

THE METHOD FOR CALCULATING THE TAXABLE BASE OF THE TAX ON THE INCREASE IN VALUE OF THE URBAN LAND IS UNCONSTITUTIONAL AND VOID

On 3 November 2021, the Spanish Constitutional Court published the text of its judgment declaring unconstitutional and void the statutory provisions establishing the rules for calculating the taxable amount for the purposes of the tax on the increase in value of the urban land. There are significant limits on the judgment's scope and effects.

1. UNCONSTITUTIONAL AND NULL

The judgment, dated 26 October 2021, finds that the statutory provisions establishing the rules for calculating the amount on which the tax on the increase in value of the urban land ("TIVUL") is levied are unconstitutional and void (i.e. the second paragraph of article 107.1 and articles 107.2.a) and 107.4 of Royal Legislative Decree 2/2004 of 5 March approving the consolidated text of the Law Regulating Local Treasuries) ("Judgment"). The Judgment only declares **the method for calculating the taxable amount** unconstitutional and void, not the other elements of the TIVUL.

The Constitutional Court considers that the calculation method is automatic and mandatory and that, "by not considering the reality of the real estate market and the economic crisis, and, therefore, ignoring the taxpayer's economic capacity on which the tax is levied, it infringes the principle of economic capacity as a taxation criterion (article 31.1 of the Spanish Constitution)", without there being any objective and reasonable justification (fifth legal ground).

The Judgment arrives after the Constitutional Court's previous judgments (59/2017 and 126/2019) on the TIVUL that had ruled that it could not be levied on property transfers where there had been no real capital gain or when the TIVUL payable would be as much as or more than the capital gain.

2. SCOPE AND EFFECTS

The Judgment has yet to be published in the Spanish Official Gazette (*Boletín Oficial del Estado*), which is when it will have full effect.

As the Constitutional Court already anticipated in its [press release of 26 October 2021](#), there are significant limits on the Judgment's scope and effects (sixth legal ground).

- (i) It notes that as a result of the Judgment, the articles in question will be removed from the Spanish legal order, leaving “a legal vacuum in relation to the method for calculating the taxable amount that prevents this local tax from being assessed, reviewed and collected and, therefore, enforced”. Thus, until the law is amended, **it will not be possible to impose the TIVUL if it has not already been self-assessed or assessed by the tax agency.**
- (ii) It stresses **that situations that have already been considered and settled in a final judgment or administrative decision at the time the Judgment was handed will not be retroactively reviewed based on the Judgment.** Nor will (i) provisional or final assessments that had not been challenged prior to the date the Judgment was handed, or (ii) self-assessments that had not been challenged under article 120.3 of the General Tax Law prior to the Judgment by that date. We would note the following:
 - (a) although the limit on the effects of unconstitutionality and nullity for non-final situations (such as self-assessments that are not statute-barred), especially at a date prior to the Judgment's publication in the Official Gazette, has generated criticism and doubts among experts, the Judgment's wording means the chances of successfully challenging a TIVUL assessment based on the Judgment if that challenge was not raised before it was handed down are low;
 - (b) but the Judgment does not prevent assessments or self-assessments based on other legal grounds (e.g. those referred to in the Constitutional Court's judgments 59/2017 and 126/2019);
 - (c) this limitation does not affect tax claims and appeals that were ongoing when the Judgment was handed down, even if they are based on different grounds;
 - (d) a case that was subject to review in a tax procedure would not be considered a final situation; and
 - (e) the limit would not affect the possibility of bringing damages claims against the state, when applicable.

3. IMMINENT LEGISLATIVE REFORM

In response to the Constitutional Court's request to legislators to modify the TIVUL to align it with constitutional principles, the Ministry of Finance announced in a [press release dated 26 October 2021](#) that they are currently preparing a draft bill “that will ensure that the tax is constitutional, and will offer legal certainty to both taxpayers and local councils”. The legal text finally approved should be carefully examined to check whether it affects existing situations once it is in effect.

The Judgment's impact will need to be analysed on a case-by-case so as to determine whether any action can be taken to protect the interests at hand.

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