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Tax Law Department
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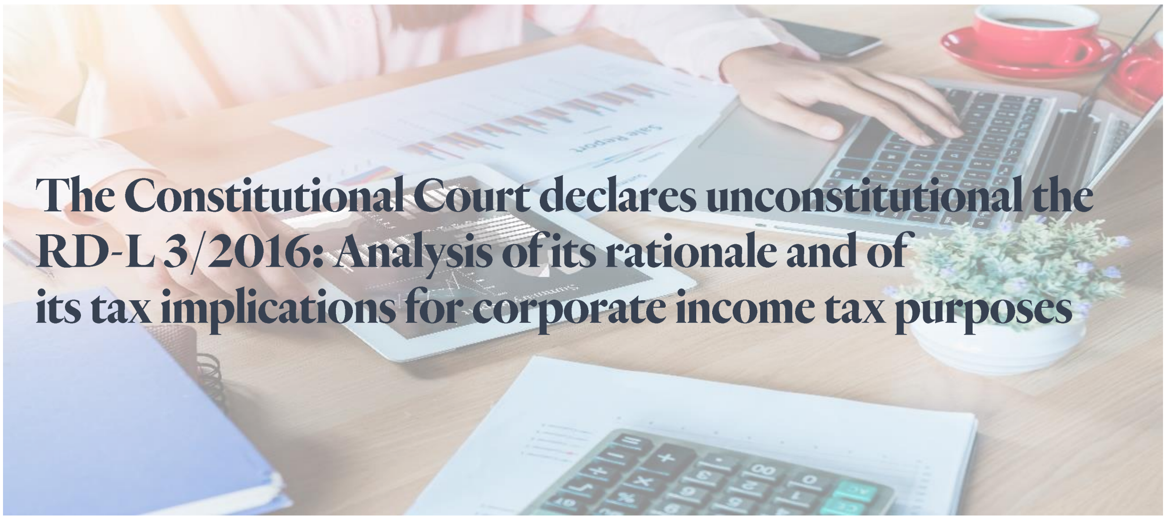

The Constitutional Court declares unconstitutional the RD-L 3/2016: Analysis of its rationale and of its tax implications for corporate income tax purposes

By judgment of 18-1-2024, the Constitutional Court (hereinafter, TC) has declared the unconstitutionality of certain provisions of Royal Decree-Law (RD-L) 3/2016, of 2 December. This ruling is a consequence of one of the two questions of unconstitutionality raised by the Audiencia Nacional (AN) in relation to two contentious-administrative appeals that are being processed.

<u>Provisions declared unconstitutional</u>

The NA brought before the TC the unconstitutionality of the 15th Additional Provision of the Corporate Income Tax Act (hereinafter, LIS) and paragraph 3 of the 16th Transitional Provision of the LIS, both precepts in the wording given by article 3. First, sections One and Two of RD-L 3/2016.

The first of these provisions established measures applicable to large companies (with Net Turnover in excess of 20 million euros) consisting of (i) limiting the offsetting of Negative Taxable Income (NTI), and (ii) limiting the application of deductions to avoid double taxation. On the other hand, section 3 of the LIS 16 (3) was applicable to all types of companies and consisted of the mandatory reversal of impairment losses on holdings deducted in previous years.

Grounds of Unconstitutionality

According to the TC, there is no impediment to establishing, modifying or repealing taxes by means of a decree-law, provided that there is a situation of extraordinary urgency that justifies it, and that the duty to contribute to the support of public expenditure established in art. 31.1 EC is not affected.

However, in this specific case, in the opinion of the TC, the approval of RD-L 3/2016 exceeded the material limit to which this type of provision may refer (art. 86.1 CE). The reason is that RD-L 3/2016 altered essential elements of the tax that affected the determination of the tax burden, and consequently, the aforementioned duty of citizens to contribute to the support of public expenditure through a fair tax system. This is so because:

a) He referred to corporate income tax, which is a "basic pillar of direct taxation".

b) It affected the structural parameters of the tax: the determination of the tax base and the tax liability.

c) The changes introduced were relevant from a taxation point of view.

Furthermore, the ruling highlights the intimate connection of RD-L 3/2016 with RD-L 2/2016 (the famous modification of the fractioned payments), which was already declared unconstitutional. If RD-L 2/2016 affected the ability to contribute by modifying the fractioned payments of the IS, RD-L 3/2016 does the same with regard to the main obligation with measures which, in the words of the TC, "come to complete those contained in the former".

Claims rejected

The appellant requested that other grounds of unconstitutionality also be analysed, and not only that of the rank of the regulation. The Constitutional Court, as it did when it declared the unconstitutionality of RD-L 2/2016, points out that, once a regulation has been annulled for contravening art. 86.1 EC, it is no longer appropriate to analyse other infringements.

In addition, the appellant requested that article 3.Seven of RD-L 3/2016, which establishes the non-inclusion in the tax base of capital losses arising from the transfer of certain shareholdings in companies, also be declared unconstitutional. The ruling rejects this claim on the understanding that it is a measure independent of those declared unconstitutional.

Effects of the declaration of unconstitutionality

As has occurred in other rulings, it is established that IS tax obligations that on 18-1-2024: (i) have been decided with a final administrative ruling or resolution, (ii) or settlements not contested on the same date; (iii) or self-assessments whose rectification has not been requested on the same date, cannot be reviewed on the basis of this ruling.

The judgement has a dissenting opinion which, despite agreeing with the grounds and the ruling, disagrees with the limitation of the effects of the judgement.

The fact that the ruling does not allow the rectification of the IS self-assessments does not mean that the articles declared unconstitutional must continue to be applied. Therefore, when, from now on, the tax administration issues an IS tax assessment, it will not be able to apply the rule declared unconstitutional in its calculation and determination. In other words, tax assessments issued after the publication of this Ruling will not be able to apply the limit on BINs declared unconstitutional or the limitation on the quota in the application of deductions for double taxation, nor will they be able to apply the mandatory minimum reversal of portfolio impairments.

Given that the unconstitutionality has been established due to the insufficient rank of the Royal Decree-Law, these amendments can be reintroduced into the Tax Law by means of a regulation with the rank of Law.

In our opinion, it is not foreseeable that this regulation could be processed, approved and have effects for tax periods already concluded, therefore, companies whose turnover for the previous year has exceeded 20 million euros will be able to complete the corporate income tax return for the period 2023 without taking into consideration the amendments introduced by RDL 3/2016, now declared unconstitutional.