
Municipal capital gains tax: effects of the Constitutional Court judgment and recently enacted legislation

The judgment declares the unconstitutionality of the method for calculating municipal capital gains tax and the government hastily adopts new rules

Legal flash

November, 2021



Key aspects

- > The Constitutional Court has published on its website the judgment declaring the unconstitutionality of the method for calculating tax on the increase in the value of urban property (“IIVTNU,” commonly known as “municipal capital gains tax”).
- > Following the publication, the Spanish government has enacted a Royal Decree-law, approving a new regulation to fill the legal vacuum following the judgment.
- > It is advisable to analyze on a case-by-case basis how the Constitutional Court’s doctrine and the newly approved regulation affect previous and future taxation on the transfer of urban land.



Introduction: Constitutional Court judgments

In Spain, the transfer of urban land is subject to municipal tax on the increase in the value of urban property (“IIVTNU”). As its name suggests, this tax is imposed on the increase in land value.

Until now, IIVTNU regulations only established an objective method to determine the taxable base, which occasionally meant that tax was imposed on the transfer of land where the transferor had not obtained a real increase in the value of the property. This has resulted in several questions of unconstitutionality being raised before the Constitutional Court in recent years, leading to a number of judgments declaring the unconstitutionality of the IIVTNU regulations, specifically:

- [*Judgment 59/2017*](#), of May 11 (published in the Official Gazette of the Spanish State on June 15, 2017), declaring the method for calculating the IIVTNU base to be unconstitutional and void in cases where it cannot be proved that the value of the land has increased during the period of ownership.
- [*Judgment 126/2019*](#), of October 31 (published in the Official Gazette of the Spanish State on December 6, 2019), declaring the regulation to be unconstitutional and void in cases where the property increased in value, but the IIVTNU amount payable exceeds the actual capital gain obtained by the taxpayer.
- Recent judgment 182/2021, of October 26, 2021 (published on the Constitutional Court’s website, but not yet in the Official Gazette of the Spanish State) declares that the method for calculating the taxable base is unconstitutional and void in its entirety, i.e., in all cases. The Constitutional Court first announced the operative part of the judgment in a press release on October 26 before publishing it on its website.

Temporary effects of the Constitutional Court judgment and recently enacted legislation

In its judgment of October 26, 2021, the Constitutional Court declares part of the IIVTNU regulation to be unconstitutional and void, considering that the objective and compulsory method for determining the taxable base is far removed from the reality of the real estate market and the economic crisis. Therefore, as it is outside the economic capacity imposed by the tax and proved by the taxpayer, it is contrary to the principle of economic capacity.



The most significant aspect of the judgment, besides annulling the section regulating the tax, is that it restricts the unconstitutionality effects to cases appealed from the date of the ruling (October 26, 2021). The Constitutional Court states that *“any tax obligations accruing as a result of this tax that, on the date this judgment is issued, have been finally resolved through a judgment which has the force of res judicata or through a final administrative decision will not be considered situations that can be reviewed on the basis of this judgment. For these purposes alone, the following will also be considered consolidated situations: (i) provisional and definitive settlements that have not been challenged before the date of the judgment, and (ii) self-assessments the adjustment of which have not been requested under article 120.3 of the General Tax Act before that date.”* Therefore, despite declaring that the method to calculate this tax is unconstitutional and void, the court clarifies that the effects of the judgment will only apply to cases appealed from the date it was issued.

The time limitation provided under the judgment, which is yet to be published in the Official Gazette of the Spanish State, is controversial, taking into account the provisions of the Organic Law on the Constitutional Court. At Cuatrecasas, we are analyzing potential instruments to recover amounts that have been paid previously.

In any event, note that the limitation on bringing a challenge only affects the grounds for opposing tax returns and self-assessments based on the Constitutional Court’s new judgment (i.e., in cases where the value has increased and the real increase in the value of the property is not the same as or less than the liability to IIVTNU). We assume that all other arguments for challenge (such as (i) the lack of an increase in real value, (ii) when the tax payable resulting from IIVTNU is the same as or higher than the real increase in value, and (iii) the incorrect calculation of the tax period) can still be put forward as in the past.

Owing to the legal vacuum following the judgment, the Spanish government has hastily approved Royal Decree-Law 26/2021, of November 8, regulating a new method for calculating the taxable base of IIVTNU, to fulfill the mandate in the above Constitutional Court judgments. This new method for calculating IIVTNU allows taxpayers to choose a direct estimation method for calculating the taxable base that takes into account the difference between the land transfer value and the acquisition value, instead of the objective method. Another new development is that land transfer transactions where the property’s value has not increased are not subject to the tax.

We believe that this new method for determining the taxable base can be applied to property transfers occurring from November 10, 2021, the date on which Royal Decree-Law 26/2021 came into force.



In the case of transfers occurring before the Royal Decree-law came into force, in municipalities where the tax is managed through the tax settlements system (that is, when the local tax authority is in charge of determining the tax amount and notifies the taxpayer of payments), taxpayers are strongly advised to promptly challenge any IIVTNU settlements they may receive these days through notification, and in any case within one month of receipt.

In the case of transfers occurring before the new regulation came into force the return or self-assessment of which has still not been filed, one possible course of action is to file a return or self-assessment indicating that the taxable base is “0” (given that although the obligation to file a return/self-assessment is still in force, the method for calculating the taxable base has been declared null). It is also advisable, on making this notification, to clearly state that this tax cannot be imposed in accordance with Constitutional Court judgments dated October 26, 2021; October 31, 2019 (*126/2019*); and May 11, 2017 (*59/2017*).

The approved regulation also raises some doubts as to its constitutionality. For example, there may be uncertainty as to the extraordinary need and urgency to implement this Royal Decree-law (one of the requirements under article 86 of the Spanish Constitution for the approval of royal decree-laws), particularly bearing in mind the time that has passed since the first judgment of the Constitutional Court was published in the Official Gazette of the Spanish State.

The Constitutional Court’s latest judgment and the recently enacted legislation do not end the discussion on IIVTNU, but it is an important milestone on the path laid out in 2012 with several rulings handed down by the High Court of Justice of Catalonia, obtained through legal claims filed by Cuatrecasas, establishing for the first time that the imposition of IIVTNU, as provided in the regulations (it was levied without exception), was contrary to law.



For additional information, please contact Cuatrecasas. If you do not have a usual contact at the firm, please contact one of the expert lawyers in our Tax Litigation Group.

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