

## TAX ALERT

# The Spanish Supreme Court Confirms The National Court Criterium Stating That Offset Of Nols Is A Right, Not A Tax Option With A Submission Deadline



The Supreme Court, in its ruling dated November 30, 2021, analyses whether a taxpayer could offset its net operating losses (“NOLs”) in a Corporate Income Tax (“CIT”) filed beyond the voluntary filing period.

To date, The Spanish Central Economic-Administrative Court (“CEAC”) has repeatedly held that the offsetting of NOLs constitutes a tax option affected by the limitations of article 119.3 of the Spanish General Tax Law 58/2003 (“GTL”), according to which tax options cannot be exercised timing wise other than within the statutorily established filing period.

The National Court already rejected the CEAC interpretation in a ruling dated October 29th, 2021, stating that the offset of NOLs is not a tax option but a taxpayer’s right linked to the principle of economic capacity, set forth under article 31 of the Spanish Constitution.

The Supreme Court, after analysing article 119 of the GTL, has concluded in line with

the National Court. Thus, in the first place, it holds that neither the GTL nor its regulations are clear in this respect, because those do not define the legal concept of tax option, and the lack of clarity in the regulations cannot harm those who have not generated it, as it is the taxpayer case.

Moreover, the Supreme Court holds that there are two key elements that can limit the tax options of article 119.3 of the GTL, an objective and a subjective one. The objective one consists of the determination by law of an alternative between different and exclusive tax regimes; and the subjective one, consists of the free act of will of the taxpayer reflected in the tax return.

Thus, the Supreme Court concludes setting forth that the offset of NOLs would not be a tax option technically wise, because it does not describe an alternative consisting of choosing between different and specific tax regimes. Therefore, the Supreme Court considers that

the offset of NOLs is a true autonomous right that the taxpayer may exercise or not, or even, if need be, renounce to. And as such right it does not admit any type of restriction, except for the causes specifically provided by law, so it is not possible to impede the exercise of the said right thru a tax return filed out of the statutorily established filing period based on a non-proceeding interpretation of the GTL.

In a nutshell: the Supreme Court establishes as a criterion that CIT taxpayers can offset its NOLs against taxable income in the following tax periods regardless the fact they proceed in that way out of the term they were supposed to do it in, being the voluntary filing period, as proceeding in such way cannot be considered an option with an expired date and thus null and void, because it is in the end a taxpayers' right.



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