RocaJunyent Reports

Tax Law Department
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The Constitutional Court has declared the Municipal Capital Gains Tax Unconstitutional

The Constitutional Court (CC), through judgement dated 26 October 2021 (at the time of writing this Alert, it was not yet published in the BOE [Boletín Oficial del Estado (Official State Gazette)], but only on the website of the aforementioned Court), has declared unconstitutional and null the rules for determining the amount to be paid for the Tax on the Increase in Value of Urban Land (hereinafter, **"IIVTNU" [Incremento de Valor de los Terrenos de Naturaleza Urbana]).** Specifically, the Judgement has expelled from the legal system Articles 107.1, second paragraph, 107.2.a) and 107.4 of the Consolidated Text of the Local Treasury Regulatory Law, approved by Royal Legislative Decree 2/2004, of 5 March.

The declaration of unconstitutionality is based on the fact that the CC considers that the aforementioned Articles establish the taxable base of the tax regardless of the economic reality of the transmission operation and establishing a tax that violates the principle of economic capacity of Article 31.1 of the Spanish Constitution.

The most relevant, direct consequence of this Judgement is that, as a result of the same, it is not possible to collect any new settlement of this tax or demand its payment, nor to carry out verifications or revisions, until a new regulation that replaces the previous one is approved.

The Judgement establishes limitations to its scope:

- no settlements that have been confirmed by a final judgement or that have become final can be reviewed based on this Judgement.

- it considers that settlements not challenged on the date of the Judgement, as well as the self-assessments whose rectification had not been requested before the aforementioned date, are consolidated situations. Notwithstanding the fact that the CC is authorised to make its judgements known by alternative means, it is important to note that our legal system establishes that judgements of the Constitutional Court are effective from the day of their publication in the BOE.

Given the absence of applicable regulations, the Ministry of Finance and Public Service is preparing "*a legal draft that will guarantee the constitutionality of the tax, offer legal certainty to taxpayers and certainty to the town councils*", as stated by a Press release of 26 October 2021

Contentious issues

There are many contentious issues arising from this judgement and its future implementing regulations. By way of example, discussions may centre around the following questions:

- Can the town councils demand payment of tax settlements made prior to the date of the judgement but that had not yet been paid?
- Is it possible to request the rectification of self-assessments filed prior to the date of the judgement (and request the refund of the amount paid) for a reason other than this judgement having been issued?
- Is it possible to request pecuniary liability from the Administration to be compensated for having paid an unconstitutional tax while the CC does not allow the effects of its judgement to be applied to such payment?
- Can the new tax regulation have retroactive effects? What would its limit be?
- Is it possible to request the protection of the European courts and institutions for violation of the right to judicial protection, violation of the principle of legitimate expectation and/or discriminatory treatment?

It is necessary to assess each situation on a case-by-case basis in order to determine what actions should be taken.