



The Constitutional Court declares certain corporate income tax measures introduced by Royal Decree-Law 3/2016 unconstitutional

Tax Alert



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The Constitutional Court has declared unconstitutional several of the provisions of Royal Decree-Law 3/2016 of 2 December 2016, adopting tax-related measures aimed at consolidating public finances and other urgent welfare measures. Taking a view similar to that adopted with respect to Royal Decree-Law 2/2016, the Court has upheld the exception of unconstitutionality raised by the National Court.

In its [press release](#) of 18 January 2024, the Constitutional Court (“CC”) announced the unconstitutionality of a number of provisions of [Royal Decree-Law 3/2016](#) of 2 December 2016, adopting tax-related measures aimed at consolidating public finances and other urgent welfare measures (“RD-Law 3/2016” or the “RD-Law”).

The Judgment has been rendered in response to the exception of unconstitutionality raised by the National Court in relation to articles 3.1.one and 3.1.two of the above Royal Decree-Law. It declares the unconstitutionality and invalidity of the measures in question and removes them from the law, albeit subject to certain limitations that will necessitate a case-by-case review of the ruling’s impact.

RD-Law 3/2016 introduced sweeping changes in respect of corporate income tax (“CIT”). Of these, the CC has specifically analysed: (i) the introduction of limits on the offset of net operating losses (“NOLs”) and the use of tax credits for the avoidance of international double taxation; and (ii) the reversal, in equal parts over five years of impairment losses on shares deemed deductible for CIT purposes between 2002 and 2013.

Based on the information published to date (the full text of the Judgment has yet to be released), the CC has held that RD-Law 3/2016 runs contrary to the Spanish Constitution (“SC”) as it infringes the substantive limits laid down in article 86.1 of the SC for the legislative vehicle in question (the Royal Decree-Law).

It is worth recalling that Royal Decree-Law 2/2016 was declared unconstitutional on the same grounds - the Court found that it too exceeded the limits envisaged in article 86 of the SC for a Royal Decree-Law.

The most recent declaration of unconstitutionality is issued in respect of major CIT measures that have been effective for all tax periods commencing as of 1 January 2016.

Subject matter of the appeal for judicial review

Among others, RD-Law 3/2016 announced the following CIT measures applicable to tax periods commencing **as of 1 January 2016, which are still in force:**

Limits on the offset of net operating losses (NOLs) and on the deduction of deferred tax assets

The RD-Law incorporated into the Corporate Income Tax Law (“CIT Law”) a new additional provision whereby large companies with revenues of at least Euros 20 million in the 12 months preceding the date on which the tax period commenced would be subject to the following limits on the offset of NOLs:

- 50%, in the case of companies with revenues of between Euros 20 million and Euros 60 million in the 12 months preceding the date on which the tax period commenced.
- 25%, in the case of companies with revenues of at least Euros 60 million in the aforementioned 12-month period.
- No amendments were introduced for other companies, to which the 70% limit therefore continued to apply (60% for years commencing in 2016).

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The possibility of deducting the full amount of the first Euros 1 million remained in place. The same limits were introduced for the deduction of deferred tax assets provided for in article 11. 12 of Corporate Income Tax Law 27/2014 of 27 November 2014.

Limit on the use of tax credits for the avoidance of national and international double taxation

A new limit was also introduced on the use of tax credits for the avoidance of national and international double taxation by Companies with revenues of at least Euros 20 million in the 12 months preceding the date on which the tax period commenced - articles 31. 32, 100.11 and transitional provision twenty-three of the CIT Law. This limit was set at 50% of the gross tax payable for the year.

Reversal of impairment losses on shares prior to 2013

Impairment losses on shares that would have been considered tax deductible prior to 2013 and which were pending reversal were to be included, at least in equal parts, in the tax bases for each of the first five tax periods commencing as of 1 January 2016.

In addition to the above measures, RD-Law 3/2016 introduced others which, it would appear from the press release and pending in-depth analysis of the Judgment's terms, were not addressed by the appeal. These include:

Non-deductibility of losses on the transfer of shares

Effective for years commencing as of 1 January 2017, losses on the transfer of shares are no longer deductible where the exemption for obtaining a capital gain applies.

Limitation on the inclusion of losses on the transfer of permanent establishments located abroad

In the case of transfers of permanent establishments as of 1 January 2016, the tax base must include the amount by which any related losses that were deductible under the legislation applicable prior to 1 January 2013 exceed the net income earned as of that date, up to a maximum of the income deriving from the transfer.

Regarding the declaration of unconstitutionality of RD-Law 3/2016

Sitting in plenary session, the Constitutional Court has unanimously upheld the exception of unconstitutionality on formal grounds, finding that the Royal Decree-Law infringes article 86.1 of the SC.

The Court refers to the precedent set previously whereby a Decree-Law can alter neither the general rules governing taxes, nor any of the essential elements thereof that affect the determination of the tax burden, as this must be calculated having regard to the tax itself, the elements affected by the amendment and the scope thereof.

The CC stresses that CIT is a basic pillar of the Spanish tax system, that the elements affected by the RD-Law are the tax base and tax payable - core aspects of the tax's structure - and that the changes introduced are of "considerable significance" - a fact acknowledged in the preamble to RD-Law 3/2016 itself.

In [Judgment 78/2020 of 1 July 2020](#), the Constitutional Court unanimously ruled that the regulation of CIT instalment payments in RD-Law 2/2016 was unconstitutional, on the grounds that the regulatory instrument in question affected the very essence of the duty to contribute to sustaining public expenditure (article 31.1 of the SC), a matter exceeding the limits set for such an instrument under article 86.1 of the SC.

The measures provided for in article 3.1.one and 3.1.two of RD-Law 3/2016 are now declared unconstitutional on the same grounds. Nonetheless, as noted previously, the CC has opted once again to limit the effects of its declaration of unconstitutionality.

According to the press release, the ruling includes a limitation on its effects that will have to be taken into account when considering the impact of the Judgment in each case.

Reflecting the wording of Judgment 182/2021 of 26 October 2021 (which declared the unconstitutionality of several provisions of the "municipal capital gains tax" and to which the press release refers), the press release states that CIT obligations in respect of which a final judgment with the force of res judicata (article 40.1 of the Organic Law on the Constitutional Court) or a final administrative decision has already been

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rendered at the Judgment date will not be eligible for review on grounds of unconstitutionality. The same applies to assessments that have not been challenged at the Judgment date and self-assessments in respect of which no rectification has been sought at such date.

The specific scope of the Judgment has yet to be seen - it will depend on its precise wording and the specific details of each case. Thus far, the CC has taken a clear stance as regards the impossibility of regulating or amending key aspects of major taxes by means of Royal Decree-Laws. It is nonetheless silent on a number of other potentially unconstitutional aspects of a substantive nature, such as the infringement of the ability to pay principle.

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