

Possibility of claiming a Spanish Inheritance Tax refund

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

Usoa Arregui
Tax Senior Associate, Gómez-Acebo & Pombo

Following a recent judgment of the Court of Justice of the European Union (CJEU) in Case C-127/12, non-Spanish resident taxpayers that have paid Spanish Inheritance and Gift Tax (IGT) in the last four years are generally entitled to claim a tax refund.

In the aforementioned judgment, dated 3 September 2014, the CJEU held that the Spanish IGT was contrary to the free movement of capital within the European Union (EU), guaranteed under Art. 63 of the Treaty on the Functioning of the European Union (TFUE) and Art. 40 of the Agreement on the European Economic Area (EEA).

Judgment

In this case, the CJEU stated that “*by applying different tax treatment to donations and successions between beneficiaries and donees resident in Spain and those not resident in Spain, between bequeathers resident in Spain and those not resident in Spain, and between donations and similar transfers of immovable property situated within and outside of Spain, the Kingdom of Spain has failed to fulfil its obligations under Article 63 TFEU and Article 40 of the Agreement on the European Economic Area of 2 May 1992*”. The CJEU ruled similarly in the Welte case (C-181/12).

The CJEU concluded that the rules of the state law regulating the delegation of powers to the different Autonomous Communities (‘connection points’) were contrary to the free movement of capital inasmuch as leading to a higher tax burden in successions or gifts involving non-Spanish resident taxpayers and for

gifts of real estate located outside Spain. The higher tax burden derived from the impossibility of applying the law of the Autonomous Communities (i.e. devolved regions) that had introduced amendments reducing the tax liability (e.g. exemptions, tax credits and reduced tax rates). For example, in the Autonomous Community of the Balearic Islands the applicable tax rates used to be 7% for gifts and 1% for *mortis causa* acquisitions, while the state law tax rate could reach 34%.

The CJEU’s decision is chiefly based on the existence of an objectively comparable situation with Spanish resident taxpayers.

Consequences of the judgment

Such infringement of EU law implied that the relevant Spanish law was null and void, which meant that:

- (i) Spanish law had to be amended to guarantee the free movement of capital as understood by the CJEU.
- (ii) It can be held that there is no applicable law in those situations falling within the Spanish law that are held contrary to the free movement of capital.

Measures adopted by Spain

Spanish law has been amended to guarantee non-discrimination in terms of free movement of capital for EU and EEA residents, but not in terms of third country residents. Such new law implies that situations related to taxpayers resident, or real

estate located, in the EU and EEA now benefit from the Autonomous Communities' laws according to new criteria in the delegation of powers.

Moreover, no retroactive effect has been provided for in the new law, although in practice it seems that the authorities are accepting the retroactive application of the new law and, thus, the Autonomous Communities' law, to situations that were not previously covered.

Authors' comment

Our Firm has conducted a detailed legal and case law analysis as to whether the above consequences can be extrapolated to taxpayers resident in third countries so that they can also claim tax refunds, based on the premise that the scope of the free

movement of capital is broader than only EU and EEA situations and on the comparability of their situations.

Taking into account the above circumstances, there are sufficient grounds to claim tax refunds under the following factual scenarios, provided an analysis is conducted on a case by case basis:

- Non-Spanish residents that paid Inheritance and Gift Tax in the last four years, as a consequence of having inherited Spanish assets (e.g. real estate).
- Spanish residents that paid Inheritance and Gift Tax in the last four years, where the deceased person was a non-Spanish resident or the real estate assets were located outside Spain.

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