

New Tax Opportunities for Non-Resident Investors under the Spanish Non-resident Income Tax (“NRIT”)

The Spanish tax landscape for non-resident investors is currently undergoing a transformative shift. Recent landmark rulings by the **Spanish National High Court**, aligned with the **jurisprudence of the Court of Justice of the European Union (“CJEU”)**, challenge long-standing discriminatory practices within the NRIT framework. These developments redefine taxation from a gross to a net basis and provide a substantial opportunity for institutional investors to reclaim refunds for undue payments made in previous fiscal years.

I. Withholding Tax in Loss Positions

This shift in case law fundamentally alters the Withholding Tax (“**WHT**”) treatment for non-residents. **The National High Court, in its decision of July 28, 2025**, held that Spanish-source income should not be subject to Spanish WHT where the non-resident taxpayer is in a net loss position for the relevant fiscal year.

Historically, the Spanish NRIT framework levied taxes on gross Spanish-source income—such as dividends—on a per-item basis, disregarding the taxpayer’s overall fiscal result for the period. This created a clear discriminatory treatment compared to resident taxpayers, who are entitled to offset losses and maintain fiscal neutrality under Corporate Income Tax rules.

Key Principles of the New Framework:

- **Recognition of Global Loss Positions:** The ruling establishes that applying WHT to Spanish-source income is inappropriate when the taxpayer can substantiate a net loss position for the relevant fiscal period. This is based on the principle that an entity lacking economic capacity (due to losses) should not bear a tax burden that a resident entity in the same position would avoid.
- **Protection of Third-Country Investors:** The CJEU has reiterated that the Free Movement of Capital (Article 63 TFEU) constitutes a pillar of protection that extends beyond EU borders. This ensures that institutional investors from third-country jurisdictions can invoke these protections, provided an exchange of information framework exists.
- **Refund Potential:** Withholdings borne over the past four non-statute-barred years may be reclaimed as undue payments before the Spanish Tax Administration, provided the loss position is duly substantiated.
- **National Uniformity:** Although the legal challenge was initially raised regarding regional Basque regulations, the National High Court has extended this reasoning to the state level, ensuring a unified application across all Spanish territory.

II. Deductibility of Expenses for Real Estate Income

Similar to the treatment of global net losses, the taxation of Spanish real estate income is undergoing a significant jurisprudential redefinition. The core of the debate focuses on the asymmetry faced by investors resident in third-country jurisdictions, who have historically been prevented from deducting operating expenses associated with leasing activities, thus being forced to pay tax on gross income.

This practice contrasts with the regime applicable to EU residents, who are taxed on net income. Following the doctrine established by the CJEU, several Spanish courts have begun to recognize that this differentiation breaches the free movement of capital, as there is no objective justification for denying the deduction of necessary costs (such as depreciation, property taxes, community fees, or financing interest) based solely on the investor's residence.

- **Status before the Supreme Court:** It is essential to note that the Spanish Supreme Court has yet to establish a definitive doctrine to unify the criteria of the lower courts. However, the current jurisprudential trend already provides a robust basis for investors to claim these deductions based on the principle of comparability.
- **Rectification and Refund Potential:** The current legal climate enables investment vehicles to seek the rectification of tax returns filed within the last four non-statute-barred years. This allows for the reclamation of undue payments resulting from taxation on gross income, potentially leading to a significant recovery of amounts overpaid.
- **Impact on Net Profitability:** Recognizing the right to be taxed on a net basis aligns the tax burden with the actual economic capacity of the asset. For portfolios with high maintenance costs or leveraged structures, the ability to deduct operating expenses substantially improves the net cash flow and, consequently, the after-tax valuation of the assets.

III. Tax Rate Convergence: From 24% to 19% in NRIT

The tax rate disparity within the NRIT framework —whereby non-EU investors are burdened with a 24% rate compared to the 19% applied to EU/EEA residents— is now at the forefront of judicial review. The recent National High Court ruling of July 2025, which upheld expense deductibility on the grounds of the free movement of capital, provides the necessary legal leverage to challenge this rate differential. Since the courts have acknowledged that both types of investors are in a comparable position regarding the determination of the tax base, the same rationale of non-discrimination supports challenging a rate differential that rests solely on residence and lacks objective justification.

As a result, recovery strategies are no longer confined to tax base reductions: they now incorporate, on a retroactive basis, claims for the reduced 19% rate. Including this demand in refund applications covering the past four non-statute-barred years is a prudential measure to safeguard the position of the investor. Delaying action risks the expiration of older fiscal years before the doctrine is consolidated by the higher courts.

IV. Inability to Offset Capital Losses against Gains

A further dimension of the discriminatory regime concerns the offsetting of capital losses. Under the Personal Income Tax (“IRPF”) and the Corporate Income Tax (“IS”), Spanish residents are entitled to offset capital losses against gains realised in the same fiscal year and, where applicable, to carry forward unused balances to subsequent periods. By contrast, the NRIT framework taxes each Spanish-source capital gain on a per-item basis, with no possibility of offsetting losses either within the same year or against gains arising in later years.

This treatment imposes on non-residents a tax burden that a Spanish resident in a comparable position would not bear, and is increasingly difficult to justify under the same free movement of capital rationale that underpins the developments described above. Investors with mixed-result portfolios — particularly funds and pooled vehicles realising multiple disposals over a fiscal year — should consider including this argument in refund claims covering the past four non-statute-barred years.

At a Glance: Who Can Claim What

Opportunity	Applies to	Recovery scope
I. WHT in loss positions	Non-residents (EU/EEA and third-country) in a global net loss position for the year	WHT borne on Spanish-source income over the last four non-statute-barred years
II. Expense deductibility on real estate income	Third-country investors earning Spanish rental income (EU/EEA already taxed on net basis)	Right to net-basis taxation; refund of overtaxed gross income for the last four years
III. 19% rate convergence	Non-EU/EEA investors currently taxed at 24%	5-point rate differential applied to income obtained over the last four years
IV. Capital loss offsetting	Non-residents with mixed-result portfolios (gains and losses in the same year or across years)	Tax overpaid as a result of being unable to offset losses; last four non-statute-barred years

How Marboré Can Assist

Marbore Legal advises institutional investors, real estate funds and other non-resident vehicles on the assessment, structuring and recovery of undue payments under the Spanish Non-resident Income Tax. Our team conducts case-by-case feasibility analyses, quantifies refund potential and acts before the Spanish Tax Administration and the relevant courts.

For a review of your potential position under any of the scenarios above, please contact:

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