privatizations, and the Provision of Public Services by Private Initiative, published in Official Gazette No. 349 on December 31, 1993. With this law, the concept of positive administrative silence was included as a new legal administrative institution, which was previously absent in our system. (Robalino, *El Silencio Administrativo Positivo*, 2000).

Methods

This research has a qualitative-quantitative nature. It will survey tax law professionals to examine their opinions on the analyzed topic. It also seeks to analyze a cause-and-effect relationship with positive administrative silence and describe casuistic legal processes. The research design is non-experimental, based on doctrinal theory, and heavily relies on the documentary analysis of legal regulations and jurisprudence. The research has a descriptive, analytical, explanatory, and propositional scope, using the method of specific analysis-synthesis of the subject to reach necessary conclusions.

Results

Positive Administrative Silence in the Organic Administrative Code

Positive administrative silence is a legal institution that arises in the absence of a timely response from the public administration (Hurtado Valencia, 2019). In this regard, it could be stated that the legislator's intention in incorporating this legal concept is to penalize the entities within the public sector when they fail to issue a resolution within the time provided by the law (García Pérez, 2014).

Positive Administrative Silence in Tax Matters

When the public administration does not provide the citizen with a response to requests within the legally specified timeframes, it is known in law, doctrine, and jurisprudence as positive administrative silence, and in tax matters, it is referred to as tacit acceptance. In tax matters, only claims can be subject to tacit acceptance, the main effect of which is to validate the petitioner's request that was not promptly resolved in the submitted claim, thus accepting it, thereby creating a presumptive administrative act in his favor (Robles, 2022).

In the tax code, SECTION 3A. OF THE RESOLUTION ART. 132, it discusses the timeframe that the administrative authority has to respond to the submission of a claim, which is set at 120 days.

If there is no response to users' requests, it can have a negative impact because, in cases of urgent situations or those requiring prompt attention, people may face difficulties in resolving their procedures. Some users are not aware of the time limits for each administration to respond or address their concerns, so if the deadline expires, citizens may not know that they can challenge that decision, as it is considered a positive administrative silence.

If this right expires for the administration, it empowers the petitioner to have the matter resolved effectively, because in tax matters, a regular contentious procedure must be followed, while in administrative matters, one goes directly to the execution of the request.

The period established by law for resolving a request that has initiated an **administrative procedure** must have elapsed without the Administration having pronounced about it. It is important to note that the Office of the Comptroller General of the Republic has indicated that the legal fiction of positive administrative silence only applies to certain types of requests, specifically those that give rise to an administrative procedure. An administrative procedure is a sequence of interconnected acts or procedures, involving both the Administration and private individuals, with the purpose of producing a final administrative act (Vial, 2015).

The interested party must approach the authority responsible for resolving the relevant matter, reporting the failure to comply with the established deadline and requesting a decision regarding their request. (Vial, 2015)

Effects of Administrative Silence

The current legislation in Ecuador in these areas has established that, if the public administration does not respond to the requests submitted to it, it will be considered an implicit acceptance of these requests. This has been termed "positive administrative silence" (Oleas, 2014).

Previously, the system followed the "negative silence" approach, which meant that if the administration did not respond to a request, it was considered rejected, allowing the interested party to exhaust the administrative route and resort to the courts to challenge the "implicit" denial and assert their rights (Echeverría & René, 2015).

However, with the State Modernization Law, a radical change occurred in the approach to administrative silence. This law represented a significant advancement in protecting the constitutional rights of those subject to administrative actions. The regulation complemented the sub-constitutional regulation more comprehensively by addressing the right to petition, establishing the timeframe for considering positive silence, prohibiting the suspension of the processing of the request by officials under penalty of criminal sanctions, and obliging the administration to provide a certification indicating the expiration of the legal deadline (Portilla & Armando, 2015).

Now, let's review the regulation provided by Law 05 and the Tax Code regarding this legal institution:

"The first provision indicates that: From January 1, 1995, in all cases where the Tax Code and other tax laws provide for or do not specify specific deadlines for resolving or addressing requests, claims, or appeals by taxpayers, the tax administration will have a period of one

hundred and twenty business days to issue a response. If, after the deadline indicated in the previous paragraph has expired, there is no express response to requests, claims, or appeals submitted from the indicated date, administrative silence will be considered as tacit acceptance of them. The official responsible for a tacit acceptance due to administrative silence may be removed from their position without prejudice to any actions that may be taken against them in accordance with relevant legal regulations." (Oleas, 2014)

In accordance with what was transcribed above, the codification of the Tax Code, regarding the term to resolve claims, establishes the following mandate:

"Art. 104 - Tacit acceptance. - The failure to issue a resolution by the tax authority within the period established in Article 132 shall be deemed as the tacit acceptance of the respective claim, and it shall empower the interested party to exercise the corresponding legal action. The responsible official shall be penalized in accordance with the provisions of Article 33 of the Law on the Modernization of the State, Privatizations, and the Provision of Public Services by Private Initiative."

Once the overall context is understood, we will address the issue of the legal institution of tacit administrative acceptance, which is treated differently in administrative litigation. To do this, we will analyze Article 370 A of the General Organic Code of Procedures, which states the following:

"If it involves the execution of a presumed administrative act, the judge will convene a hearing in which they will hear the parties. It is the responsibility of the petitioner to demonstrate that the legal term for the administration to resolve their request has expired, through a sworn statement in the execution request stating that they have not been notified of an express resolution within the legal term. Additionally, they will attach the original request, which should include the acknowledgment of receipt."

These kinds of problems occur due to the legal gaps left by the law, meaning it leaves room for interpretation precisely because it does not clarify with exactitude how the procedure should be carried out in different cases. Now there is an enigma because we are marking this differentiation of processes in different subjects, while one is treated as if it were an execution procedure in tax litigation, there is due process in which an appeal can be made, and it is considered an ordinary process, meaning it will have two hearings. (Viñán & Fernanda, 2009)

In general terms, in administrative litigation, the opportunity for a proper defense is not given, as the action is executed, even lacking the formalities, which, if we analyze beyond the literal meaning of the norm, could be considered procedural irregularities. Due to the absence of any notification, the due process is entirely violated. For this reason, a knowledge survey was conducted among various legal professionals to obtain feedback on how much they know about this research and their opinions on the differentiation outlined in this study. (Ramos & Briseida, 2017)

Survey

Question No. 1

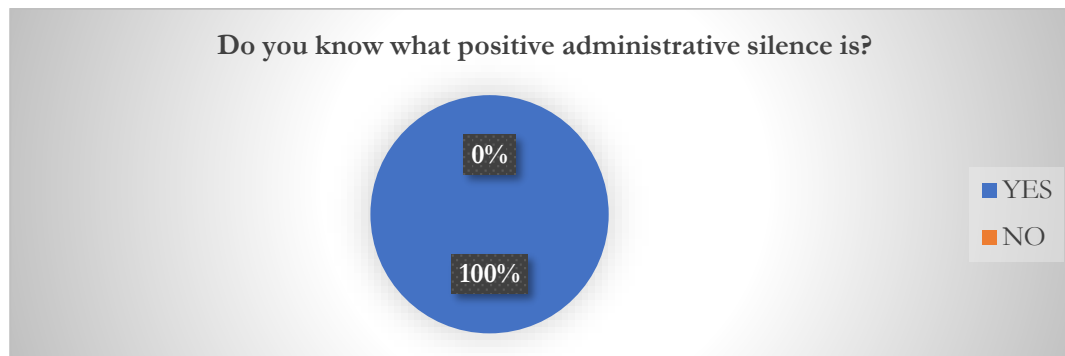
Do you know what positive administrative silence is?

- a) Yes
- b) No

Table No 1:

Answer	Frequency	Percentage
Yes	15	100%
No	0	0%
Total	15	100%

Table elaborated by: Erika Yanchapanta, and Diego Jacome



The jurists of tax law, in its entirety, opted for the answer "yes". Therefore, it is clear what administrative silence is among those legal professionals.

Question No. 2

Have you, as a lawyer, requested anything by letter or writing from any public administration?

- a) Yes
- b) No

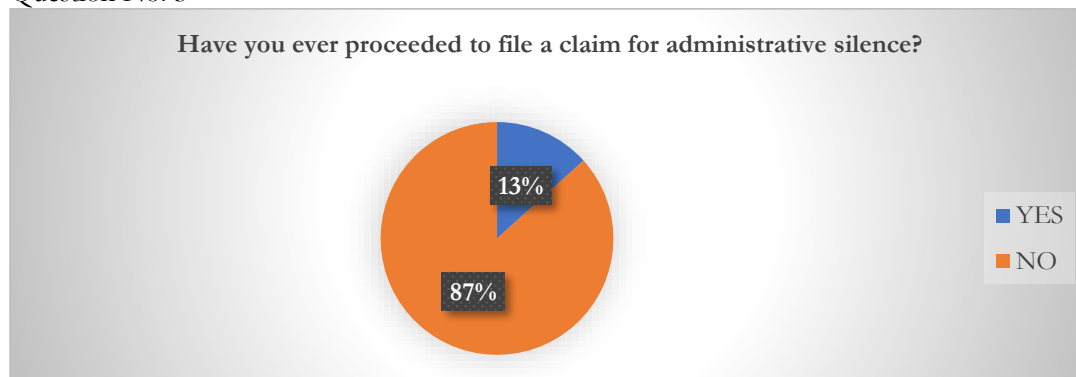
Table No 2:

Answer	Frequency	Percentage
Yes	14	93%
No	1	7%
Total	15	100%

Table elaborated by: Erika Yanchapanta, and Diego Jacome

93% of the legal professionals chose the answer "Yes." In other words, it is quite common for legal professionals to make requests through letters or written documents to public administrations to exercise their administrative powers.

Question No. 3



Have you ever proceeded to file a claim for administrative silence?

- a) Yes
- b) No

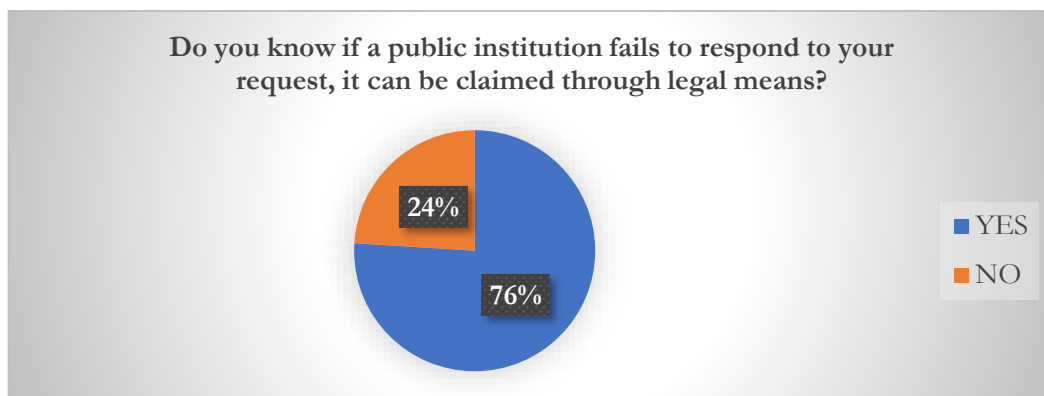
Table No 3:

Answer	Frequency	Percentage
Yes	2	13%
No	13	87%
Total	15	100%

Table elaborated by: Erika Yanchapanta, and Diego Jacome

87 percent of the jurists are unaware of the claim for administrative silence, which means that, despite being aware of its existence, they have not put it into practice. Many factors influence the responses given, such as the vague explanation of the rules or simply the conflict within them.

Question No. 4



Do you know if a public institution fails to respond to your request, it can be claimed through legal means?

- a) Yes
- b) No

Table No 4:

Answer	Frequency	Percentage
Yes	10	76%
No	5	24%
Total	15	100%

Table elaborated by: Erika Yanchapanta, and Diego Jacome

The 76 percent of the jurists do not have the issue of administrative silence clarified, even though they are aware of what the rule is about and of its existence, they do not know how it works.

Question No. 5

Do you know the jurisdictional procedure for positive administrative silence in tax and administrative matters?

Do you know if a public institution fails to respond to your request, it can be claimed through legal means?



- a) Yes
- b) No

Table No. 5

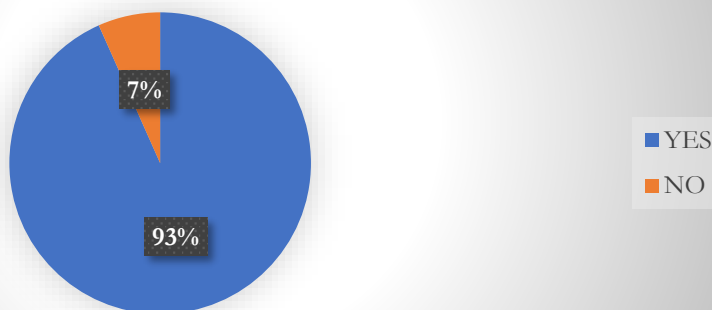
Answer	Frequency	Percentage
Yes	14	93%
No	1	7%
Total	15	100%

Table elaborated by: Erika Yanchapanta, and Diego Jacome

As mentioned earlier, lawyers have a broad knowledge of the topic; however, it is essential to emphasize the limited use of the law and their knowledge in this matter. The survey makes it clear that despite knowing what it entails, most lawyers do not engage in positive administrative silence and try to avoid reaching that point.

Question No. 6

Do you know the jurisdictional procedure for positive administrative silence in tax and administrative matters?



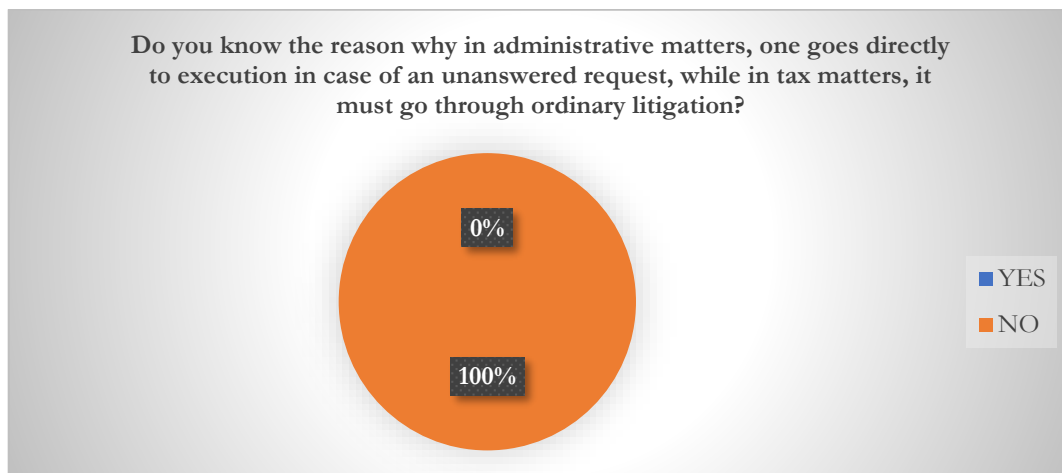
Do you know the reason why in administrative matters, one goes directly to execution in case of an unanswered request, while in tax matters, it must go through ordinary litigation??

- a) Yes
- b) No

Table No 6:

Answer	Frequency	Percentage
Yes	0	0%
No	15	100%
Total	15	100%

Table elaborated by: Erika Yanchapanta, and Diego Jacome



The main issue lies in this question: even though jurists are knowledgeable about the law and regulations, they are entirely unaware of why there is a differentiation between tax matters and administrative matters.

It should be considered that there is no justification as to why there is no response to understand why tax matters and administrative matters involve different processes when there is a request from the public for acts that violate their rights, either directly or indirectly.

In practice, these rights are being violated by the Tax Administration when it fails to resolve requests from the administered individuals within the timeframes established by law, or when its inactivity persists beyond a reasonable period to put an end to the disputes that may arise. (Villanueva, 2017)

In 1993, the legal institution of positive administrative silence was introduced into Ecuador's administrative law with the issuance of the State Modernization Law published in Official Registry No. 349 on December 31, 1993. Specifically, Article 28 stated that any request made to the public administration had to be resolved within a maximum period of fifteen days. If this period elapsed, it was understood that, by administrative silence, the request had been approved or resolved in favor of the administered individual (Quintero Navarrete y Lombeida Castro, 2017).

Discussion

In the work of the author Miguel Gustavo Almeida Oleas, titled "A Comparative Study of the Effects and Execution of Positive Administrative Silence, Both in Administrative and Tax Matters in Ecuador, Since the Enactment of Decree-Law No. 05 on March 10, 1994," clear references are made to the subject matter of this article. Specifically, it discusses the changes in administrative and tax regulations and the differentiation between them. There was

inadequate legislation when separating these two processes, leaving them open to interpretation as to how each should be conducted. As mentioned earlier, one is understood to be an execution process while the other is a knowledge process, meaning that each follows a distinct procedure to ensure the protection of rights. The work also provides a thorough analysis of positive administrative silence in both administrative and tax matters, and it presents advances in research to obtain more precise and clear information.

Simultaneously, the authors Rosero Portilla and Segundo Armando, in their thesis titled "Administrative Silence as an Instrument to Ensure that the Administration Responds to Requests from Individuals," also conducted a detailed analysis of the concept of Administrative Silence in the Ecuadorian legal framework. It has been established that this concept is a valid and recognized tool that allows citizens to obtain an effective and timely response to their requests submitted to the public administration, whether at the central or sectional level. It is important to highlight that if a citizen does not receive a response within the legally established deadlines and wishes to assert their rights, guaranteed both by the Constitution of the Republic of Ecuador and the legal framework, they must turn to the courts to declare the existence of Administrative Silence due to the lack of attention or response to their request. The legislator created this concept to address the absence of a response from the public administration and establish positive or negative consequences for the benefit of the individual, as appropriate. This aims to ensure that citizens are not disadvantaged by the inaction of the authorities.

Conclusions

1. Positive administrative silence in tax law and administrative law allows to execute the presumed act generated *ipso jure* due to the administration's negligence in not responding or not expressly manifesting itself in relation to the constitutional right of petition or claim.
2. In administrative matters, the public entity loses its competence to resolve the request negatively, and its silence results in the execution of the presumed act. In contrast, in tax matters, there is a due process to follow, which is the ordinary procedure with two hearings, citation, notice of means of evidence, and a judgment. This suggests that in tax matters, it is declaratory of rights, while in administrative matters, it is resolved in the execution phase based on what was requested, and it is the judge's role to deliberate exclusively on its enforceability or potential nullity.
3. In a contentious setting according to the COGEP (General Organic Code of Judicial Function), in administrative cases, a sworn statement and the original request are imposed as a procedural requirement, while in tax matters, the specific requirements of the lawsuit are followed.
4. Finally, this scientific article should be considered to examine the inconsistencies found in the legislation regarding the legal concept of positive administrative silence and to highlight the existing legal gaps precisely because they affect the certainty in the application of the rule regarding the same legal concept. This is detrimental to society as a whole in terms of legal security when asserting their rights.

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