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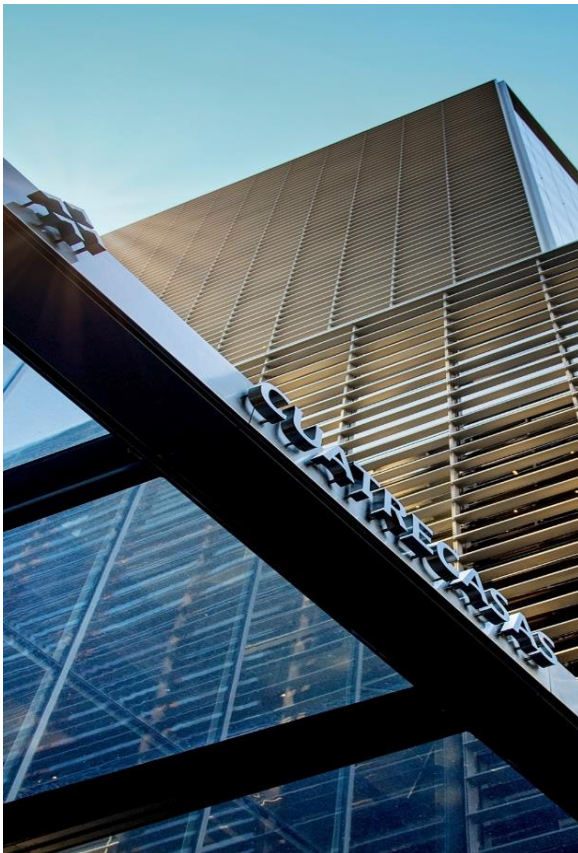
# Advanced payment system approved by RDL 2/2016 declared unconstitutional

Legal flash | Tax

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## Spanish Constitutional Court declares unconstitutional and void measures relating to payments on account of Corporate Income Tax approved by RDL 2/2016



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## Key aspects

- The Constitutional Court ("CC") declared unconstitutional Royal Decree Law 2/2016 ("RDL 2/2016"), which introduced changes to the calculation of payments on account of Corporate Income Tax from October 2016 onwards.
- The effects of the judgment are relevant both for taxpayers that have challenged their self-assessments, and those that have not done so yet. These taxpayers should review their situation and the convenience of challenging their self-assessments.
- This decision does not put an end to the controversy. Issues have been raised in relation to the temporary effects of the judgment and the declaration of unconstitutionality of payments on account made after the entry into force of the 2018 budget approved by Act 6/2018 ("2018 Budget Act").



By introducing a new additional provision 14 in Act 27/2014 on Corporate Income Tax (“CIT Act”), RDL 2/2016 approved two measures affecting payments on account of Corporate Income Tax for those taxpayers with revenue of more than EUR 10 million in the previous year. These measures had a first impact on payments on account due in October 2016.

These measures consisted of: (i) the establishment of a minimum payment on account calculated by applying the tax rate of 23% (or 25%, in certain cases) to the accounting profit for the relevant period, which precluded, for example, offsetting tax losses from previous years or taking into account certain exemptions or other adjustments and corrections to determine the tax base; and (ii) the increase in the tax rate applicable to the current taxable base from 17% to 24% (for entities with a tax rate of 25%).

The CC, in its [\*judgment of July 1, 2020\*](#), upheld the matter of unconstitutionality raised by the Spanish Court of Appeals and declared RDL 2/2016 to be unconstitutional and void. The CC concluded that RDL 2/2016 had breached article 86.1 of the Spanish Constitution, as the essential components of a basic tax under the Spanish tax system, such as Corporate Income Tax, cannot be regulated by a royal decree law.

Regarding the effects of the judgment, it is expressly established that the judgment cannot affect situations that have been (i) the subject of judgments that cannot be appealed, or (ii) consolidated in administrative proceedings as a result of not having been challenged in due time and form. Therefore, it is still possible to challenge the self-assessments for payments on account that are not statute barred—if they have not been consolidated in administrative proceedings—to claim the default interest on overpaid payments on account. Given that the first payment on account affected by RDL 2/2016 was that of October 2016, the general four-year limitation period under Spanish tax law has not yet elapsed.

Note that the impossibility to regulate this matter through a royal decree law may have been rectified in the 2018 Budget Act (i.e., regarding advanced payments made from its entry into force onwards). The 2018 Budget Act amended the wording of additional provision 14 of the CIT Act, as drafted by RDL 2/2016, for the sole purpose of including a carve-out for payments on account made by venture capital entities. However, as it reproduced in full the text of the provision included in RDL 2/2016, it could be argued that the system of payments on account was not approved by a royal decree law but through a valid act. All despite the fact that this was not the purpose of the amendment, and the 2018 Budget Act also does not seem to be the appropriate instrument for introducing these types of measures.

In any case, we consider that there are arguments for challenging those payments on account affected by the measures approved at the time by additional provision 14 of the CIT Act which was approved by RDL 2/2016, even after the amendment introduced by the 2018 Budget Act, which applies to payments on account. The appropriateness and grounds for challenging cases must be analyzed on a case-by-case basis. One of these grounds may relate to the potential



breach of the principle of economic capacity established in article 31.1 of the Constitution, which was argued but has not been analyzed in the CC's judgment, given that the RDL 2/2016 has been declared unconstitutional for a breach of article 86.1 of the Constitution.

Finally, we also highlight that, a few weeks after the entry into force of RDL 2/2016, additional amendments to the CIT Act were added through RDL 3/2016. These amendments include (i) the limit of 50% or 25%, instead of 70%, on offsetting tax losses from previous years, (ii) the automatic reversal by one-fifth of the impairment losses on the value of investments deducted in previous years, (iii) a 50% limitation on the use of foreign tax credits, and (iv) significant changes on the treatment of capital losses under the participation exemption regime. Some of them, applicable to the Corporate Income Tax payable in 2016, affected only large corporate taxpayers, while others, applicable since 2017, affected all taxpayers. In both cases, the CC's criteria set out in this judgment on RDL 2/2016 and in previous judgments leads us to consider that the CC will very likely also declare RDL 3/2016 to be unconstitutional.

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