

Spanish Tax Alert

The Spanish Constitutional court once more makes a pronouncement on the bank deposits tax

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1. Introduction

Following Judgment 201/2012 of the Constitutional Court of 14 November, which upheld the constitutionality of the tax on deposits held by credit institutions created by Act (Extremadura) 14/2001 of 29 November, several devolved regions approved similar taxes. The State legislature responded to the foregoing by establishing a credit institution deposits tax ("the Bank Deposits Tax") through art. 19 of Act 16/2012 of 27 December, initially setting it as a direct zero-rated tax. Said provision was first amended by Royal Decree-Act 88/2014 and, later on, by Act 18/2014 of 15 October, raising the tax rate to 0.03%, lower than that set by the regional laws that had established their respective taxes.

Once created, the state tax's constitutionality has been repeatedly endorsed by the Constitutional Court (abbrev. TC), which now holds unconstitutional the equivalent regional taxes it has adjudicated on. In this sense, for instance, Judgment 30/2015 of the Constitutional Court of 19 February (rec. no. 5832-2014) held that art. 161 of Act (Valencia) 5/2013, inasmuch as concerning a tax equivalent to the state tax, was unconstitutional and thus void by reason of being in breach of arts. 133(2) and 157(3) of the Spanish Constitution (abbrev. CE) and art. 6(2) of the Regional Financing Act (abbrev. LOFCA) (Point of Law no. 4).

Well, the TC has recently ruled on various issues related to the Bank Deposits Tax (abbrev. IDEC), and has done so through a judgment of 26 May 2015 and different judgments of 28 May 2015, which we briefly analyse below.

2. Recent judgments of the Constitutional Court regarding the Bank Deposits Tax

2.1. *Judgment 102/2015 of the Constitutional Court of 26 May (Rec. no. 275/2015)*

In this judgment, the Constitutional Court dismissed the appeal on constitutionality lodged by the Regional Government of Asturias against art. 124 of Act 18/2014 of 15 October, by virtue of which art. 19 of Act 16/2012 was amended, an amendment that, among other things and as just noted, affected the tax rate (initially zero), fixing it at 0.03 percent.

Below we highlight some of the alleged reasons of unconstitutionality, along with the response given, in each case, by the TC:

- Breach of art. 6(2) LOFCA, especially as regards the possible compensation provided therein when the State levies taxes on taxable events taxed by the devolved regions. The TC, in line with what has stated in previous

rulings, considered in this case that, as the Asturian tax was created after 1 December 2012, the requirement laid down in Act 16/2012 to obtain compensation for the expected tax shift is not satisfied. In this regard, the judgment recalls that Act 16/2012 referred to similar taxes that had already been created by devolved regions, providing for coordination or compensation measures where such regional taxes had been established "prior to 1 December 2012".

- Breach of the principles of non-retroactivity of rules restricting individual rights, legal certainty and prohibition of arbitrariness contained in art. 9(3) CE, by giving retroactive effect (from 1 January 2014) to the tax rate fixed by Act 18/2014, amending art. 19 of Act 16/2012. On this issue, the TC concludes that, in the circumstances of the case, it cannot accept such grounds of unconstitutionality:
 - Degree of retroactivity of the contested provision. In this respect the TC is of the opinion that such retroactivity is only partial.
 - Predictability. The TC pays attention in this regard to the successive regulation of the tax in three pieces of legislation with force of law, something which in its view enabled both the appellant and the financial institutions to have knowledge of the existence, scope and content of this form of tax, with the opportunity to adjust their economic behaviour to the legislative provisions of the tax.
 - Objective of the legislation. As noted by the TC, such objective translates into a requirement of public interest consisting in providing devolved regions with an additional source of income, not only to compensate for the expected loss of revenue when similar taxes are effectively eliminated, but also to avoid

differences between the different territorial tax authorities.

2.2. *Judgment 107/2015 of the Constitutional Court of 28 May (Rec. no. 7279-2012)*

In this case, hearing the appeal instigated by the President of Spain against the Credit Institution Deposits Tax Decree-Act (Catalonia) 5/2012 of 18 December, the TC holds such piece of legislation unconstitutional and void.

Some statements of the court are particularly interesting, particularly those made in respect of the following:

- When it determines fulfilment of the enabling requirements for Decree-Acts at the regional level. In this respect, the TC notes that "both constitutional doctrine concerning art. 86(1) CE and the limits specified or added by the state's legislator to the regional decree-act", deeming the latter "additional safeguards or exclusions", must be taken into consideration.
- Regarding the analysis performed to determine if a regional decree-act can create taxes. On this issue, the TC concludes that "art. 203(5) of the Catalonia (Devolution) Act imposes a clear material limit to the Catalan decree-act, resulting in the impossibility of creating its own taxes by means of this legislative instrument, expressly pointing out that the Catalan Government's own taxes must be created "by an Act of the Parliament".

2.3. *Judgment 111/2015 of the Constitutional Court of 28 May (Rec. no. 7870-2014)*

Two years after the regional Decree-Act 5/2012, which was annulled by the judgment to which we have just referred, the Credit Institution Deposits Tax Act (Catalonia) 4/2014 of 4 April was passed, subject-matter of the appeal on constitutionality that the Constitutional Court has now ruled on.

On this occasion, in view of what is stated in art. 6(2) LOFCA, inasmuch as it provides that “taxes established by the devolved regions may not be levied on taxable events taxed by the State,” the court compares the essential elements of the state and regional taxes, noting that “both share an identical taxable event, the tax base and taxpayers, the only differences referring to the tax rate and relief established by the devolved region

for branches located in its territory.” Because of this, the Constitutional Court concludes, as it did in its Judgment 30/2015 concerning the Valencian bank deposits tax, cited above, that “such substantial identity between the essential elements of the two taxes involve a breach of arts. 133(2), 157(3) CE and art. 6(2) LOFCA”, thus holding the Catalanian Act unconstitutional and void.