
Spanish Constitutional Court rules on tax on large fortunes

Spanish Constitutional Court declares constitutionality of the temporary solidarity tax on large fortunes

Spain - Legal Flash

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Key aspects

- > The Spanish Constitutional Court declares constitutionality of the temporary solidarity tax on large fortunes approved by Act 38/2022.
- > However, there continues to be discussion about its validity under law, both from a constitutional and an EU law perspective.



Constitutional Court judgement

The Spanish Constitutional Court (“CC”) has issued its judgement 149/2023 of November 7, 2023 ([ECLI:ES:TC:2023/149](#)), where it rejects the [appeal no. 616-2023 on the grounds of unconstitutionality](#) filed by the Council of Government of the Madrid autonomous region against article 3 Act 38/2022, of December 27, and backs the constitutional validity of the temporary solidarity tax on large fortunes (“**ITSGF**”).

For a detailed analysis of the ITSGF, see our [Legal Flash | New tax measures approved in Spain for 2022 and 2023](#).

The appellant, the Council of Government of the Madrid autonomous region, claimed the following constitutional breaches: (i) a breach of article 23.2 of the Spanish Constitution (“**SC**”), due to the legislative initiative having been put forward in a proposal for legislation instead of in a draft bill, and due to a lack of consistency between the original wording of the proposal for legislation and the amendment introducing the ITSGF; (ii) a breach of articles 156.1 (and, in relation to it, of article 137) and 157.3 SC, due to the creation of a new tax to harmonize the wealth tax (“**IP**”) in an inappropriate way, instead of changing how it is transferred to the autonomous regions, as well as a breach of the principles of fiscal co-responsibility, coordination and institutional loyalty under article 156.1 SC; (iii) a breach of article 31.1 SC due to a violation of the principles of economic capacity and prohibition of confiscatory taxation; and (iv) a breach of the principle of legal certainty under article 9.3 SC due to the creation of a tax of a retroactive nature.

PRELIMINARY THOUGHTS

The judgment issued by the CC settles the debate about the constitutionality of article 3 of Act 38/2022 where it refers to: (i) the promotion of the legislative initiative through a proposal for legislation instead of through a draft bill issued by the government, and its parliamentary processing; (ii) the encroachment of the autonomous regions’ regulatory capacity in relation to IP, the impact on the autonomous regions’ financial autonomy and the breach of the principles governing financial relations between the state and the autonomous regions; and (iii) the retroactive nature of article 3 Act 38/2022.



However, **the debate is still ongoing in relation to the breach of legal certainty and of the principle of protection of legitimate expectations** based on how the ITSGF was introduced in 2022:

- It is true that the CC's judgment rejects the argument about the unexpected manner in which the tax was created, arguing, in line with CC doctrine, that there is no right to an unchanging nature of the tax regime nor to the freezing of the existing legal system.
- But that is not the debate. The issue is whether, given the demands inherent to the **principle of legal certainty** proclaimed in article 9.3 SC and to the **principle of good regulation** incorporated in our positive law, a tax can be introduced without giving the affected taxpayers—based on the date on which the amendment was made public—the possibility to take decisions that (i) could have legitimately and significantly reduced the tax burden this tax represents, (ii) enabled them to have avoided it; or (iii) could have led to them to become non-resident in Spain in the 2022 tax year.
- This was made worse, if this is possible, by the fact that the only official act with external importance carried out by the Spanish public powers in relation to the mentioned ITSGF (notification to the European Commission of the 2023 Budget Plan, carried out on October 15, 2022) stated that the new tax would be applied for the first time in the 2023 tax year and not, as happened in the end, in the 2022 tax year, in this way not acknowledging the **principle of the protection of legitimate expectations**.
- None of this is explained in the CC's judgment, making it possible, to request a **question of unconstitutionality** to be raised with the CC, addressing this dimension of the legal certainty not dealt with in the recent CC judgment.

Also **unprecedented is the debate about the possible breach of the EU legal system**, which the CC has not addressed in this judgment. This has a triple dimension:

- The **direct discrimination of the taxpayers subject to limited taxation (non residents), with infringement of the free movement of capital** (article 63 Treaty on the Functioning of the European Union or TFUE), as they cannot benefit from the minimum exemption of €700,000 and the cap on the tax liability.
- The **indirect discrimination obstructing the free movement of people** (articles 21 TFUE and 45.1 of the Charter of Fundamental Rights of the European Union) in relation to individuals from other EU Member States that had exercised that freedom to be able to apply the IP regime of certain regions of Spain but that unexpectedly, without being



given time to transfer their tax residence and despite what the Spanish government had announced, were obliged to pay ITSGF on their worldwide assets in the 2022 tax year without the possibility of any personal option.

- > The possible **breach of the principle of legal certainty as one of the values inherent to the rule of law on which the European Union is based** (article 2 Treaty on European Union or TUE), which would protect all the taxpayers from the ITSGF in the 2022 tax year [an argument not easy to put forward, but with some backing in the case law of the Court of Justice of the European Union (“CJEU”)].
- > Therefore, in the court challenges driven by the acts of application of article 3 Act 38/2022, it would be feasible to raise a question for **preliminary ruling** of interpretation with the CJEU, addressing the EU dimension of the ITSGF.

Lastly, from the perspective of the **guarantee of property**, established in article 1 of the additional protocol to the European Convention on Human Rights and Fundamental Freedoms, we must not rule out the possibility of intervention by the **European Court of Human Rights**, after all the internal court proceedings have been exhausted.

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