# ASSESSMENT OF REAL ESTATE PROPERTY LIABLE TO TAX IN THE SPANISH TAX SYSTEM

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***Summary:***



## 1. Real Estate Taxation in Spain.

The Spanish tax legislator (and, in general, the legislator of any country with a developed taxation system) has always shown a special interest in real estate taxation, not only because the real estate sector plays a fundamental role in the economy of any country, but also because of its peculiar characteristics, which limit or hinder tax evasion.

This taxation is imposed on each of the three levels which make up the territorial power structure of the country, being levied principally at the municipal level, where it plays a pre-eminent role, as the cornerstone for the financing of the local coffers, where one might say it takes the so called profit principle[1]as its model.

Therefore real estate, whether as inherent wealth as part of the tax payer's economic capital or in the dynamics of exchange, such as the earnings produced by its exploitation, is an index of economic capacity on which tax is levied and payable to the State, at its different levels of jurisdiction, as it is, in fact, a relevant, versatile source of taxable income.

[1] According to SIMON ACOSTA, E.: "the expenses incurred by the County Councils can be found at the root of the local tax levy on property (...) to the benefit of the owners whose goods lie in the municipal jurisdiction". "El Impuesto Municipal sobre Bienes Inmuebles", Revista de Hacienda Autonómica y Local ("Municipal Property Tax", Tax Office Magazine for Autonomous and Local Regions*),* nº 55-56, 1989, pgs. 83 and 84.

However, in the Spanish taxation system, this special interest becomes an excessive tax burden on these assets, when compared with other assets, which also have taxable economic capacity. This excessive burden occurs, on the one hand, due to the fact that several taxes are levied (property is subject to a high number of direct and indirect rates) and on the other hand, because of overtaxing (when different taxes apply to the economic capacity of the real estate at the same time, which are either similar, or at times, identical).

To demonstrate the above, we must undertake a brief analysis of the different tax authorities which levy taxes. In order to achieve this, we need to distinguish between the three levels of jurisdiction: state, autonomous government and local, beginning with the latter.

At the local level, where taxation on real estate is essential to maintain the municipal bodies, real estate property is liable to two direct taxes: the *Property Tax (Impuesto sobre bienes inmuebles -IBI-)*[2] which is levied on the ownership of, or certain rights pertaining to, the real estate; and the *Urban Land Gains Tax (Impuesto sobre el incremento de valor de terrenos de naturaleza urbana -IIVTNU-)*, which is assessed by computing the income in a theoretical way. The amount is decided on solely by the transfer of an urban site, regardless of whether it has been developed or not.

Real estate is also liable to two indirect taxes at local level. These are the *Buildings, Installations and Construction Tax (Impuesto sobre construcciones, instalaciones y obras -ICIO-)*, and the *Business Tax (Impuesto sobre actividades económicas -IAE-)*. The ICIO is imposed on the construction of any building, installation or construction, which needs an appropriate license in the municipal jurisdiction where it is being carried out. The IAE is levied, periodically, on activities related to the promotion, construction and renting of real estate, within the general sphere of business activities.

At the autonomous government level of jurisdiction, real estate is liable to three taxes on one of its forms of economic capacity. The first of these taxes is *Capital Tax (Impuesto sobre el patrimonio -IP-)*, which is imposed annually and levied on the real estate which is part of an individual's economic capital (unless it concerns the taxpayer's habitual residence, which is exempt from tax up to a point, depending on its worth); the *Property Transfer Tax (Impuesto sobre transmisiones patrimoniales -ITP-)*, to which the purchaser is liable, in non-profit transactions, for the private purchase and sale of these assets, as well as for establishing a lease, or real right, on these assets; and the *Succession and Gift Tax (Impuesto sobre sucesiones y dona-*

[2] In terms of the budgetary revenue of the towns, which fall within the national rating system, the IBI represented 31.76% of its tax revenue and 15.2% of the total in 1998 (Source: Ministry of Public Administration, *http://www.map.es*).

*ciones -ISD-)*, where the receiver is liable to tax on gifts, legacies, and like assets received from another individual, real estate being included among these assets.

Real estate is subject to four taxes at state level: *Personal Income Tax (Impuesto sobre la renta de las personas físicas -IRPF-)*, which taxes income derived from renting, presumed income obtained by the taxpayer who is the owner of a property which is not their habitual residence, and the income received as capital gains by the vendor in a transfer; *Corporate Tax (Impuesto sobre sociedades -IS-)*, which applies to taxable income, generated by the transfer of real estate by companies and like organisations, as well as taxable income arising from acquisitions gained from gifts, legacies, etc. to the company's benefit; the *Special Charge on the Real Assets of Non-Resident Entities (Gravamen especial sobre bienes inmuebles de entidades no residentes -GESBIENR-)*, designed to prevent fraud, is levied on non-residents who own property in Spanish territory, but who need not fill out information returns set by the Treasury; and *Value Added Tax or VAT (Impuesto sobre el valor añadido -IVA-)*, which taxes the use of these assets, which affects not only the first transfer of these assets by their promotors, but also certain leasing services (premises, car park lots, etc).

This analysis of the "Property Taxation system" should be rounded off with the Autonomous Governments' rates, together with the fees and special contributions, which take real estate as a more or less direct reference point for their application.

The obvious conclusion that can be reached after studying this situation is that real estate is encumbered with an excessive discriminatory tax burden, when compared to other taxable assets. It is certain that many of the previous taxes are mutually incompatible, and that though the County Councils may waive the right to levy some of the municipal rates, nevertheless one can state that real estate is overtaxed. The problems of double, and even triple, taxation arise from this situation, since different rates are levied on the economic capacity of real estate at the same time[3].

The problem of excessive taxation on these assets is made worse by the assessment process used in the different rates. The assessment system which exists is incoherent, not only in that its norms are not sufficiently interconnected, but also in the lack of clarity in the legal definition of some of the concepts used as values. Due to this, the taxpayer faces great uncertainty as regards legal matters and, in some cases, is not aware of how their property will be assessed administratively. Therefore, taxpayers may lack the crucial knowledge of what their fiscal obligations will be.

[3] For further information consult P. PERIS GARCÍA: *Bienes inmuebles urbanos e Impuesto sobre la Renta y el Patrimonio* (*Urban real estate, and Income and Capital Tax)*, Tecnos, Madrid, 1998, pgs. 63 and 64.

The assessment system of the entire fiscal rates system needs to be reappraised so that it is sufficiently coherent and, thus, the necessary legal certainty may be guaranteed for the taxpayers involved, in every tax event.

## 2. Real Estate Assessment in Tax: The present situation and proposals for improvement.

### 2.1. Preliminary considerations.

#### 2.1.1. The concept of taxable value.

Tax regulations do not have a generic definition of what should be understood by a taxable value. Notwithstanding this, by examining the various accepted uses of the term and fitting them into the scope of our study, we can take it to mean the quality of assets that allows them to be used or to provide a certain power of exchange, which moreover facilitates a comparison of assets, above all if the same unit of measurement is used for said comparison, the monetary unit being the best for this task.

In short, in keeping with the few studies that have been carried out in this area[4], the taxable value can be termed as the fruit of the usefulness of the property in question, which may be expressed through ownership, earnings, or the power of exchange.

Within this generic concept of taxable value, regardless of the dilemma of whether it is up to date or whether it applies only to one tax, all concepts used in the various forms of taxation to monetarily quantify the taxable amount are compiled[5]. It is at this point that we must consider some terminological confusions that arise.

The first confusion concerns the lack of distinction between the concepts of value and price. As far as the definition of price for taxable value is concerned, we should take this to be one of the possible measurements of taxable value. To be exact, it can be considered as one of the several specific values which indicate the power of exchange of an asset at a given moment, although it is not fully identified with the more general concept of value which is used.

The concept of cost, in its widely-accepted meaning, tends to be used in the same way as value. We think that, in reality, cost, like price, is one of several specific values which are used

[4] See L. CAMPOS SENTIS: "Criterios de valoración de bienes en las normas de la Comunidad Económica Europea y españolas", Noticias CEE-CISS ("Asset evaluation criteria in the European Economic Community and Spanish regulations", EEC news-CISS), 1988 nº 43-44; M.CARROBÉ GENÉ: "Problemas de valoración en Derecho Financiero y Tributario", Revista de Derecho Financiero y Hacienda Pública ("Evaluation Problems in Financial and Tributary Law", Financial Law and Treasury Magazine) 211/XLI, 1991, pg. 54; and P. PERIS GARCÍA: "La valoración de los bienes en el Ordenamiento Tributario Español", Revista Valenciana de Hacienda Pública Palau 14 ("Asset Evaluation in the Spanish Tax Ordinances", Public Tax Office Valencia Magazine, Palau 14), nº 22, pg. 23.

[5] A. ANGULO CASCÁN´s analysis on assessment material criteria is interesting: *Valoración fiscal de accio-*

to estimate the asset's capacity for exchange. To be precise, we understand cost as the value most directly related to the transferred asset's components and their respective prices: that is to say, the asset value in terms of its production, the price of its components and the labour used in its construction, without including the manufacturer's profits, which when added to said cost would give the sale price.

#### 2.1.2.Taxable value, gross tax base and economic capacity in Real Estate Taxation.

The fact that real estate is considered as being liable to tax is due to its economic capacity, which should be taxed. Economic capacity is measured by the gross tax base, which is normally represented in monetary units, and the tax payable is decided by applying a tax bracket.

Real estate assessment, together with the calculation of the gross tax base and the corresponding tax payable, are two distinct processes. It is important to highlight this difference since a connection between the property's value and the gross tax base of the tax which is levied on it does not always exist. The asset assessment is usually an indispensable preliminary stage in the calculation of said base, which is determined by the result of the assessment. In this sense, what usually happens is that the value is taken as a reference point to quantify the taxable event as it is part of a whole which determines the gross tax base.

Equally, the real estate's taxable value may be used in other situations, either as a unit of comparison or as a threshold limit, below which it is tax exempt.

In short, the assessment of these assets, when liable to tax, will be the basis used to calculate the exact amount of tax and the assessment value will be the basis for deciding which assets are liable to tax (income, the value of the economic capital, costs of usage etc.).

### 2.2. Real estate assessment in the Spanish tax system.

Because of the situation that taxable real estate finds itself, it is the task of the legislator to establish reference to one value or another in order that the property be assessed. Seen in this light, the asset, from the tax point of view, is either in a static situation, in the taxpayer's capital or in a dynamic situation, that is, in the process of exchange between individuals, and is liable to different taxes. Moreover, in the first case, the owner may either use it for personal ends or exploit it on an individual or corporate level for economic gain[6].

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*nes, bienes y derechos (Fiscal Assessment of shares, assets and rights)*, Marcial Pons, Madrid, 2000.

[6] According to P. PERIS GARCÍA asset value, decided by its use, or potential use, can be broken down into three, more specific types of value: if the asset is for usage or consumption, we will have the usage value, if it is of earnings, we will have the earning or income value; and if it is used for sale, the disposal value or market value.

In the situations liable to tax referred to above, the asset should be assessed and the assessment value which is used in the taxes levied should bear a direct relation to said situations, if the legislator desires the taxable event and the gross base tax in each tax to be consistent with each other.

We now turn to an analysis of this tax assessment as regards the taxable asset, so as to determine if such consistency exists, and if it does not, propose the actions necessary to implement it, and thus improve the guarantees for the taxpayer in the assessment of this asset.

### 2.2.1. Asset assessment as a definitive part of the owner's capital.

In this section we can distinguish, in turn, between taxes levied on the real estate itself and taxes which consider the property in the light of its use or the earnings it generates, where tax is levied on said earnings and use.

There are three types of tax in the first group: the IBI, the GESBIENR, and IP, taxes enacted on ownership of real estate[7], regardless of its usage, or end purpose. Moreover, we can also consider here, IRPF, to the degree that it taxes the real or presumed revenue that a property generates, or may generate, for its owner as part of in their capital.

Not only the IBI, but also the GESBIENR, are taxes which come into play when real estate ownership has several facets (principally ownership and real rights). Here, the assessed value[8] is used to evaluate the taxable asset.

The assessed value is an administratively set value of quantity for each individual piece of real estate and is computed by a specific procedure with numerous ramifications. Information on these assets is obtained to form a database from the Land Registry Office, which registers all the main characteristics of property for towns. Overall studies of the assets in question are used in this assessment process, as well as homogenous criteria and national legally defined objectives. One of the basic premises in specifying the assessed value is its reference to and grounding on market value, which operates as a legally defined base and insurmountable limit, ensuring that the assessed value has a real basis.

In actual fact, the assessed value encompasses two administratively differentiated values, each computed by a different procedure, which aim to distinguish between the economic capac-

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*Bienes inmuebles e impuestos sobre la renta y sobre el patrimonio (Real Estate, and Income and Capital Tax),* ob. cit. pg. 165.

[7] Or the possession of certain rights or certain administrative concessions regarding them, which we shall not examine.

[8] In 1999, the assessed value of the 25,897,930 urban units existing in the 7,579 Spanish municipalities rose to 676,120.47 euros, the average assessed value for each urban unit being 26,107.97 euros. (Source: Land Registry Head Office, *http://www.catastro.meh.es*).

ity of the class of assets they apply to. They are the assessed value for urban assets, and its counterpart, for rural property.

The first has been highly developed by means of statutory norms[9], backed up, in turn, by ministerial regulations[10], which contrasts with the lack of a parallel regulation for the latter, which refers to rural assets. This continues to be governed by a transitory set of rules[11] which uses real estate data compiled before 1990 to capitalise assets, very out of touch with the reality of the current rural property market, which the assessed values should use as a reference.

Apart from the inadequate situation regarding rural assets, we conclude that the assessed value is suitable for quantitatively evaluating taxable real estate in a static ownership situation, insofar as it is a homogenous, administratively determined value, and fluctuates less in terms of specific prices. Furthermore, it is based on reality, since it is obtained by closely tracking market value, whose value is obtained through market studies, carried out by the competent authority for calculating assessed value[12], where market tendencies and prices are analysed.

IP, like the aforementioned taxes, is levied on real estate ownership as part of an individual's capital. Therefore, as it considers these assets to be in a permanent situation, they are assessed using the highest of a set of disparate values, all of which are designed to aid tax collection[13].

The assessed value and the value established after taking into account other taxes (ITP and ISD, depending on the asset's origin) are both of an administrative nature. The others, mutually exclusive, are price and a mutual exchange of assets or value of the acquisition, which are based on reality and established with real, monetary amounts, irrespective of administrative criteria.

We have previously referred to the assessed value, therefore we will now centre on the administratively established value, which is no other than the indefinite real value.

This value considers a specific fiscal value in a single operation, and is used by the Administration for comparison with the amount to be assessed that the tax payer may declare in their income tax return, which would be the amount due if it were a non-profit making transfer

[9] Royal Decree 1020/ 25th June 1993 (*Real Decreto 1020/1993* ).

[10] Ministerial Order of 5th July 2000 and Ministerial Order 18th December 2000.

[11] 2ª Transitory Provisions of the Regulatory Law of the Local Tax Offices (*Ley 39/1988* -Law 39/ 28th December 1988).

[12] Land Registry Head Office *(Dirección General del Catastro),* a state body, with the corresponding local branches.

[13] In 1999 the urban real estate liable to this tax amounted to 109,979,36 million euros, and the rural real estate amounted to 5,172.06 million euros, out of a total of 317,302 million declared in the same. (Source: 1999 Tax Administration Report, *http://www.minhac.es*).

operation, but which would not be completely matched if it were transfer operation for profit.

The legal imprecision of this term, has meant that both the taxpayer and the Authorities have tried to clarify it and, as a last resort the courts, which have had to settle the disputes between the aforementioned parties. Doctrine and jurisprudence try to link, or even match, it to other existing concepts of value: actual price, market price and intrinsic value are some of the terms which try to assimilate the concept of real value. However, scholars[14] usually accept market value as an equivalent of the real value.

Market value, although also legally imprecise, presents less uncertainty than the real value. We can define it as the monetary amount that a buyer should pay for a property at any given moment, taking into account that, it being a theoretical value, we are concerned with a transparent market where free play between supply and demand has been established, and where there is a willing seller and buyer, neither being under compulsion to buy or sell[15]. Market value can only be established by using concrete statistically and econometrically-treated market data and market prices as a basis.

IP[16] also takes into account other values such as price, mutual exchange of assets and the acquisition value. Although, legally, they fit into the same framework as regards tax, they are not concepts which agree with each other, being moreover mutually exclusive. Price refers to what is paid in a non-profit making operation, that is to say, an exchange of money; by mutual exchange of assets we can understand non-monetary exchange, as would be the case in exchange in kind, even though it must be quantified monetarily; the acquisition value must be understood as a wider concept than the previous two, as much for non-profit as for profit-making transactions, in which, apart from the two aforementioned values (or when the real value/ market value is relevant) additional costs are included, inevitable in an exchange, which increase

[14] Among others: R. CALVO ORTEGA and others: *La fiscalidad de las sucesiones y donaciones* (*The taxability of succession and gifts)*, Lex Nova, Valladolid, 1989, pgs. 55 and 347; F. POVEDA BLANCO: "La comprobación de valores de los bienes inmuebles transmitidos: un problema en vías de solución", Revista Valenciana de Hacienda Pública Palau 14 ("The value assessment of transferred real estate: a problem in the process of being solved", Public Tax Office Valencia Magazine, Palau 14), nº 22, pg. 63; A. NAVARRO FAURE: "Facultades de la Administración Autonómica en España en materia de comprobación de valores", Revista Valenciana de Hacienda Pública Palau 14 ("Autonomous Administration powers in Spain concerning the verification of values", Public Tax Office Valencia Magazine, Palau 14), nº 28, pgs. 211 and following; A. ANGULO CASCÁN: *Valoración fiscal de acciones, bienes y derechos* (*Fiscal assessment of shares, assets and rights)*, ob. cit., pg. 29.

[15] Mª. L. OCHOA TREPAT: "Reflexiones sobre la repercusión de la nueva Ley 8/89 en el Impuesto Inmobiliario", Revista de Hacienda Autonómica y Local ("Reflections on the repercussions of the new Law 8/89 regarding Real Estate Tax", Autonomous and Local Tax Office magazine), nº 57, 1989, pg. 379. The IRPF legislation 40/ 9th December 1998 (*Ley 40/1998*), article 41, specifically defines the market value as the "mutual exchange of assets which is agreed between different parties". The legislation of 43/ 27th December 1995 (*Ley 43/1995*), regarding IS (article 15.2), uses similar terms.

[16] For a detailed analysis of the same consult J.E. VARONA ALABERN: *Impuesto sobre el Patrimonio: valoración de bienes inmuebles (Capital Tax: real estate assessment)*, Lex Nova, Valladolid, 1999, pgs. 89 and following.

the cost of the real estate acquired, (rates, registry office expenses etc). One of these values will appear, to the exclusion of the other two, in any transaction (non-profit making, profit-making, with mutual exchange of assets, monetary or in kind, with or without additional expenses) that we consider.

The use of the highest value of this group, for the assessment of real estate in the IP regime, merits criticism, given that it directly undermines the necessary coherence which should exist between the taxable event and the gross tax base of the tax, furthermore distorting the assessment of real estate in some situations[17]. Since IP pertains to capital, using transfer operations values to evaluate real estate in a static situation engenders a practice contrary to the spirit of this tax. Hence, we consider the use of these values, more properly pertaining to exchange, inappropriate and propose that they should be discontinued and replaced by the assessed value as the only proper measurement of capital value for this tax[18].

Real estate is considered, within the IRPF guidelines, in terms of how the income is produced, depending on what the legislator considers it may produce. Both transfer and ownership, translated into terms of the income generated or possible income, are liable to tax. In the second situation, the property is categorised in terms of its connection or not to a specific activity and, in this latter case, a distinction is made between leased and non-leased real estate. To put it another way, a distinction is drawn between real estate which produces capital earnings or losses, revenue from business activity, earnings from real estate capital and fictitious imputed real estate income.

Our attention will centre on the latter, insofar that to verify the presumed income one must use the assessment of the real estate in question[19] as a starting point. The assessed value is used to do this and due to the obligatory nature of the tax [20], is calculated as a percentage, based on the calculation date set by the Land Registry Head Office, to determine taxable income[21].

Although the existence of presumed revenue in IRPF does not coincide with the principle of taxing specific, real income which should govern tax, we believe that using the Land Registry

[17] In the case of postponed payments in certain real estate transfers.

[18] P. PERIS GARCÍA expresses the same opinion in *Bienes inmuebles urbanos e impuestos sobre la renta y el patrimonio (Urban real estate, and Income and Capital taxes)*, ob. cit. pg. 222.

[19] This situation mainly affects urban assets which are not the habitual residence, are not being rented, or are not under construction.

[20] Income earned by an individual.

[21] 3,206.78 million euros were declared as net earnings from owner occupied urban real estate in 1999, as opposed to 5,232.06 as revenue from leased property, within a common gross tax base of 213,276.09 million. (Source: 1999 Tax Administration Report).

Office assessed value to establish the said revenue is appropriate. This is so because it is the real estate, as a static part of the owners´ capital, which is being taxed, based on the presumption that it indicates an added, taxable, economic capacity. Therefore the legal decision to use the assessed value as an assessment criteria, which monetarily quantifies the real estate as a static part of the capital seems logical inasmuch as this is the same rule applied to the IBI and the GESBIENR, and which should be the only one taken into account, in our opinion, in the IP.

### 2.2.2. Asset assessment in a dynamic of exchange.

As we have had occasion to analyse, when the taxes related to real estate are transferred, they are applied in different ways. Some are levied on the transferor, when the transaction generates taxable income (IRPF and IS); others on the receiver, either as a result of the profit gained with this revenue (ISD and IS), or of evidence of its usage (ITP and VAT)[22]. The IIVTNU can also be applied if the urban real estate shows an increase of value or gain as a consequence of the transfer, principally through ownership.

In the latter example, it is the increase in extraordinary value, irrespective of the owner's activities, which is supposed to be taxable and this is established by a complex procedure, taking the assessed value of the land at the time of the transfer as the starting point, and then applying a percentage to it, depending on the time period during which the revenue was gained and the municipal town where it is levied.

The procedure is an authentic juridical fiction which separates the determining of the real increase in value, always giving rise to a positive gross tax base, which does not reflect the taxable economic capacity and whose end result has little to do with the intended gain. Because of this, we think that it is inadequate and should be replaced by one which really compares the values at the start and end of the period in which the increase occurred, taking into account the effect of inflation on them as necessary. These values should be market values taken, as we stated, from an analysis of actual prices, since they are those which best fit the dynamic situation of the real estate regarding the taxable event and allow a more exact verification of the real non-monetary gain, regardless of the owner of the land, since they are produced by real estate prices in their entirety.

In IRPF, income resulting from a change in capital, due to an alteration in its composition, is taxable. Therefore, it is necessary to assess the asset changing hands in order to determine the component of the gross tax base, which corresponds to the same in the tax.

IRPF Regulations lay down general norms[23] to decide the corresponding tax, with a set of specific rules for set cases. Again, these general norms differentiate between whether the difference of capital has been obtained by a transfer or through other means.

When capital is altered by a transfer, the income is obtained by comparing two quantitatively different magnitudes, which are separated in time but which have a common root: the acquisition value and the transfer value, which is analysed in a specific way depending on whether the transfer is profit or non-profit making.

In the non-profit making transfer, the acquisition value is determined by starting from the asset's real acquisition price, that is to say, the price paid in the acquisition, which is augmented by investments and improvements undertaken, as well as expenses (such as amortisation, if the asset were leased), and taxes directly related to the transaction, and paid by the purchaser, when necessary. To this acquisition value, several coefficients are applied in order to eliminate income derived from inflation, and which should not be liable to tax.

The transfer value is also based on the real amount paid, or price, being reduced by the expenses and taxes arising from the transfer, which are paid by the transferor. But the market value exists as a minimum limit to the real price, which, not being reached, will take precedence in the tax demands, as an alienation value. This measure is taken in order to prevent fraud in the declaration of the transaction prices.

A profit-making transfer[24], in the form of a gift, is a situation without mutual exchange of assets, hence the real amount, or price, does not exist, and the transfer value should be arrived at through reference to the value taken in the ISD, which as we will see, is the aforementioned real value. This, for the reasons previously stated, can be no other than the market value, to which may be added or subtracted the rest of the investments, improvements and expenses considered in a non-profit making transaction. One must proceed in the same way if the previous purchase was of a lucrative nature so that the purchase value will be the market value, taken together with all the points needed to calculate it and the corresponding coefficients necessary to update it.

In situations in which the capital is altered, but not by a previous transaction (mainly prizes, or uncompensated losses of capital assets), income is established using the market value of all, or part of, the asset, which is incorporated into, or detracted from, the capital.

IRPF assessment, seen in this light, seems sufficient, inasmuch as it uses specific values

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[22] In short, VAT is borne by the end consumer, although they are not, in general, the subject taxed.
[23] Which is what we are analysing.
[24] Which is liable to IRPF.

based on the amounts actually paid in the transaction exchange. Neither do we offer objections to the specific situations which take the market value as a transfer value, whether due to administrative caution or the absence of the real price, as they also appear sufficient and coherent in the situation of the taxable exchange of real estate.

The IS, the equivalent of IRPF for legal bodies, establishes their liabilities, as taxpayers, on the income received. Amongst them can be found the earnings obtained on transferring real estate engaged in business activity, where it is essential to assess them beforehand, in order to quantify them.

If the taxable transfer is of a non-profit making nature, with a mutual exchange involving money, the income is calculated from the difference between the transfer value and the accounting value. By the first, we must understand the real sale price, without indirect taxes, reduced by those transaction expenses borne by the transferor. The accounting value is calculated after reducing the acquisition price or production cost of the asset, by the amounts corresponding to the real amortisation.

In circumstances which are peculiar to acquisition with free title of fixed assets, the acquisition price is determined by using the sale value, which is laid down by the General Accounting Plan (*Plan General de Contabilidad*)[25], which in practice is related to the market value of the asset as a starting point.

In transactions where the mutual exchange of assets is not monetary, where there is no mutual exchange of assets, or in those where only the ownership title of determined assets[26] is changed, the IS norms decree that the transaction value will be the market value, which, in the case of this tax, is decided administratively by a series of clearly laid down methods, which are based on prices existing in the market for like assets.

In the above cases, a correction process using coefficients is used to offset the effects of inflation on the taxed income.

We understand that the way the IS considers the real amount of the transaction, or the cost of the asset, as a basis for determining acquisition and transfer values, as well as considering market value, in specific circumstances, is in harmony with the dynamics of the circumstances of taxable real estate. The only issue meriting criticism is the generalisation of the market value assessment methods used in the norms of this tax, which need to be more clearly de-

[25] Royal Decree 1643/ 20th December 1990 *(Real Decreto 1643/1990).*

[26] Situations is which, from an accounting viewpoint, positive income does not usually exist, and so cannot be computed.

fined, rather than being considered as merely guidelines.

As a complement to IRPF, which taxes the profit-making increase of capital obtained by the transferor in a transfer transaction, the receiver in such a transaction is liable to the ISD. The real estate assessment is determined by the real value, of which we have previously stated that no definition, or performance guidelines to calculate it, exist legislatively. Notwithstanding the general opinion that it should be linked to market value, the reality is that the Administration has the power to query the value declared by the tax payer, thus engendering juridical uncertainty, and giving the assessment an undesirable arbitrariness[27].

This same real value is used in the ITP, which taxes usage as relocation of assets and rights in civil transactions. The problems previously discussed, engendered by said value, also apply to this tax.

We believe the application of the real value in both taxes is appropriate, from the perspective that it can represent no other concept than the market value, even though we think that this evaluative identification should be explained in the appropriate legislation. Notwithstanding this, in the case of non-profit making transactions, where the price is known, and liable to the ITP, it must be this price, and no other concept, which is used in order to quantify the gross tax base, since it is the most adequate in terms of the economic capacity manifested in the transaction[28].

Lastly, VAT, a tax which is applied to the exchange of certain assets when they are the object of use in business or professional transactions, is calculated from the mutual exchange of assets centred in the transaction price, in an exchange situation. On the other hand, in the case that there is no transaction price, as happens with exchanges in kind, the market value of the assets involved is used.

In both cases, the assessment is in line with the tributary considerations of the asset in the dynamics of an exchange situation, the most satisfactory being the consideration of the price as a valuation tool, when it exists in the transaction.

### 2.3. Conclusions.

Bearing in mind the above analysis, we can initially conclude that when it comes to specifi-

[27] The measures established by the Taxpayers´ Rights and Guarantees Law (*Ley 1/1998* - Law 1/ 26th February 1998) concerning the information the Administration has to disclose regarding the value of the transferred property, and others, developed by some Autonomous Communities, are designed to provide juridical security to the taxpayer in this regard.

[28] Without prejudice to possible verification of value by the Administration, as a precautionary measure, tak-

cally quantifying real estate, a single tributary value does not exist, but rather a collection of evaluation concepts, whose definitions are poor or non-existent, whose norms lack internal coherence, and whose methodologies have either been incorrectly developed (or not developed at all), or have significant arbitrary nuances. All this lends itself to juridical uncertainty, felt by the taxpayer when confronted with the difficulty of knowing a priori the fiscal value of their assets. Therefore, a reappraisal is needed of the evaluation process which decides the tax to be levied on real estate.

We can distinguish two groups of taxes, directly related to real estate: firstly, those which consider real estate to be a permanent part of the taxpayer's capital and, secondly, those taxes which consider that real estate enters into the dynamics of an exchange situation.

In the first group, the assessed value is the predominant value, when quantifying the real estate within the gross tax base of the tax, which, in our judgement, is the most appropriate, insofar as it is designed to assess the asset from a static[29] point of view, but based on the reality of the market, being extrapolated from, and related directly to, the market value.

In certain cases, IP assessment, as an exception to the rule, uses other values, other than the assessed value, so we therefore propose that the current situation be modified and that only this administrative value be accepted. In this way, compatibility between the taxable event and the concept of the chosen value will be assured.

In the second group, real estate evaluation as it stands is more complex, since it considers not only the price, but also the market value or the real value, and even the assessed value. To give coherence to this somewhat untidy evaluation process, depending on the information available on the real price in monetary terms, we propose the use of two concrete values: in the non-profit making exchange where the real price is known, this will be the most appropriate value to evaluate the asset[30]; in an exchange where the real transaction price is not known, since it does not exist, or is not determined monetarily, the market value will be the most appropriate value as a specific criteria, by which we can understand the figure obtained from statistically analysing the prices of the market it belongs to. This means that this must be legalised in the tax code.

Having examined the taxes collected in this group, it is essential to undertake certain

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ing the market value as a reference.

[29] P. PERIS GARCÍA considers that the assessed value could be used as a unique fiscal assessment, in the static taxes levied on urban assets themselves, and even in those of a dynamic nature when no mutual exchange of assets involving money exists. "La valoración de los bienes en el Ordenamiento Tributario Español" ("Asset assessment in Spanish Tax Ordinances"), ob. cit., pgs. 42 and 43.

[30] P. PERIS GARCÍA expresses himself in similar terms in "La valoración de los bienes en el Ordenamiento Tributario Español" ("Asset assessment in Spanish Tax Ordinances"), ob. cit., pg. 43.

modifications. The use of a juridical fiction in the IIVTNU to generate an increase shows a lack of coherence between the taxable object and its measurement unit. We believe that it is more suitable to use market values, which are derived from the start and end of the period when the gain was brought about by the labour of the community and which are adjusted to take account of inflation, and so avoid taxing monetary gains. It would be most appropriate to use the specific transaction price in the ITP, so long as measures against tax evasion through legal loopholes were not affected. In another case, the use of the real value would require its legal identification with the market value, derived from the latter's actual prices. In this way, this value should be used in the ISD. Once these two issues have been clarified, the verification of the values corresponding to these taxes would allow greater juridical certainty as it would be more obvious as to what is the right decision.

This assessment framework in the tax code means that real estate fiscal assessment unification is not viable. However, the assessed value can be used as a starting point to determine the market value, due to the numeric related rules which exist between them[31]. We therefore suggest that if the real amount, which reflects the specific value of the asset liable to each tax, is missing, then the assessed value should be taken as the basis from which the specific value appropriate in each case can be obtained, by applying the necessary corrections.

Furthermore, if one takes into account that the stated administrative value is the ideal criteria for real estate assessment in the taxes imposed on a permanent asset, one can take the assessed value as the essential basis in the fiscal assessment of these assets, without it changing the legally expected specific value nor implying the development of tax uniqueness as far as assessment in the fiscal system is concerned.

The use of the assessed value, in this sense, would lessen the uncertainty and the juridical doubt of the individual taxpayer, since it would be a value known beforehand by him or her, whilst at the same time it would improve tax law, by establishing assessment within a homogenous legal framework, co-ordinated at state level. Equally it would improve the effectiveness of the administrative management, and would reduce its costs, also reducing law suits between the Administration and the tax payers, over the controversial verification of values.

In order for assessed value to take its place as the primary building block it would need to be reappraised, principally in terms of its methodology. As a result, when faced with market changes, it would be simpler and more flexible and should be endowed with the legal status

[31] Presently fixed with the RM coefficient, in relation to the market, at 0.5. That is to say, the assessed value will be half that of the market value (Ministerial Order of 14th October 1998).

appropriate to its usage. However, this is a matter that should be considered and developed in future research and studies.