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Afirmativa ficta (authorization by default).

The theory of the administrative silence.
by Carlos Sierra

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Mexican Commercial Law



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“DILIGITE JUSTITIAM QUI JUDICATIS TERRAM.” “Ye who judge the earth, give diligent love to justice”

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The theory of the administrative silence.

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One of the main characteristics of a civil law procedural system is the cumbersome excess of formality that is required to navigate through any kind of administrative or judicial proceeding. One of the perversities of this system is the continuing assumption that every statement of fact made by any person needs to be demonstrated over, and over again at every step of every process. A signature, for instance, must always be proven to be authentic by attaching a notarial ratification thereof; if the document has been signed abroad it needs to be certified by a notary and such certification needs to be attached with an *Apostille*. Exhibited documents must always be in original, or in copy that needs to be certified by a notary public to demonstrate that such is a true copy of the original. The capacity of a signatory must also be demonstrated by exhibiting lengthy powers of attorney that also need to be proven to be sufficient, authentic and truthful in every respect, etc., etc.

“A profound change to this problem would result from the adoption of the Afirmativa Ficta, which we could translate for this purposes as an affirmation by default by authorities involved, particularly in administrative proceedings.”

The system seems to lack an acknowledgment of *bona fide* of the parties that are acting in any kind of proceeding. It is as if a presumption of falseness on the contrary should be made by authorities in respect to every statement that any person shall make during proceedings at every step. In the end, this excessive formalism results in an immense amount of effort and an endless stream of paperwork that overwhelms authorities and provokes endless mistakes. The vast majority of the acts that administrative authorities impose against legal and individual persons is flawed in one form or another by the lack of strict adherence to a certain formalism. Matters in course before administrative authorities generally take months while different formalisms are addressed, contested or resolved, rarely reaching a substantive analysis before they are dismissed or are tremendously delayed by mere reasons for form rather than substance.

This formalistic disease is widespread in Mexican proceedings. This is what makes impossible to predict with any certainty how long it could take to resolve almost any matter of administrative nature. The statutes of limitations to resolve are rarely respected by authorities, while these are strictly imposed against individuals and entities. Months are generally spent before a resolution can be obtained, which is likely to be issued in the negative for one or another aspect of form.

A profound change to this problem would result from the adoption of the *Afirmativa Ficta*, which we could translate for this purposes as an affirmation by default by authorities involved, particularly in administrative proceedings.

The administrative silence, as has been discussed in many court resolutions in Mexico. For instance, in a 1988 *amparo* decision the Third Collegiate Tribunal in Administrative Matters¹, refers to this as a doctrine whereby

1.- SILENCIO ADMINISTRATIVO Y AFIRMATIVA FICTA. SU ALCANCE Y CASOS DE APLICACIÓN EN EL RÉGIMEN JURÍDICO MEXICANO. TERCER TRIBUNAL COLEGIADO EN MATERIA ADMINISTRATIVA DEL PRIMER CIRCUITO. Amparo en revisión 267/88.-Eli Lilly y Cía. de México, S.A. de C.V.-9 de marzo de 1988.- Unanimidad de votos.-Ponente: Genaro David Góngora Pimentel.-Secretaria: Adriana Leticia Campuzano Gallegos. Semanario Judicial de la Federación, Octava Época, Tomo I, Segunda Parte-2, enero a junio de 1988, página 676, Tribunales Colegiados de Circuito.

the law provides legal value to the lack of response, inertia or passiveness of an authority, being this possible to be in the negative or positive sense.

In our legal regime, this inactivity of the authority is principally expressed to be in the negative sense, particularly in tax related matters where in accordance with Article 37 of the Federal Fiscal Code (*Código Fiscal de la Federación*), the lack of response of the competent authority after a period of four months shall be equivalent to a negative response. As it is recognized by the thesis invoked. The theory of the administrative silence has not been widely adopted by the federal administrative legislation, particularly in the affirmative sense.

The administrative silence is recognized in legal systems as a mechanism to resolve the petitions made by individuals that have a natural right to receive a response from their authorities. Through this figure, the lapse of time becomes equivalent to a response or resolution to the petition made by the individual.²

“An evolution of this figure could avoid the excessive formalism and would provide certainty to the administrative acts while greatly improving the efficiency and expeditiousness of most administrative and judicial proceedings.”

While in other civil law systems such as Spain or France, the theory of the administrative silence was adopted around 1900, in Mexico this was not adopted until 1936 when it was introduced as a form to resolve fiscal related matters in the Law of Fiscal Justice (*Ley de Justicia Fiscal*),³ and subsequently in the referenced Article 37 of the Federal Fiscal Code. As of this date, the administrative silence continues to be regulated in Mexican law, but it continues to be in the negative sense, as provided under Article 17 of the Federal Law of the Administrative Proceeding (*Ley Federal del Procedimiento administrativo*), which states that *“Unless any other legal or administrative provision of general nature shall establish a different term, a term of no more than three months can be exceeded for the entity or decentralized organism to resolve as applicable. Upon expiration of the applicable term, the resolutions shall be understood to be in negative sense to the applicant, unless any other legal or administrative provision of general nature shall provide to the contrary. ...”*.

Several court resolutions, particularly in resolution of *amparos* have granted value to the administrative silence in the affirmative sense in various specific cases in Mexico. Nevertheless, the availability of the *Afirmativa Ficta* in Mexican administrative law continues to be very limited. An evolution of this figure could avoid the excessive formalism and would provide certainty to the administrative acts while greatly improving the efficiency and expeditiousness of most administrative and judicial proceedings.

Most importantly, this would respect the right of individuals to be presumed to be stating the of truth in the petitions that are made and in the compliance of legal requirements before any administrative authority. The assumption that every statement that an individual makes before an authority shall be presumed to be false, *ab initio*, and unless otherwise proven is the principal disease of a civil legal system.

2.- <https://archivos.juridicas.unam.mx/www/bjv/libros/3/1336/9.pdf>, as seen on July 6, 2017

3.- <https://archivos.juridicas.unam.mx/www/bjv/libros/3/1336/9.pdf>, as seen on July 6, 2017

Mexico raises economic growth projection.

Mexico revised its official 2017 growth estimate upward on Monday, shortly after government data showed the economy was largely shrugging off fears U.S. President Donald Trump's policies would wreak havoc on exports and investment. Mexico's finance ministry said in a statement it was raising its 2017 growth estimate to 1.5 percent-2.5 percent from its previous range of 1.3 percent-2.3 percent. Seasonally adjusted data released by national statistics agency INEGI showed that gross domestic product (GDP) grew at a rate of 0.7 percent in the first three months of 2017, the same pace as in the fourth quarter. GDP expanded 2.8 percent compared with the first quarter of 2016. <http://www.reuters.com/article/us-mexico-economy-idUSKBN1811RQ> 01/06/2017.

Automotive companies seek to reach further to NAFTA.

The Mexican assembly plants are planning to expand further the market in the US. Some companies such as BMW, Volkswagen and Mazda intend to reach places where the demand for crossover vehicles has increased. According to the Mexican Association of the Automobile Industry, between January and May of 2017, approximately 1,140,900 automobiles were exported to the North American countries (USA and Canada), 14.1% more than 2016. Nevertheless, experts argue that it's going to be difficult for these companies to find other markets that reach the income from NAFTA region. <http://www.elfinanciero.com.mx/empresas/automotrices-en-mexico-quieren-llegar-mas-alla-del-tlcan.html> 20/06/2017.

China and Mexico in potential free-trade agreement.

China is open to negotiating a free-trade agreement with Mexico, the official Xinhua news agency reported on Thursday, citing the Chinese ambassador to the country, a fillip for Mexico as it faces uncertainty over its trade deals with the United States. Qiu Xiaoyi, China's ambassador to Mexico, said China was willing to discuss a free-trade agreement, although no discussions had been held so far, Xinhua said. Qiu was speaking at an academic event in Mexico City. "If we negotiate a free-trade agreement, this will greatly favor trade exchanges between our two countries. There is no difficulty from China's side," he said. "Mexico is China's second-largest trading partner in Latin America and China is Mexico's second-largest trading partner in the world. This is a highly important relationship and we have great interest in deepening and broadening these ties." Mexico is keen to cut its economic reliance on the United States out of concern that access to its top trade partner may be restricted by the policies of U.S. President Donald Trump, who has pledged to protect U.S. jobs from going outside the country. <https://www.reuters.com/article/us-china-mexico-trade-idUSKBN19K01Z> 28/06/17.

US threatening to stop financial regulation cooperation: Spiegel.

The United States has signaled that it could discontinue multilateral cooperation on financial market regulation and tax havens ahead of a G-20 summit in Germany next week, weekly magazine Der Spiegel reported on Friday. Separately, officials confirmed to Reuters that German Chancellor Angela Merkel had sent her top economic adviser Lars-Hendrik Roeller to Washington for talks on Friday with U.S. officials. Merkel acknowledged in a speech in the German lower house of parliament that there were stubborn differences with the Trump administration on trade and climate. <http://www.cnn.com/2017/06/30/us-threatening-to-stop-financial-regulation-cooperation-spiegel.html> 30/06/17.

Euro zone inflation eases less than expected, core measure up.

Euro zone inflation eased in June because of more moderate energy price rises, but the slowdown was less than expected by markets and the core measure of price growth the ECB keenly watches increased by more than anticipated. They also expected inflation excluding unprocessed food and energy -- the two most volatile components -- at 1.0 percent, the same as in May. <http://www.cnn.com/2017/06/30/euro-zone-inflation-eases-less-than-expected-core-measure-up.html> 30/06/2017.

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