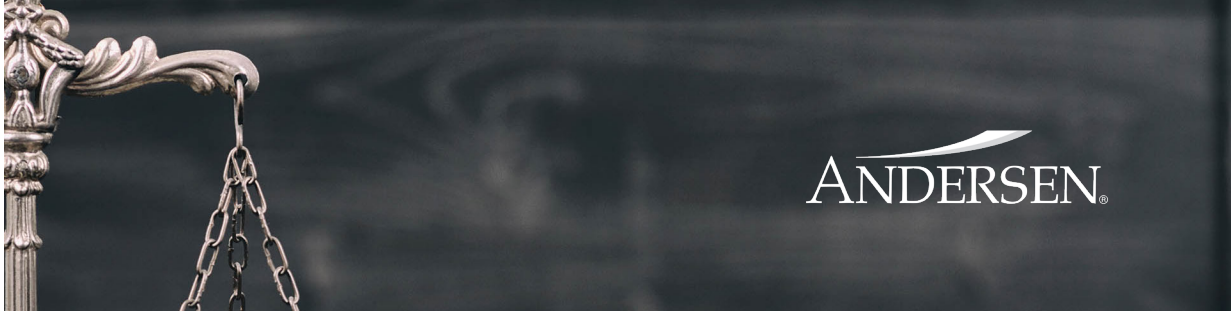


TAX ALERT

The Supreme Court Addresses Inheritance Tax to Beneficiaries Resident For Tax Purposes In Third Countries

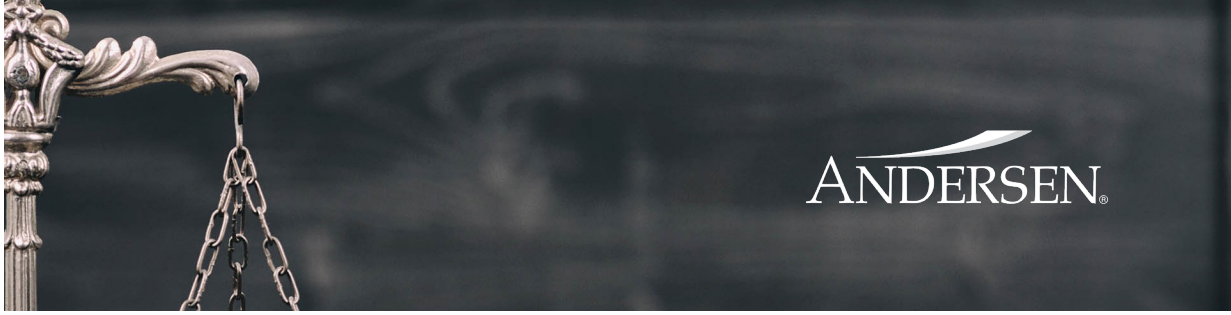
The recent judgment of the Supreme Court ("TS") of 6th April 2022 corrects a crazy Audiencia Nacional ("AN") 7th November 2019 judgment, which ratified another previous judgment upholding the tax administration in relation to the rejection of a rectification made by a taxpayer -the appellant- invoking a rebate of the Community of Madrid in the Inheritance and Gift Tax ("ISD") that she had not applied in the initial self-assessment due to the application of the state regulations, as opposed to the aforementioned Autonomous Community legislation.

The appellant, a tax resident in the USA, initially filed a self-assessment of ISD resulting in an amount payable of 511,670.37 Euros, and subsequently filed a rectification of said self-assessment, invoking the 99% rebate provided by the ISD regulation of the Community of Madrid -a rebate that was applied by her siblings residing in said Community- based on the judgment of the Court of Justice of the European Union ("TJEU") of 3rd September 2004.

This ruling of the TJEU declared contrary to European Union Law the Spanish regulation in relation to ISD under the pretext that it constituted an infringement of the free movement of capital, by applying a different tax rate depending on the residence of the perpetrators, successors in title or recipients, as well as in relation to the location of real estate.

Law 22/2009, which regulates the financing system of the Autonomous Communities ("CCAA"), establishes the criteria for the connection of the taxes ceded by the State to the CCAA -in the case of ISD-, establishing where a transfer mortis causa (e.g. inheritance) or inter vivos (e.g. donation) would be taxed, provided that the taxable person resides for tax purposes in Spain, otherwise the national regulation of ISD, i.e. Law 29/1987, applies.

The plurality of Autonomous Communities in Spain has led to a disparity of regional regimes in terms of assigned taxes which has created notable differences between them and with



respect to the national regulation, such as the one which is the subject of the appeal before the High Court, in which it is debated whether a co-heir resident in the USA should be taxed in full on his inheritance tax (State regime), as their initial ISD self-assessment showed, or whether they should do so applying a 99% rebate (Community of Madrid regime). In this case, it is debated whether a co-heir resident in the USA should be taxed in full on his or her inheritance tax liability (State regime), as stated in the initial ISD self-assessment, or whether he or she should do so by applying a 99% rebate (Community of Madrid regime), as stated in the subsequent rectification of the self-assessment.

The tax authorities rejected the corrective self-assessment on the ground that the taxpayer was not entitled to the abovementioned rebate because she was resident in the United States, since that country was neither a member of the European Union ('EU') nor part of the European Economic Area ('EEA').

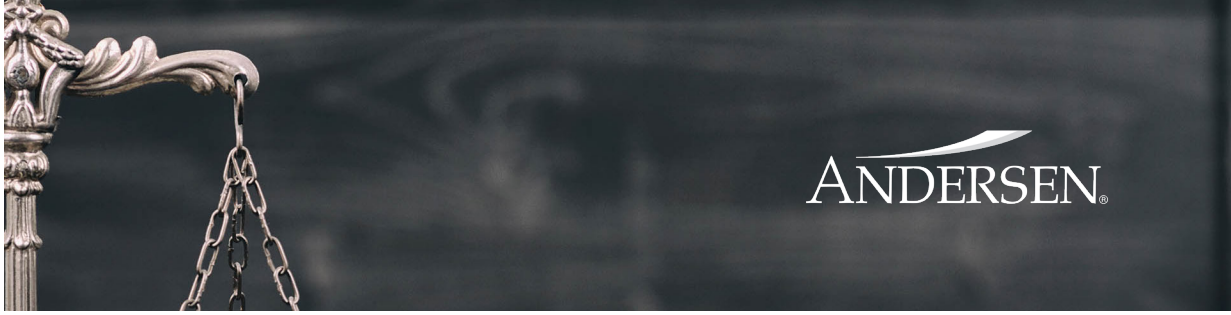
The taxpayer did not appeal the decision of the tax authorities rejecting the self-assessment rectification (invoking the 99% ISD rebate provided for by the Community of Madrid), but rather, once the decision became final, she filed an appeal for full nullity of the decision under Article 217. 1.a) of the 58/2003 General Tributaria Law ("LGT"), which provides for the nullity of acts issued in tax matters which infringe rights and freedoms subject to constitutional protection.

The taxpayer based the application for full nullity on the fact that the rejection of her corrective ISD self-assessment, applying the 99% rebate, contravened the right to equality, freedom of residence, effective judicial protection, economic capacity as well as the principle of a fair tax system and the economic protection of the family, rights and freedoms enshrined in Articles 14, 19, 24, 31.1 and 39.1, respectively, of the Spanish Constitution.

The tax authorities rejected the application for full nullity on the grounds that it was manifestly unfounded.

The taxpayer appealed to the AN, reiterating its arguments, and the AN dismissed its appeal on two main grounds. On the one hand, that the taxpayer's arguments could have been valid if it had appealed the decision rejecting the ISD rebate, but that the decision had already become final due to the taxpayer's inactivity; and on the other hand, that the resolution of the Tax Administration was a mere rejection of the application for a declaration of nullity, and that the taxpayer should have focused her appeal on the erroneous nature of said rejection, not being valid to refer to the merits of the matter, as if her appeal had been rejected for lack of the reasons set out in the aforementioned Article 217. 1 of the LGT.

The SC held that the AN was wrong in its dismissal of the taxpayer's appeal because the High Court disagreed with the AN's criterion in



relation to the three issues raised with appeal interest.

In relation to the first, regarding whether the TJEU's doctrine is applicable to residents in third countries, the SC's correction of the tax administration and the State Attorney's Office - whose argumentation is incomprehensible - is grotesque, since the State Attorney's Office considers that this question "has lost its interest in the case and that its analysis is unnecessary" because it has already been addressed in two judgments of the SC, such as 1546/2020 of 19th November and 1633/2020 of 30th November. The SC argues that these judgments precisely address the issue, but conclude the opposite, i.e. that non-discrimination in relation to the taxation of non-residents in Spain with respect to ISD applies both to residents of another EU member state, of the EEA, and to third countries.

Regarding the second question of appeal (relating to whether the TJEU doctrine constitutes per se sufficient grounds for declaring the nullity of full nullity invoked in the case under analysis) and the third question (relating to which cause of nullity of full nullity of art. 217. 1 of the LGT would operate and with what temporal limitation), the TS recalls that it already addressed those questions in its judgment 1016/2020 of 16 July, against which the State Attorney's Office had requested reconsideration or qualification, adding that that judgment was its parent or initial pronouncement, but that it has been reiterated and assumed by the TS, but that it has been reiterated and assumed by two subsequent rulings, such as those mentioned above - 1546/2020 and 1633/2020 - erroneously interpreted by the State Attorney's Office, so that ruling 1016/2020 is not an isolated pronouncement but that there is jurisprudence in this regard. And the case law created is in the sense that the full nullity of an assessment issued to a non-resident taxpayer in Spain in relation to ISD in application of a law that does not comply with EU law and which is final, entails a full nullity under section a) of Article 217.1 of the LGT, which relates to acts that harm rights and freedoms that can be protected under constitutional law.

Finally, and to the humiliation of the Tax Administration, the TS recalls that there are two binding rulings of the Directorate General of Taxes ("DGT"), V3151-18 of 11th December and V3193-18 of 14th December, which recognise that discrimination in ISD must be avoided with taxpayers residing in another EU Member State, in the EEA or in a third country, the TS finding it shocking that the tax administration should operate in disregard of EU law and the rulings of its own DGT, which are precisely binding only on the tax administration. To this end, the TS refers to its ruling 1336/2021 of 16th November on the obligation of the administration of every EU member state to respect the rule of law, as one of the values on which the EU is based (ex. Art. 2 of the EU Treaty), since if the administration omits the rule of law and acts in ignorance of

EU law and the criteria of the TJEU, it would be placed in a position of irresponsibility that would simply be unacceptable.

In conclusion, any non-resident for tax purposes in Spain who, following the TJEU ruling of September 3rd 2014, has paid more Spanish ISD tax than they should have - because the national regulation has been applied to them and a more favourable regional regulation that would have been applied in the same situation to a resident in Spain has been denied - is entitled to request a refund of the amount paid together with the payment of interest for late payment.

For more information you may contact with:

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