

Non-resident taxpayers may benefit from the wealth tax liability cap

For the Supreme Court, habitual residence within or outside Spain does not justify the different treatment given to residents and non-residents, which prevents the latter from applying the wealth tax liability cap provided for in Article 31(1) of the Wealth Tax Act 19/1991 of 6 June. This difference in treatment is discriminatory and unjustified.

SATURNINA MORENO GONZÁLEZ

Professor of Public Finance and Tax Law, University of Castilla-La Mancha
Academic counsel, Gómez-Acebo & Pombo

GUADALUPE DÍAZ-SÚNICO ABOITIZ

Partner in the Tax Practice Area, Gómez-Acebo & Pombo

The Second Chamber of the Supreme Court's Judicial Review Division, through its judgments of 29 October and 3 November 2025 (app. 4701/2023 and 7626/2023), has established legal doctrine regarding the application to non-residents of the combined wealth and personal income tax liability (before allowances or credits) cap provided for in Article 31(1) of the Wealth Tax Act 19/1991 of 6 June (LIP).

The aforementioned article establishes that the wealth tax liability cap, together with the personal income tax liability cap, may not exceed, for taxpayers subject to the tax on a personal (*in personam*) basis, 60% of the sum of the latter's tax bases. The application of this rule allows for a significant reduction in the wealth tax liability up to the indicated cap of 60%, although a maximum reduction of up to 80% of the liability for the aforementioned tax is also established.

Article 31(1) LIP is contrary to the free movement of capital

Until now, the tax authorities had been denying non-resident taxpayers, subject to taxation on a real (in rem) basis, the application of this cap, based on a literal interpretation of Article 31(1) LIP and the difficulties in verifying the tax status of non-residents, as concluded by the Central Tax Tribunal in its ruling of 20 October 2025, 00/11005/2022.

In this context, the judgments under discussion originate from the submission of requests for rectification of self assessment wealth tax returns filed by a taxpayer subject to taxation under the real-basis category because he is a resident of Belgium. These requests sought the application of the caps set by Article 31(1) LIP and the refund of the excess amount paid, on the grounds that there was discrimination between residents and non-residents, in addition to a violation of the free movement of capital established in Article 63 of the Treaty on the Functioning of the European Union (TFEU). After his claims were dismissed in the administrative track, the High Court of Justice of the Balearic Islands issued favourable judgments on 1 February 2023 (app. 432/2020) and 28 June 2023 (app. 431/2020), considering the judgment of the Court of Justice of the European Union of 3 September 2014, *Commission v Spain*, case C-127/12, concerning tax benefits approved by the devolved regions in relation to inheritance and gift tax, to be fully applicable to the cases in question.

In the aforementioned judgments, the Supreme Court responds to the ‘cassation’ appeals lodged by the Central General Government against the earlier judgments. The purpose of the appeals is to determine whether the element of habitual residence, in Spain or abroad, justifies the non-applicability of the tax liability cap of Article 31(1) LIP and, consequently,

whether this different tax treatment is justified by the principle of non-confiscation – given the complementarity between personal income tax and wealth tax – or, on the contrary, is discriminatory.

The Supreme Court bases its analysis on the interpretative premises that emerge from the case law of the Court of Justice of the European Union (CJEU) on the free movement of capital and the tax differences included in the tax laws of Member States between resident and non-resident taxpayers. This analysis allows it to conclude that Article 31(1) LIP establishes a difference in tax treatment between resident and non-resident taxpayers that makes investment by the latter less attractive, which constitutes a restriction on the free movement of capital. However, in accordance with EU case law relating to Article 65 TFEU, this restriction is admissible if it affects situations that are not objectively comparable in the light of the objective and content of the measure in question or if it is justified by overriding reasons of public interest.

Next, after noting the parallels with what happened in relation to inheritance and gift tax in the CJEU judgment of 3 September 2014 (*Commission v Spain*, C-127/12), the Supreme Court notes that all taxpayers subject to wealth tax, both residents and non-residents, are in a comparable situation and must therefore be able to apply the combined cap of Article 31(1) LIP, the existence of a real or personal obligation being irrelevant for the purposes of the comparability analysis, since the determining factor is the nature and purpose of this tax device, as well as its content. Wealth tax is levied on the net wealth of individuals, i.e. all pro-

perty and property rights of economic value of the taxpayers, whether this extends to all or part of their wealth. Therefore, there is a difference in treatment between taxpayers depending on their residence, even though both are in a comparable situation, since what determines the tax is the ownership of the assets, whether the all of the wealth or part thereof.

On the other hand, the appellant does not claim in the present case any public interest objective that could justify the different tax treatment. The Supreme Court concedes that the situations might not be comparable if the public authorities did not have access to appropriate information on non-resident owners of real estate, but, in the case under consideration, concerning a taxpayer resident in Belgium, there is nothing to prevent the Spanish authorities from requesting the information it deems appropriate from its Belgian counterparts, given the existence of various supranational and international instruments of administrative cooperation in the field of taxation in force between the two countries.

Furthermore, it is not reasonable to try to justify the exception to the free movement of capital on the basis of the principle of non-confiscation, given the comparability of the situations of domestic and foreign taxpayers. In other words, limiting the levy to wealth tax in order to reconcile this tax with income tax is an objective that affects both domestic and cross-border situations.

Finally, in the Supreme Court's opinion, it is not necessary to refer the matter for a preliminary ruling in application of the *acte claire* doctrine, since the basic criteria for determining whether tax legislation infringes the free movement of capital are well established in the CJEU's case law.

On the basis of all of the above, the Supreme Court concludes that “[h]abitual residence, whether in Spain or abroad, does not justify the different treatment given to residents and non-residents, whereby the latter are not subject to the tax liability cap provided for in Article 31(1) LIP. This difference in treatment is discriminatory and unjustified”.

From this statement, it can be inferred that it is possible to extend the combined cap of Article 31(1) LIP to non-resident taxpayers as well. With regard to the calculation of the aforementioned cap, in accordance with the reasoning of the Supreme Court, as well as the validation in its rulings of the criterion of the High Court of Justice of the Balearic Islands - which allowed the Belgian taxpayer to benefit from the cap on the wealth tax liability by taking as a reference the income that had been taxed in Belgium's personal income tax -, it can be understood that the wealth tax liability could be reduced taking into account the personal tax that the non-resident taxpayer has paid in his or her country of residence.

In addition to its effects on future tax years, this legal doctrine facilitates the recovery of part of the tax from previous years that are not time-barred by requesting the rectification of the self assessments concerned. However, even in the presence of final decisions, in accordance with the interpretative criterion established by the Supreme Court itself - in judgments of 16 July 2020 (app. 810/2019) and 6 April 2022 (app. 2575/2020) - it would be possible to invoke the cause of nullity provided for in Article 217(1)(a) of the Taxation Act (LGT), referring to acts that infringe rights and freedoms subject to constitutional protection, insofar as it establishes a situation of discriminatory treatment between residents and non-residents.

It should also be noted, in relation to the tax on large fortunes, that Article 2(12) of Act 38/2022 provides for a similar liability cap, together with the personal income tax and wealth tax liability, applicable only to taxpayers subject to the tax on a personal basis. In our opinion, the reasoning used by the Supreme Court in these judgments should also be applicable to this tax given its complementarity to wealth tax.

On the other hand, although with less practical impact, the judgments discussed may also affect taxpayers covered by the special scheme for impatriates, who are subject not only to

wealth tax but also to the temporary tax on large fortunes throughout the period of application of the special scheme (formal binding answer by the Directorate-General for Taxation VO424-23, of 24 February).

In conclusion, these rulings will allow non-resident taxpayers who are subject on a real basis and to whom the combined cap of Article 31(1) LIP applies to reduce the amount of wealth tax or solidarity tax payable. They also open the door to challenging returns that have already been filed, although the possible avenues for challenge must be analysed in light of each taxpayer's particular situation.