

Spanish Tax Alert

Spanish National Appellate Court allows foreign foundations to apply the special tax exemption regime provided for resident foundations

Eduardo Martínez-Matosas
Tax Partner, Gómez-Acebo & Pombo

Luis Cuesta
Tax lawyer, Gómez-Acebo & Pombo

1. Introduction

On 29 January 2015, the Spanish National Appellate Court (the "**Court**") gave its judgment in case 456/2011 regarding the German foundation "*Stifterverband Für Die Deutsche Wissenschaft e.v.*". The judgment confirms that the exclusion of a non-Spanish resident foundation from the benefit of the general tax exemption regime on Spanish source income for domestic foundations should be considered a restriction to the freedom of movement of capital.

2. The Facts

The facts can be summarised as follows:

- In the fiscal year 2006, *Stifterverband Für Die Deutsche Wissenschaft e.v.* (the "**Foundation**"), a German based non-profit entity sold a real estate property located in Spain and paid Spanish Non-Resident Income Tax ("**NRIT**") on the capital gains obtained.
- In this regard, the Tax Treaty between Spain and Germany allows Spain to tax these gains derived from the disposal of immovable property situated in its territory.
- Under the provisions of the Spanish domestic law ("**Act 49/2002**"), qualifying Spanish foundations are entitled to apply a special tax exemption regime on all the income and gains obtained as long as the requirements set out in Act 49/2002 to be considered a non-profit entity are fulfilled.

- On these grounds, the Foundation considered that its legal and tax status was comparable to the Spanish foundations and thus, requested the Spanish tax authorities the refund of the NRIT levied on the basis that limiting the access to the abovementioned tax exemption regime only to Spanish foundations constituted an infringement of the principle of freedom of movement of European Union ("**EU**") capital.
- On the other hand, according to the Spanish tax authorities' position, the Foundation did not (i) provide evidence that its German tax and legal regime could be characterised as comparable to the Spanish tax regime and (ii) did not fulfill the requirement provided in the Spanish law that in order to apply the special tax exemption regime it is necessary to previously notify the Spanish tax authorities such application.

3. The Court decision

The Court confirmed that providing a different tax treatment to non-Spanish resident foundations constitutes a restriction of the free movement of capital. The arguments of the Court can be summarised as follows:

- Limiting a domestic tax exemption regime only to the Spanish foundations which meet the requirements set out in Act 49/2002 would infringe the abovementioned EU principle.
- Consequently, non-Spanish foundations should be entitled to prove that they are established

within a regulatory and tax framework equivalent to that in Spain and the prior requirement of notifying the Spanish Tax authorities the application of the special tax regime is ancillary.

- In this sense, in the case at hand, the Court deemed that the Foundation had sufficiently proved that it had an objectively comparable situation to Spanish foundations and that the requirements provided in Act 49/2002 were fulfilled.
- Thus, the Court, in application of the primacy of EU law over Spanish law, ruled in favour of the taxpayer, and concluded that NRIT should be refunded to the Foundation, in order to afford the same tax treatment to a taxpayer residing outside Spain (German Foundation) as that which would have applied to a taxpayer residing in Spain (Spanish foundations).

4. Authors' comments

The legal doctrine established in this judgment has the following important implications:

- This judgment confirms to non-Spanish foundations or non-profit entities the possibility of claiming the refund of taxes levied at source in Spain. This is the first

judgment in this sense of the Court and it confirms the criteria established by the Madrid High Court in judgments dated November 2013 regarding the refund of the tax withheld on the dividends obtained in Spain by a Swedish foundation.

- Even though those cases are related to EU foundations, this refund can be also requested by non-EU entities as EU freedom of capital is also effective with regards to non-EU Member States.
- Thus, non-Spanish foundations or non-profit entities should be entitled to claim a full refund of taxes levied (and the relevant late-payment interests) on Spanish-source income within the statute of limitations (4 years) on the following basis:
 - Denying access to the Spanish current foundation tax exemption regime to non-Spanish entities constitutes a violation of the EU freedom of Capital; and
 - Non-Spanish foundations and non-profit entities should be able to prove that they operate within a regulatory and tax framework equivalent to the one existing in Spain and that they meet the requirements set out in Act 49/2002.