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BRIEFING

RENEWABLES IN SPAIN: POTENTIAL  
RECOVERY OF THE 7% ELECTRICITY TAX

NOVEMBER 2016

- THE CONSTITUTIONAL COURT WILL DECIDE WHETHER THE TAX ON THE VALUE OF ELECTRICAL ENERGY PRODUCTION IS UNCONSTITUTIONAL
- THE TAX IS ALLEGED TO LACK AN ENVIRONMENTAL PURPOSE
- AFFECTED PARTIES MAY BE ABLE TO CLAIM COMPENSATION



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“THE TVEEP WAS INTRODUCED IN 2013 AND CREATED A 7% TAX RATE FOR THE INCOME ARISING FROM THE SALE OF ELECTRICITY.”

The Third Chamber of the Spanish Supreme Court has issued several decisions (*autos*) questioning the constitutionality of 12 articles of Law 15/2012, which introduced fiscal measures for energy sustainability. In particular, the Court queried the constitutionality of three taxes regulated by the law, namely: the Tax on the Value of Electrical Energy Production (“TVEEP”), the Tax on the Production of Spent Nuclear Fuel and Radioactive Waste and the Tax on the Storage of the Spent Nuclear Fuel and Radioactive Waste.

This Briefing deals only with the decisions<sup>1</sup> in which the Supreme Court asked the Constitutional Court to determine the unconstitutionality of articles 1, 4.1, 6.1 and 8 of Law 15/2012, which regulate the TVEEP, “taking into account its potential breach of the Economic Capacity Principle set forth in article 31.1 of the Spanish Constitution” (the “Question of Unconstitutionality”).

#### Background

The TVEEP was introduced in 2013 and created a 7% tax rate for the income arising from the sale of electricity.

The Supreme Court decided to raise the Question of Unconstitutionality in June last year after examining the appeals that UNESA (the Spanish Electricity Industry Association) and Iberdrola Generación S.A.U. made after the National High Court (*Audiencia Nacional*) dismissed various appeals against Ministerial Order number

<sup>1</sup> Decisions of the Supreme Court of 14 June 2016, issued in connection with appeals 25554/2014 and 2955/2014.

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“THE CONSTITUTIONAL COURT CONSIDERS THAT THE TRUE PURPOSE OF THE TVEEP COULD BE TO REDUCE THE TARIFF DEFICIT.”

HAP/703/2013<sup>2</sup>. In these appeals, the appellants had alleged unconstitutionality, arguing that:

- The TVEEP contravened the principles of generality, equality, non-confiscatory and economic capacity provided in article 31.1 of the Constitution and in the Constitutional Court’s doctrine on the limitations of the power of taxation in respect of taxes that have another purpose in addition to tax collection.
- An analysis of the TVEEP showed that its purpose is only to collect taxes and that it overlaps with other state taxes that already tax the same economic capacity. They considered that the TVEEP lacks a true environmental aim.

#### Doubts as to constitutionality

The Supreme Court stated that although the legislator had declared that the TVEEP has a dual purpose (namely tax collection and environmental)<sup>3</sup> it has no environmental purpose. In this regard, the Court said that the appellants could be right in arguing that the true purpose of the TVEEP is to reduce the tariff deficit.

The Court went on to state that a tax would not be deemed unconstitutional by the mere fact of having only a fiscal purpose as long as the principles contained in article 31.1 of the Constitution are respected, in particular, the Economic Capacity Principle. For this reason, the Court considered it appropriate to analyse and compare the TVEEP with the Tax on Economic Activities (“TEA”), which is a tax on all business activities.

In this regard, the Supreme Court explained that there are several reasons to conclude that the TVEEP and the TEA apply to the same taxable event (i.e., economic capacity).

The Supreme Court pointed out that double taxation is not, per se, contrary to the Economic Capacity Principle provided in article 31.1 of the Constitution. However, it was unsure of the constitutionality of having two taxes (i.e. the TEA and the TVEEP) applying to the same taxable event, despite the fact that the TVEEP is meant to have an additional fiscal purpose (namely environmental<sup>4</sup>).

#### Potential infringement of EU law

The appellants also claimed the TVEEP infringed EU law. However, the Supreme Court noted that this point should be analysed, if need be, only once the Constitutional Court has reached its decision.

#### How are electrical energy producers affected?

The Constitutional Court will resolve the question of the potential unconstitutionality of the TVEEP in its role as interpreter of the Constitution and as the sole jurisdictional body that can rule on the constitutionality of laws. Electrical energy producers should follow the evolution of this issue because if the TVEEP is declared unconstitutional, they could be entitled to recover the amounts they have already paid.

<sup>2</sup> Ministerial Order number HAP/703/2013 of 29 April 2013 approved Form 583 “Tax on the value of the electrical energy production. Self-assessments and instalment payments” and established the way and procedure for its filing.

<sup>3</sup> See paragraphs I and II of the preamble to Law 15/2012.

<sup>4</sup> The Supreme Court explained its doubts about the constitutionality of the environmental purpose of the TVEEP: (i) it found remarkable that the legislator had not consider any partial or total exemption or any other kind of tax benefit for those producers whose use of transport and distribution networks are minimal or very low; (ii) similarly, it considered remarkable the fact that the tax base does not depend on any environmental variable, but it is calculated taking into consideration only the economic value of the production; and (iii) it pointed out that there is a single tax rate (7%).

In fact, taxpayers could recover taxes paid under regulations that are subsequently declared unconstitutional in two ways. They can:

- Request the rectification of the self-assessments filed under regulations subsequently declared unconstitutional and apply for a refund of the undue payments and late payment interests.
- Claim damages from the State. The aim here is to obtain compensation, not a revision of the administrative procedure (TVEEP self-assessments, in this case) governed by the law or regulation subsequently declared unconstitutional.

“THE *ONLY* CASES THAT CAN BE CHALLENGED ON THE BASIS OF A JUDGMENT DECLARING THE UNCONSTITUTIONALITY, ARE THOSE THAT HAVE NOT YET BECOME FINAL ON ACCOUNT OF HAVING BEEN APPEALED BEFORE THE CONSTITUTIONAL COURT GIVES ITS DECISION.”

#### Rectification of self-assessments and refund of undue payments

Self-assessments can be rectified and undue payments refunded only if the self-assessments are not prescribed (*firmes*). Self-assessments become prescribed: (i) if the four-year prescription period provided in Law 58/2003 of General Tax (“LGT”) has elapsed (in this regard, TVEEP self-assessment made in 2013 will become prescribed in May 2017); or (ii) if the self-assessments have been appealed and the appeal finally rejected.

However, it is worth noting the Constitutional Court’s position in respect of judgments that make precedent when regional environmental taxes are declared unconstitutional<sup>5</sup>. The Court’s view is that the *only* cases that can be challenged on the basis of such judgments are those that have not yet become final on account of having been appealed before the date of the publication of the judgment declaring the unconstitutionality and for which a final administrative or court decision has not yet been given.

In other words, if, for example, the Constitutional Court declared the TVEEP unconstitutional, in July 2017, and if, by that date, the instalment payments and self-assessments have not been challenged, affected parties are highly likely to lose the right to recover the amounts paid, despite the TVEEP having been declared unconstitutional.

“THE LSPS ESTABLISHES THAT COMPENSATION WILL BE AVAILABLE TO A PARTY THAT HAS SUFFERED DAMAGE FOLLOWING A REGULATION OR LAW BEING DECLARED UNCONSTITUTIONAL”

#### Pecuniary liability of the State

This procedure applies in the following instances: (i) the TVEEP self-assessments have been appealed and the appeal was rejected; or (ii) the four-year prescription period has elapsed. The claim for damages against the State will be prescribed one year after the regulation in question has been declared unconstitutional.

At this point, it is important to highlight the new wording of Law 40/2015 of the Legal System Applicable to the Public Sector (“LSPS”), which came into force on 2 October 2016. This establishes a new regime for the pecuniary liability of the State in instances where laws or regulations are declared unconstitutional. The requirements to apply the procedure laid down in LSPS are now tightened.

In this regard, the LSPS establishes that compensation will be available to a party that has suffered damage following a regulation or law being declared unconstitutional. However, the party needs to have appealed against the administrative procedure that caused the damage and to have alleged unconstitutionality.

<sup>5</sup> See, for example, Constitutional Court Judgment N°196/2012 of 31 October 2016 on environmental taxes applied by the Castilla La Mancha Region

In other words, a party that appeals a tax assessment that is regulated by a law that is subsequently declared unconstitutional needs to have: (i) appealed against that tax assessment; and (ii) alleged unconstitutionality, in order for State liability to be triggered.

In addition, under article 34.1 of the LSPS, a time limit applies. Compensation will be granted only for damages caused within the last five years before the date on which it was declared that the law or regulation was unconstitutional or that it contravened EU regulations.

In any case, the points described above will be subject to the terms and conditions provided in the judgment if the Constitutional Court declares the TVEEP unconstitutional.

#### What now?

The Question of Unconstitutionality was filed last June and it would be reasonable to assume that the Constitutional Court will take at least a year to resolve it. However, in the light of the aforementioned Constitutional Court precedents, taxpayers that have not challenged the tax self-assessments before the Constitutional Court gives its decision might not be able to recover the TVEEP paid. Hence, we would recommend that that taxpayers challenge the TVEEP self-assessments (both instalments payments and annual self-assessments) as soon as possible to avoid the risk of losing the right to recover the TVEEP paid in case it is declared unconstitutional.

## FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this Briefing, please speak with a member of our team below or your regular contact at Watson Farley & Williams.



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