Summary and conclusions

Important legislative amendments have been made in Spanish domestic law since 1993 and these have had a certain influence on the interpretation of the non-discrimination (ND) principle.

This principle is enshrined in various provisions of the Spanish Constitution, in particular article 14, which contains a declaration of equality under the law and prohibition on discrimination, and article 31, which envisages the principle of equality in tax matters. The constitutional legislator has opted for considering equality a fundamental right to be granted special protection – it may be the subject of an appeal for legal protection to the Constitutional Court – and has extended its scope of application to natural persons and collective entities, both Spanish and alien.

Article 10 of the Spanish Constitution lays down that the rights enshrined therein should be interpreted in accordance with the international treaties on such matters ratified by Spain. In the European context, the most emblematic instrument is the European Convention on Human Rights ratified by Spain in 1979. Article 14 of the Spanish Constitution is covered in this text, which provides prohibition of discrimination in the enjoyment of the rights and freedoms recognised therein.

Likewise, under ordinary tax legislation equality is a principle of tax justice (section 3.1 of the Tax Act), understood on the one hand as a criterion of vertical and horizontal equality, closely related to the principle of ability to pay, and on the other in its negative sense as a principle of ND. However, the ND rules laid down in the Spanish tax legislation do not apply exclusively to Spanish nationals but also to all those subjects who are connected to Spain from a subjective (residence) or objective (territoriality) point of view.

Regarding the double taxation conventions (DTCs) signed by Spain, there has been a significant development in relation to application and interpretation of the ND principle. From the legislative or convention point of view, in Spain there has been a certain “boom” in double taxation treaties that of course include the ND principle. This has mainly been due to the need to intensify the means to fight tax evasion arising as a result of economic globalisation and the increase in Spanish investment abroad. All the new treaties signed by Spain since 1993 contain an article regulating ND that is more or less equivalent to article 24 OECD model convention (MC).

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From the interpretive or jurisprudential point of view, it should be pointed out that Spanish courts have rarely applied the DTC provisions, in particular the provision governing the ND principle. The only court judgments to be found in which the principle of ND is applied to international taxation are those in which this principle has been invoked or alleged by one of the parties involved.

In Spain the deficiencies of article 24 MC have become apparent, as has the need to correctly interpret the provisions relating to the ND principle which are somewhat lacking in precision. The very fact that the ND principle has been included in DTCs has been considered paradoxical by Spanish doctrine, since its purpose is not to avoid double taxation. However, the principle of ND may be considered a logical consequence of the principle of equality and ND enshrined in articles 14 and 31 of the Spanish Constitution. The important limitations, both subjective and objective, involved in regulation of article 24 MC have brought into question the true efficacy of the principle of ND in international taxation. In this respect linking in a more precise way the concepts of “person”, “national” or “enterprise” laid down in article 24 MC with the definitions found elsewhere in the OECD MC would help to achieve a clearer, more uniform interpretation. In addition, considering the different specific cases to which the principle of ND in article 24 MC may be applied is not considered to be the best way to regulate this principle and its scope. Moreover, in the configuration of the principle of nationality-based ND, residence continues to play an essential role in establishing comparable situations.

Judicial practice in Spain relating to application and interpretation of article 24 MC has been scarce and on occasions very debatable, relegating the principle of discretionality of DTCs to second place behind domestic tax rules. Nevertheless, it has interpreted article 24 MC and placed the ND principle – even though there are deficiencies in its regulation – in a prominent place in international taxation, which to a large extent is conditional on the interpretation of the European Court of Justice (ECJ) in the Community context.

Throughout the years, this Court has undertaken to delimit the concept of ND laid down in article 12 of the European Union Treaty, and in particular the freedoms recognised at Community level. There have not been many cases in which the ECJ has had to pronounce on an infringement by Spain and this is due to various reasons: first, because Spanish courts are quite reluctant to refer pre-trial questions to the Luxembourg Court; and second, because the fact is that to a great extent Spanish tax legislation takes into account the requirements imposed by Community law both ex ante, since it tends to avoid certain application conditions that could be considered discriminatory, and ex post, since Spain has amended its tax legislation in accordance with the pronouncements of the ECJ.

1. Introduction

The principle of ND in international taxation was the subject of the IFA Congress held in Florence in 1993, when some important aspects were debated. However, many years have now gone by and the need to achieve a reasonable, generally
accepted, interpretation of this principle as applied to international taxation is still a cause for concern.

Spanish domestic tax legislation has undergone significant changes since 1993.

First, in order to defend taxpayers’ rights and guarantee fulfilment of the tax authorities’ obligations, the Taxpayers’ Rights and Guarantees Act was passed (Act 1/1998 of 26 February). The provisions of this Act were later consolidated in the General Tax Act (GTA) (Act 58/2003 of 17 December) repealing the former, which had been passed before enactment of the Spanish Constitution.

Secondly, the rules governing income tax have undergone major changes, ranging from the differentiation between resident and non-resident taxpayers introduced in 1998 – the Income Tax Act (ITA) and Non-Residents’ Income Tax Act (NRITA) (Act 40/1998 of 9 December) – to the recent income tax reform set out in Act 35/2006 of 28 November.

With regard to DTCs, these developments are manifested in three areas of application and interpretation of the law: the legislative, jurisprudential or constructive, and doctrinal.

From the legislative point of view, there has been a certain “boom” in the publication of DTCs in Spain in recent years, which of course include the principle of ND. Between 1967, when Spain signed and published its first DTC, and 1993 Spain had signed only 27 DTCs, some of which were subsequently renegotiated. On the other hand, from 1993 to 2007 Spain has signed 30 new DTCs, all of which have come into force. In addition, in the last two years another 12 DTCs have been signed which have not yet come into force and are awaiting publication in the Official State Journal. It is obvious that the number of treaties concluded by Spain has increased significantly in recent years. This is mainly due to the need to intensify the means by which to fight tax evasion resulting from economic globalisation and the growth of Spanish investment abroad.

All the new treaties signed by Spain since 1993 contain an article regulating ND which is more or less similar to article 24 MC.

From the jurisprudential or interpretive point of view, it should be mentioned that Spanish courts have rarely applied the provisions of DTCs, in particular, the provision governing the principle of ND. The reason may be the scarce knowledge that Spanish courts and judges have of DTCs, even though they are directly applicable in the Spanish legal order. The only judgments given by Spanish courts in which the principle of ND is applied correspond to cases in which this principle has been invoked or alleged by one of the parties to the suit. In this respect, the number of Spanish court judgments in which the principle of ND enshrined in DTCs is applied may be said to have increased in recent years.

1 Since 1993, eight DTCs passed prior to this date have been renegotiated. They are the DTCs with Switzerland, Brazil, Belgium, Denmark, France, Portugal, Austria and the United Kingdom.
2 They are the DTCs with Senegal, Moldova, Malaysia, Armenia, South Africa, Peru, Bosnia-Herzegovina, Nigeria, Serbia and Montenegro, Colombia, Namibia and Costa Rica.
3 The most relevant case law in which the principle of ND is applied first appears in 1996 (Supreme Court judgment of 28 November 1996) and then increases significantly from 2000 onwards, as a logical result of the increase in the number of DTCs.
Finally, with regard to the doctrinal point of view, in recent years a large number of Spanish university lecturers have studied international taxation, and numerous international tax manuals and studies analysing Spanish treaties or interpreting the MC have been published. This trend, which is becoming more and more consistent, makes it possible to define the interpretation given by Spanish doctrine to the principle of ND, and point out its strong and weak points.

2. Article 24 MC

2.1. General aspects

Despite the importance nowadays of the principle of ND, the truth is that in the context of international taxation there is no general principle as such. The main international manifestation of this principle is to be found in article 24 MC. As Spanish doctrine shows, for the principle of ND to be valid in the relations between states there must be a DTC containing an equivalent provision. Outside DTCs the principle does not exist, unless it is envisaged in another legal order, as is the case of Community law. Therefore, the principle of ND in international taxation is to a great extent subject to the reciprocity of DTCs.

Spanish doctrine has defined inclusion of the principle of ND in DTCs as “paradoxical”, since the main function of these treaties is to eliminate double taxation and prevent tax evasion and tax fraud. For this reason, the principle of ND is envisaged in DTC “special provisions”. The interpretation of the majority of Spanish authors is that the main purpose of this principle is not to prevent tax fraud and evasion, and its impact on double taxation is not very significant.

As has been said, the purpose of the principle of ND is to avoid creating restrictions to international trade, investment, the free movement of people, etc. In other words, the purpose – at least in relation to the nationality clause – is to prevent tax protectionism in the form of a greater tax burden imposed on foreigners, thus making them less competitive than nationals in the same circumstances. Hence, ND clauses are a manifestation of equality of taxpayers and not equality of states.

A question raised by Spanish doctrine in relation to article 24 MC, and in particular to the nationality clause, is that of its usefulness. Is the ND principle enshrined in article 24(1) MC necessary in Spain? This question is raised because article 31 of the Spanish Constitution regulates the principle of equality.


6 There is no doubt that if discriminatory taxation is eliminated, it may help to prevent double taxation, although the connecting link is somewhat weak.

7 Hortalá i Vallvé, op. cit., p. 723.

8 F.A. García Prats, 2006, p. 1074.

9 Calderón and Martín Jiménez, op. cit., p. 1096.
in tax matters and makes no distinction between Spaniards and aliens. Thus, any non-Spanish taxpayer is entitled to invoke this article before the Spanish state in order to obtain a similar result to that envisaged in article 24 MC. Although this rule may appear to be redundant in Spain where there is a constitutional provision on the principle of equality that prohibits any type of nationality-based discrimination, the fact is that the protection offered by the principle of article 31 of the Constitution is not the same as that guaranteed by the principle of ND enshrined in a DTC. Discrimination in tax law can only be remedied invoking the principle of equality of article 31 of the Constitution by a ruling of the Constitutional Court. However, the principle of ND envisaged in a DTC is directly applicable by the administration and by the courts, which means it may be easily alleged by taxpayers without the need for a ruling of the Spanish Constitutional Court. Therefore, the principle of ND enshrined in DTCs signed by Spain is in no way redundant.

The existence of the ND principle of DTCs is justified in Spain due to the constitutional requisite of equality in tax matters that requires a network of treaties which implement this measure in the international tax context and allow it to be invoked and directly applied by the Spanish courts.

Nevertheless, despite the fact that this principle is necessary, the fact is that Spanish doctrine has pointed out the legal problems posed by article 24 MC that, together with the reciprocity requirement and diversity of interpretations made by the courts, do not guarantee adequate protection against discrimination.10

Spanish treaty practice faithfully follows the ND provision of article 24 MC. Only the Spain–Australia treaty (1992) fails to include a clause relating to ND. However, the additional protocol provides that if Australia includes this principle in any of the treaties it signs with other states, Australia will advise Spain and negotiations will be started to provide the same treatment for Spain. In 2003, Australia signed a DTC with the United Kingdom that included an ND clause; therefore, Spain should initiate negotiations to include a similar clause in its treaty with Australia.

Most of the DTCs signed by Spain follow the wording of article 24 MC in force when the treaty was signed, although there are some exceptions which we shall discuss.

2.2. Contents of article 24 MC

2.2.1. Nationality-based ND (article 24(1) MC)

The scope of application of this principle is limited for two reasons. First, the subjective scope is different to that defined in article 1 MC. Secondly, the objective scope of this clause requires a national to be in the same circumstances, in particular as regards residence, as the nationals of the other contracting state, which raises serious doubts as to its interpretation, thereby restricting application of this principle.

Nationality is an essential condition in order to invoke application of article 24(1) MC. This is defined in article 3(1)(g) MC. Interpretation of the term

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10 Hortalá i Vallvé, op. cit., p. 724.
"national" refers to natural persons who hold the nationality or citizenship of one of the contracting states and legal persons, partnerships or associations organised under the laws of one of the contracting states. With regard to natural persons, there are no doubts as to interpretation because the treaty refers to the domestic rules determining the nationality of natural persons in each contracting state. However, in the case of legal persons, partnerships or associations, the problem is that the treaty does not define such terms and it is necessary to have recourse to the civil or mercantile rather than tax legislation of each state. The reference to “partnerships or associations” should be interpreted to include entities without legal personality. A problem may arise when the laws of two member states differ in relation to certain entities lacking in legal personality that may well be considered “partnerships” for the purpose of article 3(1)(b) MC since they are taxable persons, but cannot be classified as either partnerships or associations: this is the case with pension or investment funds and trusts.

Likewise, determination of the nationality of such legal persons, partnerships or associations depends on the majority doctrine at the place of establishment or incorporation of the entity or partnership. In other words, they are nationals if they have been set up under the legislation of a contracting state, irrespective of the criteria used by the state in question to attribute nationality to a company. However, some treaties consider that companies are nationals in accordance with other criteria (seat of effective management) whereby they obtain the nationality of one of the contracting states.

In the treaty between Spain and France, application of the nationality clause is limited to natural persons. On the other hand, the treaty with Bulgaria expressly states that this precept is applicable to legal persons and other entities classified as such by the tax legislation. The treaty with Poland refers to citizens instead of nationals, but these words should be interpreted as being synonymous.

Application of the nationality-based ND clause is not limited by article 1 of the treaty, and so it is applicable not only to residents of either of the contracting states but also to nationals that are not residents of either of the two states. This is set out in the last sentence of article 24(1), added in 1977, which has been interpreted as being explanatory. Thus, there are many treaties signed by Spain in which this last sentence (“this provision shall, notwithstanding the provisions of Article 1, also apply to persons who are not residents of one or both of the Contracting States”) has been omitted, both in treaties prior to 1997 and in other later ones: the DTCs with Germany (1968), Austria (1966), Brazil (1975), Canada (1981), Czech Republic (1981), Slovakia (1981), Cuba (2001), Ecuador (1993), Finland (1968), Greece (2002), Italy (1980), India (1995), Morocco (1985), Mexico (1994), Switzerland (1967), Thailand (1998), Vietnam (2006) and Malaysia (pending).

Application of nationality-based ND requires that a national of one state be in the same circumstances as a national of the other state, in particular with respect to residence. This has been interpreted in the sense that taxpayers must be in the same factual and legal circumstances, which significantly restricts the cases in which this provision may be invoked. The same legal circumstances are

11 Calderón and Martín Jiménez, op. cit., p. 1098.
12 DTCs with Germany, China, Philippines, Japan, United Kingdom, Sweden.
interpreted to refer to nationality (a national of one of the contracting states), whereas the factual circumstances include situations such as residence (resident of the same state). This also raises the possibility of considering the last sentence of article 24(1) MC redundant (in particular with respect to residence) since the very essence of the ND principle implies an analysis of comparable situations; therefore, the different circumstances of the object of comparison and the one who wishes to be compared (resident/non-resident) prevents any discrimination.\textsuperscript{13}

The reference “in particular with respect to residence” is omitted from many Spanish treaties before and after 1992 when article 24 was added.\textsuperscript{14} This does not pose any problem of interpretation or application since its function was explanatory. A particular case is that of the treaty with the USA in which, since this country applies the principle of taxation of non-resident nationals on their worldwide income, it is provided that “a non-national of the USA who is not resident in the USA and a Spanish national who is not resident in the USA are not in the same circumstances”. However, a Spaniard resident in the USA may invoke the principle of ND enshrined in article 24. However, although article 24(1) MC itself allows the comparability and application of the principle of nationality-based ND when both nationals are not residents of either of the contracting states, this does not necessarily mean that they are in the same circumstances, since they may be residents of different third countries. Therefore, even in such cases they must be in the same circumstances, in other words, the situations must be comparable, so they must be residents of the same third country. Conferring on them the status of non-residents when they are residents of different third countries would be equivalent to admitting that this provision conceals a most favoured nation (MFN) clause.\textsuperscript{15}

Since residence is an essential factor in direct taxation, this form of ND enshrined in article 24(1) MC lacks material importance in this context. However, it acquires its full relevance in other tax questions in which residence is not a determining factor such as indirect taxation, pursuant to paragraph (6) of article 24 MC. For this reason, Spanish doctrine has described this nationality clause as not only paradoxical but also “disappointing”.

In their answers to various enquiries made to the Inland Revenue, the Spanish authorities have interpreted this provision considering that “a taxpayer resident in Spain and another resident in Ecuador are not in the same circumstances with respect to taxation in Spain, regardless of their nationality”.\textsuperscript{16}

“The application of different tax rates to residents and non-residents does not imply any type of discrimination based on the taxpayers’ nationality, but rather different treatment depending on the taxpayers’ residence.”\textsuperscript{17}

\textsuperscript{13} Calderón and Martín Jiménez, \textit{op. cit.}, p. 1098.
\textsuperscript{14} To cite just the later ones; the DTCs with India, Philippines, Ireland, Thailand, Iran, Vietnam.
\textsuperscript{15} Hortalá i Vallvé, \textit{op. cit.}, p. 727.
\textsuperscript{17} Enquiry 1925/2004 of 21 October 2004. Moreover, the Spanish authorities hold that the displacement allowance an Italian resident in Spain receives from his Italian company for being
Spanish treaty practice envisages the possibility of exclusion of nationality-based ND, pursuant to the commentary on article 24 MC, in relation to public entities of another state which do not have to be treated in an equal way when a specific tax system is envisaged by a state for its authorities, unless it is a case of mainly business activities.\(^{18}\) On the other hand, the treaty with France (1997) extends ND to public entities that do not carry on commercial or industrial activities, and these may have access to the same exemptions the other contracting state applies to its public bodies.

The prohibited discrimination refers to the imposition of taxes or obligations that are not levied or are heavier than those levied on nationals of the contracting state. Thus, the rule refers to ND as regards both substantive or quantitative aspects and procedural questions. Spanish courts have recently applied this rule in relation to discrimination due to more burdensome procedures, and interpreted it in accordance with the meaning of article 24(1) MC. The Spanish Supreme Court held that “the requisite of a time limit of one year in which USA citizens may request a refund of the excess withholdings made is a more burdensome obligation than that borne by Spanish citizens who are given a time limit of four years in which to request such a refund”.\(^{19}\)

### 2.2.2. ND of stateless persons clause (article 24(2) MC)

Extension of application of the prohibition on nationality-based discrimination to stateless persons raises no problems of interpretation. Article 29 of the 1954 New York Convention relating to stateless persons contains a national treatment clause. Spain ratified this Convention on 24 April 1997, setting out a reservation to article 29(1) according to which it would only be bound by such provisions in the case of stateless persons resident in one of the contracting states. Spain has not included the ND of stateless persons clause in its DTCs, except in those with Germany, the Czech Republic, Slovakia, the UK and Sweden. Therefore, a stateless person residing in a state that has not ratified the New York Convention and who is not a resident of any of the five states with which Spain has signed a DTC including such a clause will not be covered by the principle of ND. Likewise, we believe that when the two contracting states have ratified the New York Convention, addition of the provision of article 24(2) MC may be superfluous and even contradictory, since article 29 of the Convention does not require tax residence in one of the contracting states, thereby implying a wider subjective scope of application.

\(\text{cont.}\)

\(^{18}\) The Spanish authorities have applied the commentary on art. 24 very strictly in this respect and have denied a German public entity the possibility of receiving Spanish source royalties, that is, the application in Spain of the exemption applied to Spanish public entities (enquiry 556/2004 of 8 March 2004).

\(^{19}\) Supreme Court judgment of 18 May 2005.
2.2.3. ND of permanent establishment clause (article 24(3) MC)

This provision prohibits discrimination against permanent establishments with respect to resident companies belonging to the same sector in relation to taxation of their business activities. When the subjects involved fulfil similar subjective conditions they are considered comparable. Thus, permanent establishments of corporations are compared with corporations and those of partnerships with entities subject to the allocation of income regime. This article prohibits less favourable taxation of the permanent establishment than that levied on national companies carrying on the same activities. Different treatment as regards procedural aspects is not considered discriminatory, and neither is the levy of a different tax rate that does not imply less favourable taxation: each case should be examined individually on its merits.

The second sentence of this article limits positive discrimination by stating that natural persons who operate through a permanent establishment will not receive any of the personal or family tax allowances, reliefs or reductions granted to residents, since it is the state of residence and not that in which the permanent establishment is located that must adapt such circumstances to the ability to pay, thereby preventing a double benefit from being obtained in these two states. However, the DTCs Spain has signed with Morocco and Switzerland permit the opposite and guarantee that nationals of one state subject to taxation in the other state may take advantage in the latter of the tax benefits and exemptions granted for family responsibilities in the same conditions as nationals of the former state.

In any case the hybrid nature of a permanent establishment makes the application of the principle of ND difficult. Spanish domestic legislation allows the permanent establishments of non-resident companies to determine their taxable base in accordance with Spanish company tax rules, thereby enabling them to benefit from the same deductions and allowances applied to resident companies, including the measures to eliminate international and economic double taxation. On the other hand, in the case of application of progressive tax rates, the DTC between Spain and Belgium allows the maximum rate envisaged for resident companies to be applied to the permanent establishment without causing problems with the principle of ND, whereas the DTC with India provides that levying a tax rate on a permanent establishment that is higher than that applicable to a resident company is not contrary to the principle of ND.

Most Spanish DTCs contain this ND of permanent establishment clause and they generally follow the MC provision. Only the DTC with India regulates any exceptions and, for the purpose of ND, provides the comparability of a permanent establishment in a contracting state with other permanent establishments of companies resident in third countries rather than with companies resident in the state where the permanent establishment is located, and configures a kind of “most favoured permanent establishment” clause.

The Spanish authorities have interpreted ND of permanent establishments in terms of application of the Spanish tax regime for temporary company mergers.

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20 S. 19(4) Legislative Royal Decree 5/2004 of 5 March regulating non-residents' income tax.
(TCM) to permanent establishments located in Spain. The authorities consider that the existence of less favourable taxation must be verified by analysing each individual case, and that taxing non-residents and residents differently does not contravene article 24(3) MC. In specific cases the authorities have considered that since it is not possible to compensate losses generated by the branch with the profits of the TCM, it is difficult to compensate the profits and losses of the TCM in which it participates. This results in less favourable taxation than would arise from participation in the TCM of entities resident in Spain, thereby leading to a type of discrimination prohibited by the DTC.\textsuperscript{21} Where it is not possible to effectively demonstrate heavier taxation of the permanent establishment, application of different rules to the permanent establishment and resident companies is not a form of discrimination prohibited by the DTCs.\textsuperscript{22}

The Spanish Supreme Court has maintained – in the reporters’ opinion and that of Spanish doctrine, mistakenly – that the Spanish rule which prevents a permanent establishment from acting as the dominant company in a tax consolidation group is not discriminatory. The Supreme Court’s only argument, and a debatable one at that, is that under Spanish rules, the tax consolidation system applies to public limited companies resident in Spain.\textsuperscript{23} Nevertheless, the reporters consider that not being allowed to head a consolidation group in Spain is obviously more burdensome for a permanent establishment than heading it, since in the latter case it would for example be possible to compensate intra-group losses, thereby reducing the tax burden. The Supreme Court compares the permanent establishment of the non-resident company with other Spanish establishments lacking in legal personality, alleging that tax treatment in relation to tax consolidation is the same in these two cases, since it is not comparable with the treatment given to companies in Spain. The Court is undoubtedly mistaken in comparing a permanent establishment with other entities in Spain lacking legal personality, when under article 24(3) MC a permanent establishment must be given the same treatment as that given to Spanish enterprises carrying on the same activities. This has been clearly interpreted by the doctrine and demonstrates the Court’s confusion as regards the subjects to be compared under the principle of ND.

This judgment has been severely criticised by Spanish doctrine, which holds that it contravenes the ND principle of DTCs. For this reason, as well as because of ECJ case law, the Spanish legislator amended the Company Tax Act and now permanent establishments are authorised to act as the dominant company in a tax consolidation group in Spain.\textsuperscript{24}

\textsuperscript{21} Enquiries 23/2005 of 28 January (DTC Spain–France) and 25/2005 of January (DTC Spain–Belgium) to the Inland Revenue.

\textsuperscript{22} Enquiry 635/2002 of 26 April (DTC Spain–Denmark) to the Inland Revenue, and Binding Enquiry V1089/2005 of 14 June 2005 (DTC Spain–Italy).

\textsuperscript{23} Supreme Court judgments of 15 July 2002 and 12 February 2003.

\textsuperscript{24} S. 67(2) Company Tax Act.
2.2.4. Deductibility of payments made to non-residents (article 24(4) MC)

This rule affects the deductibility of costs from the tax bases of resident enterprises excluding, within the scope of the DTC, application of measures that restrict this deductibility – when the payments are made to non-residents – in a different way to that in which they would be applied when such payments are made to residents of the state. This is an absolute prohibition on discrimination, with there being no possible exceptions.\(^ {25}\) ND is applied to payment of interest, royalties and in general other disbursements, and it is understood that the discrimination referred to in this provision may be invoked in relation to any disbursement that is classified as deductible under the legislation of the source state. This broad interpretation includes, according to the majority’s opinion and the purpose of the rule, both payments effectively made and those not made, and applies to monetary and non-monetary considerations. In other words, the deductibility of payments made to a non-resident will be the same as that envisaged in cases in which they are made to a resident. Any domestic rules that envisage the non-deductibility of the costs incurred in operations with non-residents will contravene article 24(4).\(^ {26}\)

This clause has been omitted from many DTCs signed by Spain, mainly those prior to the incorporation of this provision in 1977. In the other DTCs the provision of article 24(4) has been included with no modification. Under the DTC with India, interest, royalties and reimbursement of technical services paid by an Indian enterprise to an enterprise resident in Spain are deductible provided that they are subject to taxation in India.

Article 24(4) does not prevent application of other treaty provisions such as articles 9(1), 11(6) or 12(4), which implies that in such cases certain excess payments made to non-residents may be considered non-deductible without contravening the ND principle. Hence, it may be said that article 24(4) MC does not prevent application of the national thin capitalisation rules of the source state. Such rules are not prohibited unless they are incompatible with article 9 or are only applied in the case of non-resident creditors.\(^ {27}\)

The Spanish administration considers that article 9 authorises the Spanish state to make corrections for the profits determined by affiliated enterprises when the requisites of this article are met. The administration holds that more specific provisions such as article 9 should prevail over article 24.\(^ {28}\)

Many DTCs have included an express provision providing that the ND principle does not prevent application of the Spanish thin capitalisation rule in the scope of such DTCs.\(^ {29}\) However, this does not mean that the thin capitalisation

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\(^ {25}\) Calderón and Martín Jiménez, *op. cit.*, p. 1145.

\(^ {26}\) The Spanish Company Tax Act contains a rule that prevents the deductibility of payments for certain services rendered directly or indirectly made to residents of countries classified as tax havens.

\(^ {27}\) Hortalá i Vallvé, *op. cit.*, p. 743.

\(^ {28}\) Decision of the Central Administrative-Economic Court of 9 January 2001.

\(^ {29}\) For example, Spain’s DTCs with Argentina, Belgium, Costa Rica, Cuba, Denmark, Slovenia, France, Greece, Ireland, Iceland, Israel, Mexico, Norway, Portugal and Russia. On the other hand, the DTC with Croatia expressly prevents application of thin capitalisation rules.
rule is compatible with other provisions of the DTC, since it may contravene provisions such as article 9. Therefore, some DTCs specify that such rules are applicable if they are in agreement with article 9(1) of the Convention.\textsuperscript{30}

The Spanish courts of law have interpreted and applied article 24(4) in relation to domestic thin capitalisation rules in a way that conflicts with the opinion held by the administration. The courts consider that article 24 should prevail over domestic thin capitalisation rules, unless article 9 may be invoked. In other words, the ND principle of DTCs must prevail over domestic thin capitalisation rules when it can be demonstrated that the Spanish subsidiary’s debts, even when they exceed the limits of the anti-thin capitalisation rule, may be considered to be “in market conditions”. In the cases analysed by the Spanish courts, the administration was not able to prove that the requisites for application of article 9 were met. In other words, it was not demonstrated that the credit conditions agreed between the affiliated companies differed from those that would be agreed between independent enterprises. Therefore, article 24(4) was held to be applicable, and application of the Spanish thin capitalisation rule was declared discriminatory in these specific cases. The courts also emphasised that in such cases there is no safeguard clause for domestic thin capitalisation legislation, which supports their doctrine.\textsuperscript{31}

The majority of Spanish doctrine considers that the domestic thin capitalisation rule was applied discriminately because it was only used in the case of borrowing operations involving non-residents and certain fixed debt ratios. Compatibility of a domestic thin capitalisation rule with European Community law was conditioned by the judgment of the ECJ in the \textit{Lankhorst-Hohorst} case\textsuperscript{32} which, although it refers to a German rule, resulted in amendment of the Spanish thin capitalisation rule, excluding its application to entities that are non-resident in Spain but resident in a territory of the EU that is not a tax haven.\textsuperscript{33}

\textbf{2.2.5. ND of affiliated companies or those controlled by non-residents (article 24(5) MC)}

This clause prohibits less favourable treatment of an enterprise whose capital belongs to or is totally or partially controlled by one or more residents in the other contracting state. The protection refers to the enterprise and not the persons who control its capital.

The wording of this provision should be improved since the characteristics of the enterprises protected by article 24(5) are not very clearly defined either in the MC or in the commentary. Consequently, the meaning of “enterprises” that may invoke protection of article 24(5) has been debated. There seems to be a consensus on considering companies to be such enterprises and excluding nat-

\textsuperscript{30} For example the DTC with France or Cuba.
\textsuperscript{31} Judgment of the special division of the Supreme Court of 15 January 2004; in the same sense, judgment of the Madrid High Court of Justice of 15 October 2003.
\textsuperscript{32} C-324/00 of 12 December 2002.
\textsuperscript{33} S. 20 Corporate Tax Act. It should be mentioned that despite the slight nuance in the doctrine of the ECJ seen in recent rulings (ECJ judgment C-524/04 of 13 March 2007, \textit{Thin Cap Group Litigation} and ECJ Order of 10 May 2007, C-492/04, \textit{Lasertec}), the fact is that the position of the Spanish legislator has not changed.
ural persons. With regard to partnerships, there is no agreement on whether they are included in the scope of application. If they are transparent, they cannot invoke this protection since article 24(5) affects taxation of the enterprise and not of the members. If, rather than in the strict legal sense, the term “capital” is interpreted as participation in the risks of an enterprise, regardless of whether it is a corporation or a partnership, article 24(5) could be applied to the latter.\textsuperscript{34} Communities of property or investment funds could invoke the protection of this provision. In addition, the reference to “control” of an enterprise makes it possible to include cases of non-residents who have voting rights but are not shareholders, and who have total or partial control of the enterprise invoking the ND principle.

The resident company must be controlled or owned by a resident of the other contracting state. This may be a natural or legal person, or take any other form such as a partnership.

For the purpose of applying ND, comparison must be made with similar enterprises in the state of residence. This has been interpreted as meaning enterprises whose capital is controlled or owned by residents of the same state in which the enterprise is located.\textsuperscript{35} But, must they carry on the same activities, or is the comparability limited to the enterprise’s legal form? In Spain, the interpretation given is that the object of comparison must be homogeneous and the “similar enterprise”, in addition to having the same legal form, must carry on the same activities and be of a similar size.\textsuperscript{36}

This provision, like paragraph (1) of article 24, prohibits imposing a tax or connected requirement which is other or more burdensome than that to which similar enterprises are subjected. It is thus intended to prevent less favourable treatment being given to the enterprise controlled by non-residents as regards both material tax issues and any formal or procedural issues. This includes the rules on transfer pricing that impose taxation or formal requisites that are more burdensome for enterprises controlled by non-residents than for those controlled by residents, since this would contravene article 24 MC.

The Spanish DTCs that do not contain a clause similar to article 24(4) MC often have an equivalent article 24(5) MC. In such cases this is the only rule that may condition application of domestic legislation on thin capitalisation when the domestic rule contravenes article 9 MC.

2.2.6. Objective scope of the ND principle (article 24(6) MC)

The principle of ND is applicable to any kind of tax and is not limited to the taxes covered by the DTC and envisaged in article 2 MC (income tax and wealth tax). When interpreting the term “tax” the doctrine considers that it does not mean the same in article 2 as it does in article 24(6) MC. Of course, the principle of ND is applied to income tax and wealth tax, but it has been interpreted that this prin-

\textsuperscript{34} The DTC between Spain and Bulgaria does not mention the word “capital” when referring to enterprises in which one or various residents of the other contracting state are shareholders. Thus, in this case, it appears clear that partnerships and other entities that have no capital in the mercantile sense may invoke art. 24(5).

\textsuperscript{35} Nevertheless, the DTC between Spain and Canada compares enterprises controlled by residents of the other contracting state with enterprises controlled by residents of a third country.

\textsuperscript{36} Calderón and Martín Jiménez, \textit{op. cit.}, p. 1167.
ciple may also be invoked in relation to any kind of tax, or any type of charge imposed by a public body. However, social security contributions and customs duties do not fall within the objective scope of the ND principle.

Most of the DTCs signed by Spain follow article 24(6) MC; however, there are some variations. The DTC with the USA applies the principle of ND to taxes levied by levels of government other than central government. Some DTCs limit the scope of application of article 24 to taxes covered by article 2 of the Convention, or simply do not include paragraph (6), which means that the principle of ND is applied to the taxes covered in article 2. Finally some conventions exclude application of this principle to specific taxes.

3. ND in other tax systems

3.1. ND in national tax context

3.1.1. Equality under the Spanish Constitution

The 1978 Spanish Constitution makes various references to equality. The first appears in article 1(1) where equality, together with other values, is enshrined as a fundamental principle of a social, democratic state governed by the rule of law. Two main aspects of equality may be distinguished in this legal text.

First, the principle of equality is expressly recognised at the beginning of Chapter II which sets out the fundamental rights and public freedoms in article 14 of the Constitution as follows: “All Spaniards are equal in the eyes of the law, and no discrimination whatsoever shall be made for reasons of birth, race, sex, religion, opinion or any other social or personal circumstance or status.” This article consists of two distinct parts. In the first part of the provision there is a declaration of equality under the law, and in the second a prohibition of discrimination including specific circumstances.

Secondly, equality is also referred to in article 9(2) of the Constitution which states that:

“The official authorities are responsible for fomenting the conditions necessary to make freedom and equality of individuals and the groups to which they belong real and effective; for removing any obstacles that may prevent or hinder the enjoyment of such freedom and equality to the full, and for facilitating the participation of all citizens in the social, cultural, economic and political life of the community.”

This dual formulation of freedom makes it possible to distinguish between equality under the law in article 14 of the Constitution and substantive equality recognised in article 9(2). Equality under the law is mainly realised through legal

37 Spanish DTCs with Austria, Canada, Chile, Finland, India, Ireland, New Zealand and Vietnam.
38 The DTC with Indonesia excludes from art. 24 the local tax on aliens; the DTC with Poland excludes business licence charges, and the DTC with Russia excludes customs duties.
rights and obligations, not only in their formulation but also in their application – equality in application of the law; whereas material equality is more of an ideal and proposes a more generic type of equality in terms of social, economic and cultural aspects.

A specific manifestation of this principle is the equality of the tax system envisaged in article 31(1) of the Constitution which provides that “Everybody shall contribute towards public expenditure in accordance with their ability to pay and under a fair tax system based on the principles of equality, progressiveness and lack of confiscatory nature”. This is the provision that formulates at the constitutional level the principles to be applied in tax law and underlines the application of equality in tax matters and the relationship with the ability to pay.

Having made a general analysis of the different aspects of equality from the constitutional point of view, we shall now focus on article 14 of the Constitution in so far as it reflects the ND principle under study and at the same time reveals some aspects that require consideration.

From the beginning the constitutional legislator decided to confer on equality the status of a fundamental right and provide it with special protection through the jurisdictional route laid down in article 53. Specifically, an appeal for legal protection may be made to the Constitutional Court.

Taking this as the starting point, the scope of application of the principle of equality under the law is delimited as follows.

Article 14 of the Constitution basically raises the question of who may enjoy this fundamental right which cannot be limited to natural persons only but must also extend to collective entities. Although this is not expressly laid down in this article, the Constitutional Court has held for quite a number of years that article 14 implicitly envisages application of this right to legal persons. The reporters believe that another argument may be put forward in this respect, since this constitutional provision should be analysed in close relation to article 9(2) mentioned above, in which it is expressly laid down that the official authorities must ensure the equality of individuals and groups of individuals, thereby demonstrating that collective entities also have the right to equality.

The wording of article 14 also raises a doubt as to application of the principle of equality under the law to aliens, since by expressly referring to “Spaniards” as having this right, it appears to distinguish between the treatment given to these and that imposed on aliens.

Nevertheless, the reporters do not believe that the lack of a constitutional declaration specifying the equality of Spaniards and aliens is a sufficiently strong argument to say that their inequality is admissible under article 14, since it is the Constitution itself that provides in article 13 that aliens shall enjoy the freedoms enshrined in Title 1 of the Constitution “in the terms laid down in the treaties and the law” with the exception of the right to vote provided in article 23. Therefore, the principle of equality may be said to be applicable to aliens also, otherwise they would not enjoy to the full the public freedoms enshrined in the Constitution. Furthermore, there is no legal provision indicating the contrary.

Legal ground 2 of Constitutional Court judgment 23/1989 of 2 February. With regard to public entities, Constitutional Court judgment 49/88 of 22 March declares it not applicable.

Legal ground 2 of Constitutional Court judgment 99/1985 of 30 September.
Having defined the subjective scope of application of this provision, the constitutional principle of equality may be said to operate at two different temporal levels: equality under the law and equality in application of the law. In the first case, any discrimination would occur in the legislation itself if the same treatment were not given in identical situations. In the second, discrimination occurs at a later date, not so much in the law itself but in its unequal application.

From another point of view, the second part of article 14 envisages the principle of ND but not in an absolute way.

The prohibition of discrimination set out appears to be based on specific circumstances, such as sex, religion, etc. or any other social or personal circumstance. This leads us to say that it does not imply a total proscription of distinguishing elements that may affect subjects. Under the Spanish Constitution discrimination is prohibited but not the difference between objectively distinct situations.\footnote{Legal ground 8B of Constitutional Court judgment 214/1994 of 14 July.}

\subsection*{3.1.2. Equality under tax laws}


But it is at this point that we need to move down from the constitutional level to the ordinary legislation which in Spanish tax law affects application of the principle of equality and ND.

The GTA repeats in section 3(1) the principles enshrined in the Constitution and provides that: “Organization of the tax system is based on taxpayers’ ability to pay and on the principles of justice, generality, equality, progressiveness, fair distribution of the tax burden and lack of confiscatory nature.”

Equality as a principle of tax justice should be understood, on the one hand, as a criterion of vertical and horizontal equity – which implies a different taxation for different abilities to pay and the same taxation for equal abilities to pay – and on the other, in its negative sense, as a principle of ND.\footnote{J.J. Bayona de Perogordo and M.T. Soler Roch, Materiales de Derecho Financiero, Ed. Compás, Alicante, 2006, p. 22.}

However, the principle of tax equality must be interpreted in the light of the other principles regulating the tax system, in particular the principle of ability to pay. While it is true that they are two distinct principles, the latter has been considered to embody the idea of equality since it implies that everybody – extending the duty to pay tax to both Spaniards and aliens – will be taxed in accordance with the same criterion.\footnote{The Constitutional Court clearly established the difference between both principles in its judgment 27/1981 of 20 July.} As Bayona de Perogordo and Soler Roch point out,\footnote{Bayona de Perogordo and Soler Roch, op. cit., p. 22.} “individual wealth is, in short, the measuring rod that guarantees equal treatment...
for those who have the same wealth and different treatment for those who have a different economic level”. Nevertheless, this specific manifestation of the constitutional principle of equality exhibits an important difference as compared with the equality of article 14, since it is not possible to appeal for legal protection to the Constitutional Court alleging infraction of tax equality under article 31(1) of the Constitution. Therefore, in this case, citizens may only have recourse to the administrative route and ordinary courts of law.

The reporters believe it pertinent to consider the question of whether tax equality is introduced as a guiding criterion of the legal-tax relations with Spanish nationals or whether it extends to other subjects regardless of their nationality. Hence, we refer to section 11 of the GTA which lays down the criteria for subjection to tax rules and which, without mentioning the criterion of personality or nationality, provides that:

“Taxes shall be applied in accordance with the criteria of residence or territoriality established by law in each case. Should this not be possible, personal taxes shall be levied pursuant to the criterion of residence and other taxes in accordance with the criterion of territoriality most appropriate to the nature of the taxed object …”

Residence and territoriality are the criteria used under Spanish law to determine liability to tax. In practice, although these criteria are envisaged separately in section 11 of the GTA, both have the same territorial basis. In the first case, it is the person subject to the tax that must be connected to the territory in which this tax is imposed, and in the second, it is the objective aspect of the taxable situation that must have this territorial connection.\(^{46}\)

However, as section 11 sets out, it is necessary to refer to the legislation regulating each tax in order to confirm the criterion for subjection thereto. Since residence is the criterion that determines subjection to personal taxes, recourse must be had to the relevant tax provisions which in the Spanish jurisdiction subject income to tax, specifically, section 9 of the Income Tax Act (Act 35/2006 of 28 November); section 8 of Royal Legislative Decree 4/2004 of 5 March, enacting the consolidated text of the Company Tax Act; and section 6 of Legislative Royal Decree 5/2004 of 5 March, concerning non-residents’ tax.

Residence is therefore the fundamental criterion for imposing tax in Spain on the income obtained. However, it should be pointed out that the criterion of nationality also has a certain significance in the Spanish legal order. Hence, for the purpose of income tax, certain persons who reside abroad but have Spanish nationality such as diplomats, members of consular offices or representatives of the Spanish state abroad are considered taxpayers\(^ {47}\) and, vice versa, foreign nationals who reside in Spain for one of the reasons mentioned above are not considered taxpayers.\(^ {48}\) Likewise, another example in which Spanish nationality


\(^{47}\) S. 10 of Act 35/2006 of 28 November.

\(^{48}\) S. 9(2) of Act 35/2006 of 28 November.
is a determining factor as regards taxpayer status is the case of natural persons with Spanish nationality who accredit their new residence in a tax haven. These are considered taxpayers during the fiscal year in which the change of residence takes place and the four subsequent fiscal years.\(^{49}\)

In conclusion it may be said that the problems of international taxation are mainly centred on the use made of the residence factor and the differences that may exist between residents and non-residents, rather than between nationals and aliens, while bearing in mind that the majority of resident citizens are nationals. The ND rules laid down in Spanish tax law do not only apply to Spanish nationals but are also applicable to all subjects who have a connection with Spanish territory from either the subjective or objective point of view.

3.2. ND in conventions relating to human rights and fundamental freedoms\(^{50}\)

Under article 10(2) of the Spanish Constitution:

“The rules relating to fundamental rights and freedoms recognised by the Constitution shall be interpreted in accordance with the Universal Declaration of Human Rights and the international agreements and treaties thereon ratified by Spain.”

In this respect, at the European level, one of the most emblematic instruments is the Convention on the Protection of Human Rights and Fundamental Freedoms, adopted by the European Council on 4 November 1950, whose general entry into force took place on 3 September 1953. Spain ratified the Convention by instrument of ratification on 26 September 1979, so it came into force in Spain on 4 October that same year. Since the Convention’s general entry into force, a series of additional protocols have been adopted.\(^{51}\) The most recent is protocol 12, concerning the general prohibition of discrimination, adopted on 4 October 2000, which has not yet come into force.

The European Convention on Human Rights, pursuant to the postulates of the Universal Declaration of Human Rights, not only recognises the existence of a series of citizens’ rights and freedoms, but also establishes a system of jurisdictional control of any violations of these rights committed by states who are parties to the Convention. This in practice allows individuals to bring individual claims before the European Court of Human Rights (ECtHR) which, following the entry into force of protocol 11 amending the Convention on 1 November 1998, has sole jurisdiction.

However, under the provisions of the European Convention itself,\(^{52}\) the judgments of this Court are declaratory, since it simply declares the existence

\(^{49}\) S. 8(2) of Act 35/2006 of 28 November.


\(^{51}\) Spain has ratified some of them, specifically protocol 1 on the right to protection of property, which came into force in Spain on 27 November 1990 and protocol 6 concerning abolition of the death penalty, in force in Spain since 14 January 1985.

\(^{52}\) See art. 41 of the Convention.
or not of an infringement of the Convention without establishing the obligation of the defendant state to carry out any specific action. Therefore, the decisions of the Court are not automatically enforceable in the Spanish legal system, since they cannot annul a rule, order or judicial decision considered contrary to the Convention.\textsuperscript{53}

However, this does not mean to say that the rule of article 10(2) is useless. Quite the opposite, it gives the text of the European Convention an important interpretive value. Thus, the Spanish courts have with ever greater frequency had recourse to the wording of the Convention and the declarations of the Court which have provided relevant conclusions as regards defining the human rights that have a special importance in tax matters.

It is no less true that the ECHR – despite the importance it has had for quite a time in such significant aspects of tax law as the disciplinary procedure (article 6 of the Convention) – makes little reference to tax matters, except for the express mention made in article 1 of protocol 1 allowing interference in a citizen’s right to enjoy his possessions “to secure the payment of taxes”.

Article 14 of the European Convention sets out a prohibition on discrimination by stating that

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, fortune, property, birth or other status…”

Nevertheless, as the ECtHR has held, article 14 complements the other substantive rules of the Convention and its protocols. It does not have an independent existence, and its effects can only be understood in relation to “the enjoyment of the rights and freedoms set forth in this Convention”. Therefore, it cannot be invoked unless it is connected to another article of the Convention.\textsuperscript{54} However, this does not mean that in order for article 14 of the Convention to be applicable, it is necessary for the other rights invoked to have been infringed, but rather that despite the fact that they have not been infringed, it may be concluded that there has been an unjustified discriminatory treatment.

However, not all differences in treatment are discriminatory: it depends on whether or not there is a reasonable, objective justification. In other words, the situation will be discriminatory when there is no legitimate objective or there is no reasonable relationship of proportionality between the means employed and the desired end.

On the other hand, it should be borne in mind that the contracting states enjoy a wide margin of appreciation to determine whether the differences that exist between situations which could be considered similar justify the difference in

\textsuperscript{53} Regarding the declarative nature of ECtHR judgments, see Spanish Supreme Court judgment of 4 April 1990.

\textsuperscript{54} The situation will change when protocol 12, adopted on 4 November 2000, enters into force. This lays down a general prohibition of discrimination by providing in art. 1: “The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, fortune, property, birth or other status.”
treatment. Hence, based on this margin of appreciation, the ECHR has on occasions justified applying different treatment to taxpayers who appear to be in identical situations.

As mentioned above, the rights protected in articles 14 to 29 of the Constitution are entitled to constitutional protection once the appropriate judicial route has been exhausted. The effectiveness of this protection may well be one of the decisive reasons why the Spanish state has only rarely been brought before the ECtHR.

A case in which Spain was the defendant state and the issue at stake was infringement of article 14 of the European Convention will now be discussed. This was the Ortega Moratilla v. Spain\textsuperscript{55} case in which the Spanish Protestant Church complained about the discriminatory treatment received since, as opposed to the Catholic Church, it does not enjoy exemption of property tax on its places of worship. However, the Commission dismissed the claim on the grounds that the above-mentioned exemption is a result of the Concordat signed by Spain with the Vatican, which had not been formulated in similar terms by the Protestant Church. Therefore, there is a reasonable, objective justification for the difference in treatment.

3.3. ND in other regional and supranational tax systems

In Community law the principle of equality is set out in general terms in article 12 of the Treaty establishing the European Community under which “within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited”.

It should be borne in mind that the scope of application of this Treaty is composed of the contracting states making up the European Community. Thus, it is limited to the relations between Member States of the Union and is not applicable to relations outside the Union.

The importance of the ND principle in the Community context has been reflected in the case law of the ECJ, whose task throughout the years has been to define this concept. This Court considers that similar situations must not be treated differently, unless the difference is objectively justified, and holds that it is discriminatory to treat similar situations differently or different situations equally. In the opinion of the Court, this principle prohibits not only nationality-based discrimination, but also any other form of discrimination which, applying other distinguishing criteria, leads to the same result.\textsuperscript{56}

There are not many cases in which the ECJ has had to pronounce on an infraction of the Spanish state and this is due to various reasons: first, because Spanish courts are quite reluctant to refer pre-trial questions to the Luxembourg Court;\textsuperscript{57}

\textsuperscript{55} Commission decision of 11 January 1992.
and secondly, because the fact is that Spanish tax legislation complies to a great extent with the requisites imposed by Community law *ex ante*, since it tends to avoid certain conditions for application that might be considered discriminatory, and *ex post*, in that Spain has amended its tax legislation taking into account the pronouncements of the ECJ.

Nevertheless, in this respect we should mention the ECJ judgment of 9 December 2004 in relation to an appeal alleging a breach of obligations on the part of the Spanish state resulting in a case of discrimination prohibited under Community legislation. In this case, the Commission of the European Communities held that in the levying of capital gains tax, Spanish legislation was an obstacle to the free movement of capital and the free rendering of services in that it subjected capital gains arising from the transfer of shares quoted on markets other than the Spanish market to a less favourable tax system than that imposed on shares quoted on Spanish markets. The ECJ held that the breach did in fact exist and ordered Spain to pay the court costs.

Likewise, we refer to the appeal against Spain lodged on 2 June 2006 in which the Commission sought in similar terms a declaration of a breach of Community obligations relating to freedom of establishment and freedom of rendering services, since under Spanish legislation, specifically section 35 of the Corporate Tax Act, a deduction existed that discriminated between costs corresponding to activities of research and development and technological innovation carried on abroad and the costs incurred in Spain.

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58 This is shown by the fact that certain situations in which the Court has held that there is infringement of the European Union Treaty do not occur in Spain. For instance, the *Saint-Gobain* case of 21 September 1999, the *Gerritse* case of 12 June 2003 or the *Bosal* case of 18 September 2003.

59 See for example the *Verkooijen* case of 6 June 2000 and its repercussions on Spanish income tax legislation.

60 *Commission v. Spain* case (C-219/03).

61 This discrimination was envisaged in the eighth transitional provision of Act 18/1991 dealing with the transitional system for capital gains. It should be borne in mind that as a result of the reform effected by Act 46/2002, the rule for calculating the capital gains derived from shares quoted on official markets now refers to “secondary exchange markets defined in Council Directive 93/22/EEC of 10 May 1993”.

62 Case C-248/06 pending resolution.

63 However, the second derogating provision of Act 35/2006 of 28 November repealed this section of the Corporate Tax Act with respect to tax years commencing as of 1 January 2012.