

# Spanish Tax Alert

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## The Spanish Constitutional Court invalidates the urban land appreciation tax in the absence of capital gains

Tax Area, Gómez-Acebo & Pombo

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The Constitutional Court, in a recent judgment dated 16 February 2017, instigates an amendment to the urban land appreciation tax<sup>1</sup> (abbrev. IIVTNU) in respect of those situations where capital gains on conveyed urban property are absent, opening, in turn, the possibility of recovering said tax for those taxpayers who paid it in conveyances where there were no capital gains.

By way of this judgment, the Constitutional Court has made a pronouncement on the question of constitutionality no. 1012-2015 referred by the Judicial Review Court no. 3 of San Sebastian, deeming unconstitutional and void the provisions of Provincial Act 16/1989, of 5 July, on the urban land appreciation tax within the Historical Territory of Guipuzcoa in respect of the determination of the tax base in conveyances for consideration where capital gains are absent.

In this regard, the Constitutional Court deems that the tax, in its current form, automatically taxes urban land appreciation simply by reason of owning urban property for a certain period of time. In view of the current wording of the provincial act, tax would be levied on urban land appreciation that could be fictitious or inexistent in those cases where, at the time of the conveyance, financial losses resulted from the difference between the conveyance price and the acquisition price. In such situations, common due to the crisis that has hit the Spanish real estate market in recent years, taxpayers would have been compelled to pay tax for inexistent gains, contrary to the income principle provided for in art. 31(1) of the Spanish Constitution.

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<sup>1</sup> *Translator's note:* The *Impuesto sobre el Incremento de Valor de los Terrenos de Naturaleza Urbana* does not tax capital gains as such, but a theoretical 'as of acquisition' increase in the cadastral value of the urban land on which the conveyed property is situated.

In addition, the Constitutional Court voids art. 7(4) of the aforementioned Provincial Act, a provision obligating city councils to confirm the correct application of the rules regulating the tax, without the possibility of assigning other values, bases or liabilities that depart from said Provincial Act's provisions. In this regard, the Constitutional Court is of the opinion that, in those situations where there are financial losses in the conveyance of urban property, the Provincial Act is inflexible since by virtue of the aforementioned provision it is impossible to certify a value different from that which results from the application of the Provincial Act, to the extent that any evidence to the contrary is barred when determining the tax base and impugning the same.

Ultimately, the Constitutional Court concludes that in the event of no capital gains, or even of capital losses, there are no reasonable grounds for imposing on the taxpayer the obligation to bear the same tax burden as in situations where capital gains have arisen, an outcome which would be at odds, as we have already pointed out, with the income principle safeguarded by the Spanish Constitution in art. 31(1).

Although the judgment of the Constitutional Court exclusively refers to the urban land appreciation tax regulated in Guipuzcoan provincial legislation (and its transposition to national legislation would thus not be direct), this same court is expected to reach an identical determination in respect of other similar questions of constitutionality referred by other judicial review courts that have applied for an adjudication (i.e., judicial declaration) of unconstitutionality of art. 107 of Royal Legislative Decree 2/2004, of 5 March, approving the Recast Text of the Local Public Finance (Regulation) Act. Among others, a determination of the questions of constitutionality 4864, 4865, 4866, 4867 and 4868 of 2016 is expected.

Assuming the adjudication of unconstitutionality of these provisions at the national level, the possibility will be opened for taxpayers to apply for a refund of the tax in those cases where, having conveyed urban property, there were no capital gains, or there were even capital losses, a question of fact that must be assessed case by case. Tax refunds may be applied for, in general, through the refund procedure for undue payments provided for in art. 221 of the Taxation Act 58/2003 of 17 December. This procedure will be the most advisable route to obtain a refund provided both the limitation period has not lapsed and the tax has not been paid under final and conclusive assessments or self-assessments on which *res judicata* impinges. On the other hand, for those cases where the urban land appreciation tax assessment has been contested in advance and, at any instance, a final and conclusive judgment has been given against the taxpayer, provided a subsequent adjudication of unconstitutionality is claimed, such taxpayer may resort to the procedure of adjudication of the Authority's liability provided for in art. 32 of the Public Sector (Legal Regime) Act 40/2015 of 1 October.