



WEALTH PLANNING NEWS

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SPAIN: THE POSSIBLE UNCONSTITUTIONALITY OF THE TEMPORARY SOLIDARITY TAX ON LARGE FORTUNES (ITSGF)?

Since the announcement of the creation of this new tax, the controversy about its possible unconstitutionality has not ceased to grow. Reputed legal professionals have been commenting and indicating solid arguments to consider the tax unconstitutional and, in this sense, most law firms are advising their clients to challenge the tax returns they file as a consequence of this tax.

Recently, Mr. Manuel Aragón Reyes, former judge of the Constitutional Court, has published an opinion, at the request of the Madrid Association of Family Businesses, with arguments worthy of consideration not only for the authority of the person who subscribes it but also for the coherence, cogency and consistency of his arguments, considering that the ITSGF should be declared unconstitutional. Below we will detail the main legal arguments that the different experts have put forward, avoiding deep legal disquisitions, and using accessible language so that they can be easily understood by lay persons.

THE ARGUMENTS DESCRIBED SUCCINCTLY ARE AS FOLLOWS:

- The procedure followed for the creation of the Tax could involve a procedural fraud, given the way in which the approval of the law was processed.

Thus, instead of using the procedure regularly established for the creation of a new tax by governmental initiative, which is none other than a new draft Bill, the Government used the way of amendments to an already existing draft bill, which dealt with fiscal matters but in no way related to this new tax. Consequently, this modality would constitute a true constitutional fraud, since by not using the way of the bill, guarantees such as the reports issued by independent bodies were ignored and parliamentarians were deprived of being able to present amendments to the totality or partial amendments to this specific tax.

- Likewise, the introduction of amendments in an already existing bill that have no connection with the object of the legislative initiative presented for debate in the Chambers, has been repeatedly considered unconstitutional by the Constitutional Court as it prevents the right of participation and debate of the parliamentarians, violating one of their main functions.

- As there is an overlap between the Wealth Tax (ceded to the Autonomous Communities) and the ITSGF, the Law on the Financing of the Autonomous Communities (Organic Law) is de facto being modified through an ordinary law, which implies a flaw of formal unconstitutionality.
- Alteration of the autonomic competences without using the instruments established for this purpose, such as the “mixed commission for conflict resolution”, in breach of the principle of institutional loyalty.
- Possible violation of the constitutional principles of economic capacity and non-confiscation.
- Finally, possible violation of the principle of non-retroactivity and legal certainty. The law was published on December 28 without giving taxpayers any possibility of rationing, especially considering that some of the essential elements of the tax (for example, the exemptions for companies or family businesses) require compliance with certain requirements during a minimum period of months in the current year.
- It was also announced that the law would be applied in the fiscal years 2023 and 2024, when in fact it will be applicable already in the fiscal year 2022, payable in the year 2023.

TAXPAYERS’ MEANS OF APPEAL

Taxpayers cannot file a constitutional challenge but can ask a court to ask a question of unconstitutionality.

Nor can we raise a preliminary question of interpretation before the European Courts, but we must do so through a Spanish court.

Therefore, taxpayers will be obliged to self-assess the tax and, once it has been settled, request rectification and refund of the undue income.

The deadline to challenge the tax liquidation is 4 years, but it might be advisable not to rush the deadline to avoid a hypothetical ruling of the TC considering the tax unconstitutional, which could be considered only applicable to taxpayers who have challenged the tax (as happened with the Tax on the Increase in Value of Urban Land).

Once the tax assessment has been challenged, the Tax authorities has 6 months to decide whether or not to accept the challenge. It is expected that the challenges will not be accepted and taxpayers will have to appeal to the Economic-Administrative Courts. The estimated resolution period of these courts is 1 year. If the Economic-Administrative Courts do not accept the challenge either, there is still the contentious-administrative route, which could take another 18 months/2 years. It is at this stage that a question of unconstitutionality can be submitted to the Constitutional Court and/or a preliminary ruling to the EU Courts. In other words, a long litigation awaits which, if won, would entail the return of the fee paid plus interest for late payment.

We strongly recommend that before taking any decision on how to act, whether or not to challenge your tax returns, etc., you carefully consult with an expert in tax and constitutional matters.

The Wealth Planning Spain department is at your disposal for any further information.

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