

Possibility of obtaining refund of undue taxes due to Corporate Income Tax unconstitutional articles

The Constitutional Court recently resolved the issue of unconstitutionality raised by the National Court, in relation to the regulation of installment payments of Corporate Income Tax introduced by Royal Decree-Law 2/2016, of September 30th. The Constitutional Court understands that the modification operated by the Royal Decree-Law affects the duty to contribute, since it affects the Corporate Income Tax, one of the main taxes of the tax system and, in addition, its entity is considerable, since it reaches the main elements of the installment payment. Consequently, it considers the issue of unconstitutionality due to the improper use of the Royal Decree-Law.

We understand that the criteria established by said Constitutional Court ruling should be extrapolated to other articles of the Corporate Income Tax modified by Royal Decree-Law and, specifically, to the important and substantial modifications in Corporate Income Tax introduced by Royal Decree-Law 3/2016, of December 2nd.

We therefore consider that there would be four possible areas where rectification of self-assessment could be sought for tax years 2016 to 2019 regarding the measures approved by Royal Decree-Law 3/2016, requesting, where appropriate, the recovery of undue income.

- Restriction in compensation of Negative Tax Bases.

In general, the Negative Tax Bases (NTBS) may be offset against the positive Tax Base for the following tax periods limited to 70 percent of the positive Tax Base prior to application of the capitalization reserves established in article 25 of CIT Law and its compensation, all in accordance with article 26 of CT Law.

However, Royal Decree-Law 3/2016 introduced a Fifteenth Additional Provision to the Corporate Income Tax Law, by which it established the following limitations in relation to NTBS to offset:

- 60% in year 2016 (and 70% in year 2017 and subsequent years) of the positive Tax Base for companies with a turnover of less than 20 million euros.
- 50% of the positive Tax Base for companies with a turnover between 20 million euros and 60 million euros.
- 25% of the positive Tax Base for those companies with a turnover of more than 60 million euros.

- Limitation on the application of certain tax deductions

Royal Decree-Law 3/2016 established a limit for companies with a turnover of more than 20 million euros.

- Negative income derived from the transfer of shares or Permanent Establishments

Royal Decree-Law 3/2016 established the non-deductibility of losses generated by the transfer of shares in such cases where the eventual profit generated by the transfer of shares would have been tax exempt.

The same happens with the losses generated in the transfer of Permanent Establishments.

- Obligation to revert portfolio impairment which was tax deductible in years prior to 2013

Another issue that could generate the right to request undue income would be the adjustment caused by the modification introduced by Royal Decree-Law 3/2016 by which it established the mandatory reversal by fifths of the impairment losses of the representative values of participation in the capital or equity of entities that had been tax deductible with the regulations in force before 2013, without prejudice to higher reversals resulting from the generally applicable rules.

Prior to the aforementioned Royal Decree-Law and from year 2013, the Corporate Income Tax regulations established that the reversal of losses due to impairment of the values representing the participation in the capital or equity of entities that had been tax deductible with the regulations in force before 2013, regardless of its accounting allocation in the profit and loss account, would be included in the Tax Base of the period in which the value of equity at the end of the year exceeds that at the beginning, in proportion to its participation, taking into account the contributions or returns of contributions made in it, with the limit of said excess. Likewise, it was established that the positive difference between the value of equity at the close and at the beginning of the tax year corresponds, firstly, to impairment losses that have been tax deductible. Likewise, it was established that the aforementioned impairment losses would be included in the Tax Base, for the amount of dividends or shares in profits received from investee entities, except that said distribution does not have the status of accounting income.

As a consequence of the above, we remain at your disposal to analyze whether your company could claim for the refund of undue income along with the corresponding interest.