

## News Tax matters

# European Court rulings change the capital gains tax law once again

**The European Court of Justice (ECJ) ruled in 2009 that the 35% rate of capital gains tax on non-residents was discriminatory and therefore against EU Law**

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The European Court of Justice (ECJ) ruled on October 6, 2009 that the rate of 35% capital gains tax on non-residents was discriminatory and therefore against EU Law.

The discrimination is considered to have occurred since the year 1997 when changes were introduced into the taxation of capital gains tax for the residents of Spain as an economic stimulus. In that year the taxation of capital gains for residents was changed to 15% for gains generated in more than a year, leaving those under a year at the ordinary income tax rates applicable at

the time on a sliding scale which went up to 45%.

The capital gains tax paid in Spain could later be offset, with certain limitations, against taxes paid in the country of residence of the taxpayer, if a Double Tax Treaty or an internal provision to avoid the adverse effects of double taxation existed.

If the rate applicable in the country of residence was lower than 35%, the non resident taxpayer ended up paying more tax than due in the country of residence.

## Possible reclaims

This judgement of the ECJ has already generated a great level of expectation amongst non-residents of Spain who sold properties when capital gains were subject to tax at 35%, since the possibility of recovering the tax paid in excess of the 15% applicable to residents for gains generated in more than one year would be now a real possibility. This, however, is not as straightforward as it may seem.

The normal procedure is to file a claim with the Spanish Tax Authorities for the amount overpaid with interest. This is an ad-



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ministrative procedure that requires the Tax Authorities to make a formal statement recognising the error or the unlawful application of laws or regulations and calculating the amounts due to the taxpayer.

Should the claim be denied, the appeals process is available; interest accrues during the whole process. This procedure for the reclaim of taxes is time barred under Spanish Law after four years have elapsed since the deadline for the filing of the taxes overpaid.

For instance, in the case of a tax-

payer that sold a property on April 20, 2006 and therefore paid the 35% capital gains tax in the due date, i.e. 4 months after the sale, 20 August 2006, the Tax Authorities would still today be liable to repay this excess tax and the claim could be filed until 20 August 2010.

## Time extension

Another judgment from the ECJ dated 26 January 2010 has recently offered hope for taxpayers to consider claiming even after four years. Such claims need to be filed within one year of the judgement

that considered the internal legislation against EU Law, or less if we take into account the previous resolutions by other EU bodies.

The effects of the difference between the rate applicable to capital gains for non-residents and residents was finally corrected in Spanish domestic legislation at the end of 2006 which brought the two rates into line at 18%.

## Change of rate

With effect from January 1st 2010, the capital gains tax for both the resident and the non resident has increased to 19% but for residents this rate is only applicable to the first six thousand euros and the rest is taxed at 21%. This time residents are those taxed at a higher rate than non-residents and no doubt Spain will amend this soon as it could give rise to claims from residents for discriminatory treatment.

Non resident taxpayers who consider that they are eligible under the possibilities set out above, should seek professional advice to consider each case individually. Aspects to be considered include the country of residence, existence of a double tax treaty, tax rate applicable in country of residence of the taxpayer at the time the tax was overpaid in Spain, tax offset in the country of residence and the cost of the claims process compared with the benefits it may produce to the taxpayer.

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