Retroactivity of tax legislation
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3.16. Spain

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3.16.1. Terminology

3.16.1.1. Distinction between ‘retroactivity’ and ‘retrospectivity’

There is no legal definition of retroactivity in Spanish law, either in the general sense or in the tax field.

In most of the Spanish literature a broad concept of retroactivity prevails, which has been passed down from civil law literature (De Castro), that makes a distinction between three levels of retroactivity (maximum-level retroactivity, medium-level retroactivity, and minimum-level retroactivity). These three levels were initially adopted in the jurisprudence of the Spanish Constitutional Court (Judgment of the Constitutional Court No. 6 of 1983).

From 1987 onwards, in Spanish constitutional jurisprudence, a distinction is made between ‘authentic or proper retroactivity’, or of a maximum level, and ‘improper retroactivity’, or of a medium level (Judgment of the Constitutional Court no. 126 of 1987). This distinction has been maintained to the present day (among the most recent decisions is found the Judgment of the Constitutional Court no. 74 of 2010).

For the Spanish Constitutional Court, ‘authentic retroactivity’ exists in the case of ‘those legal regulations that subsequently aim to tie existing situations produced or developed prior to the law itself’ and there is ‘improper retroactivity’ in the case of ‘the regulations that aim to have a bearing on current legal situations or relations that have yet to be concluded’. The literature prefers to stick to a concept of retroactivity that refers to the structure and content of the legal tax norm.\(^1\)

In the Spanish literature, the distinction is also made between ‘formal retroactivity’ and ‘material retroactivity’ as synonyms for proper retroactivity and improper retroactivity’. The term ‘retrospectivity’ is not frequent, but it is also used on occasion as a synonym for ‘improper retroactivity’.

3.16.1.2. Relevance of tax period

In Spain the conceptual distinction between an income tax statute that applies to a previous fiscal year (retroactividad auténtica) and an income tax statute that applies as of the beginning of the current fiscal year (retroactividad impropia) is usually employed.

According to the Spanish Constitutional Court, if the income tax rules are changed as of the beginning of the current fiscal year, this is a case of ‘improper’ retroactivity.

The case of ‘improper’ retroactivity is permitted if it does not breach the principle of legal certainty (Judgment of the Constitutional Court No. 182 of 1997).

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This conceptual distinction is materially significant, because the Spanish Constitutional Court applies different standards (see section 4).

3.16.1.3. Interpretative statutes

Spain has interpretative ministerial orders in tax matters (Article 12.3 of the General Tax Act (GTA)). Their inherent ‘retroactive’ effect is permitted inasmuch as they do not add anything new to the interpreted rule, but only point out the right interpretation. However, this view is debated in the literature, because the interpretative order restricts the scope of interpretation of a former statute.

3.16.1.4. Validation statutes

The legal system knows the phenomenon of ‘validation statute’, but according to the Constitutional Court a statute which tries to heal former unconstitutional or illegal tax debts leads to maximal retroactivity and is forbidden (Judgment of the Constitutional Court No. 116/2009 and 146/2009).

3.16.1.5. Comparison moment

In Spain a distinction is made between the date of entry into force of a statute and the effective date of a statute. As a general rule, tax statutes enter into force twenty days after their complete publication in the Official Gazette (Article 11.1 GTA), if they do not provide for something else. In principle, the relevant moment to compare, in order to determine whether a statute has retroactive effect or not, is the date of the entry into force of the statute, but the moment of publication in the Official Journal (and even the moment of publication of the draft statute in the parliamentary gazette) is relevant for assessing the degree of legal uncertainty caused by the retroactive effect.

3.16.1.6. Concept of retrospectivity

See section 3.16.4.

3.16.1.7. Distinction between substantive and procedural statutes

a. With respect to the impact of a statute having immediate effect

As a general rule (with the exceptions provided by transitional provisions) procedural rules do not apply to procedures initiated before the statute’s entry into force (transitional provision No. 3 GTA).

b. Rules considered procedural rules

Tax assessment, tax audit and tax collection rules are considered procedural rules. The Spanish General Tax Act also characterizes rules on the burden of the proof as procedural rules (Article 105).

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2. Macho, supra note 1, at p. 46.
3.16.2. **Ex ante evaluation of retroactivity**

3.16.2.1. **Constitutional limitations to retroactivity of tax statutes**

Article 9.3 of the Spanish Constitution (SC) prohibits the retroactivity of criminal and administrative penal provisions and of provisions which restrict individual rights. However, according to the Spanish Constitutional Court, the prohibition does not include genuine tax rules. However, the constitutional principle of legal certainty (also foreseen in Article 9.3 SC) is in conflict with the higher levels of retroactivity if it is not justified by extraordinary reasons of public interest.

3.16.2.2. **Transitional policy of government**

According to Article 10(2) GTA No. 58/2003, unless the contrary is provided tax norms will not have retroactive effect and will apply to taxes without a taxable period accrued after the entry in force and to other taxes the taxable period of which begins after entry into force.

3.16.2.3. **Ex ante control by an independent body**

Article 107 SC foresees the Council of State as the supreme advisory body of the government. Its regulation is included in the Organic Parliamentary Act No. 3 of 1980. Nevertheless there are no special requirements for requesting advice regarding retroactive rules.

3.16.3. **Use of retroactivity in legislative practice**

3.16.3.1. **Legislating by press release**

In Spain the legislator occasionally makes use of an instrument similar to the instrument of ‘legislating by press release’. It is permissible to prevent announcement effects through the publication of the draft retroactive provisions in the parliament’s official journal. In this case, retroactivity is permitted back to the date of publication in the journal.

3.16.3.2. **Retroactive effect further back than first announcement**

Sometimes the Spanish legislator grants retroactive effect to tax statutes going further back in time from the moment of its first announcement. This may be permitted, taking into account imperative reasons of general interest which are at stake and the degree of legal uncertainty which could be caused to the taxpayers (see section 4).

3.16.3.3. **Pending legal proceedings**

Even if the retroactive period is long, pending legal proceedings are as matter of principle excluded from the application of the new statute.

3.16.3.4. **Favourable retroactivity**

Retroactive effect to tax statutes which are favourable to taxpayers only apply to administrative penalties, surcharges (Article 10.2 GTA) and, occasionally, to late interest and special cases of tax liability (first transitional provision of the General Tax Act).
3.16.4. Ex post evaluation of retroactivity (in case law)

In Spain, courts can test the retroactivity of regulations for compatibility with the Constitution and with parliamentary acts. If they consider that a parliamentary act is incompatible with the Constitution they should suspend the procedure and refer the question to the Constitutional Court.

The Spanish Constitutional Court can test the retroactivity of a tax statute against the principle of legal certainty provided by Article 9.3 SC.

In Spanish practice, courts do not test the retroactivity of a tax statute against Article 1 of the First Protocol ECHR.

The Spanish Constitutional Court differentiates three degrees of retroactivity, taking into account whether the statute applies to legal situations before the publication of the statute (maximal retroactivity) to situations commenced before the publication but ended after the publication of the statute (medium or ‘improper retroactivity’) and those not really commenced before the publication of the law (mere expectations). This third case (minimum degree of retroactivity) is allowed. Medium or improper retroactivity is allowed, provided it does not create a serious breach of legal certainty. Maximum retroactivity is forbidden unless it is justified by serious reasons of general interest.

According to our constitutional case law:

- Statutes providing for retroactive charges with the aim of healing former unconstitutional ‘fees’ result in a case of maximal retroactivity which cannot be justified (Judgments of the Constitutional Court Nos. 116/2009, 146/2009, 161/2009 and 74/2010).
- If the income tax rates are increased at the middle of the taxable period (the calendar year) with effect from 1 January through a Decree-Law confirmed by a latter parliamentary act, retroactivity is possible, even if the Decree-Law is declared unconstitutional for legislating on matters reserved to a parliamentary act. This is so, because the unconstitutional Decree-Law had an announcement effect and therefore the taxpayers’ legal certainty was respected (Judgment of the Constitutional Court No. 192 of 1997).
- It is constitutional to abolish permanent tax allowances from a periodical tax on real estate without granting any transitional rights for future taxable events (grandfathering). In this case there is no real retroactivity or acquired rights but merely taxpayers’ expectations (Judgment of the Constitutional Court No. 6 of 1983). However, it is unconstitutional to abolish exemptions applicable to already accrued taxable events (Judgment of the Constitutional Court No. 234 of 2001, regarding excise duties).
- It is constitutional to increase the tax rate of already accrued tax debts on gambling devices if there are reasons of public interest to do so, e.g. past extraordinary profits which were taxed at a very low rate where the business activity is not desirable (Judgment of the Constitutional Court No. 126 of 1987). If such reasons do not exist, the retroactive taxation is unconstitutional (Judgment of the Constitutional Court No. 173 of 1996).

3.16.5. Retroactivity of case law

3.16.5.1. Temporal effect of judicial change of course

According to Article 40 of the Organic Parliamentary Act on the Constitutional Court, constitutional judgments cannot revise final judgments (res judicata), with the only exception of criminal judgments or judgments on administrative penalties, where the penalty or responsibility should be reduced as a consequence of the unconstitutionality. Regarding tax matters, the Constitutional Court has the tendency to explicitly reject the reimbursement of unconstitutional tax debts if they are final (Judgment of the Constitutional Court No. 45 of 1989). However, in several cases the Supreme Court has considered that this limitation of
effects must be helpful through a right to damages equal to the amount of the tax paid and the late interest (Judgments of the Supreme Court of 22 February 2005 and 5 December 2006).

3.16.6. Views in the literature

3.16.6.1. Opinions regarding retroactivity

The literature generally agrees that retroactivity of tax statutes is constitutional provided the legal certainty is not affected in a disproportionate way. However, it is considered that the distinction made by Constitutional Court of three degrees of retroactivity is too formal and does not reflect the severity of the breach of legal certainty.

3.16.6.2. Debate on law and economics view on transitional law

The law and economics view on transitional tax law has not led to debate in Spain.