GARRIGUES

bulletin TAX

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May 11, 2012 saw the approval of a new Royal Decree-Law (No. 18/2012) with measures to reinvigorate the Spanish economy, focusing on this occasion on reforming the financial industry and more specifically on the need to clean up credit institutions' balance sheets in relation to impaired real estate assets.

In one new measure, the new royal decree-law adds to the loan loss reserve requirements already set out in Royal Decree-Law 2/2012 and, in another, it provides for the creation of asset management companies to set apart properties that have been repossessed or received in payment of property development and construction debts. And as a tax measure, Royal Decree-Law 18/2012 seeks to eliminate the potential tax costs that usually arise in these kinds of transactions.

To do this, it broadens the reach (effective for all taxes) of the special neutrality regime for business reorganizations (mergers, spin-offs, exchanges of securities or nonmonetary contributions of lines of business or certain assets) to the contributions of assets and liabilities made to these asset management companies in compliance with the provisions of Royal Decree-Law 18/2012.

It also exempts transfers of shares of these companies and of shares of credit institutions affected by combination plans from transfer tax under the "transfers for consideration" heading. In short, the aim is to exempt these cases from the application of the controversial article 108 of the Securities Market Law.

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1. JUDGMENTS

1.1 Corporate income tax. A taxpayer cannot be denied tax relief that was granted to another taxpayer for the same transaction (National Appellate Court. Judgment of January 26, 2012)

The tax inspectors did not allow a taxpayer to take rollover relief on the disposal of a property on the ground that it was not a tangible fixed asset, but rather inventory. The same property had been sold by various taxpayers, co-owners of the property, who had also taken the rollover relief. It so happened that one of the taxpayers had also been audited and that the tax inspectors had allowed the rollover relief, since in this case they considered the property was a fixed asset.

The National Appellate Court concluded that the doctrine of estoppel should apply to this case, thus preventing the authorities from being able to go back on their own acts (unless they are illicit or unlawful), as a limit on the discretion employed in the administrative jurisdiction and to prevent arbitrary decisions.

Consequently, the court ruled that, given that the sale and purchase of the asset had been audited (at another taxpayer) and an uncontested assessment had been issued in which the rollover relief was allowed, it would not be acceptable for another proceeding, even if for another taxpayer and with another team of tax inspectors, to treat the transaction differently for tax purposes.

1.2 Nonresident income tax. Nonresident funds cannot be charged higher withholding tax than resident funds (European Court of Justice. Judgment of May 10, 2012 in joined cases C-338/11 to C-347/11)

In this judgment, the European Court of Justice concluded that French legislation that levies a withholding tax on nonresident investment funds that is higher than that levied on resident funds constitutes a restriction on the EU treaty freedoms (the free movement of capital).

The court held that when determining whether the situations of the funds were "comparable" it was only necessary to take into account the tax treatment of the fund and not that of the shareholders, and that the different treatment of the funds was not justified by the need to ensure a balanced allocation between the Member States of the power to tax or the need to guarantee the effectiveness of fiscal supervision.

Other points of interest in the judgment are (i) that the same treatment is granted to American funds because they are resident in countries with information exchange agreements with France, and (ii) that the temporal effects of the judgment are not limited, not even for statute-barred years.

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It should be remembered that the Spanish legislation was amended effective January 1, 2010, so that, since then, undertakings for collective investment in transferrable securities (UCITS) covered by the EU Directive are taxed in a similar manner to Spanish UCITS. However, this equivalent treatment did not exist before the amendment.

1.3 Nonresident income tax. The application of the reduced 5% rate to dividends under the protocol to the tax treaty with the Netherlands does not require compliance with holding requirements (National Appellate Court. Judgment of February 16, 2012)

In the case analyzed, the withholding tax charged on the dividend paid to a Netherlands entity had been higher than 5%, which is the reduced rate provided for in the protocol to the tax treaty with the Netherlands, applicable where the payee is an entity exempt from corporate income tax (with respect to the same dividends) in the Netherlands. For this reason, the Netherlands entity claimed the relevant refund.

The tax authorities considered that there should be no refund on the ground that to apply the reduced rate, the Netherlands shareholder had to meet certain holding requirements (specifically, those laid down in article 10 of the treaty for the application of the 10% rate).

Basing itself on the view taken by the Supreme Court in its judgment of December 16, 2009, the National Appellate Court held that refund should take place because the only requirement to apply the 5% rate is the above-mentioned requirement to be exempt from Netherlands tax, and therefore there was no holding requirement.

1.4 Nonresident income tax. The ownership of timeshare properties in Spain is determined according to Spanish law (National Appellate Court. Judgment of February 13, 2012)

An Irish-resident company without a permanent establishment in Spain owned timeshare properties for tourist use in Spain. The tax authorities considered that the properties were subject to the rule determining that supplies or loans of assets, rights and services capable of generating income subject to nonresident income tax are presumed remunerated (rebuttable by evidence to the contrary), and therefore they allocated taxable income to the entity.

Against this, the entity contended (i) that its activity was confined to merely holding the properties which had been made into time share properties, (ii) that this holding was only formal in nature, because the real owners were the timeshare members who had the right to use the properties; (iii) and that, accordingly, the members did not have to pay the entity any consideration at all for that use.

The National Appellate Court, on the basis of its own precedent and that of the Supreme Court in its judgment of July 5, 2006, held that the ownership of the properties should be characterized under Spanish legislation, given that the possession and ownership of, and other rights in, the properties, as well as their disclosure, are governed by the law of the place where they are located.

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Therefore, given that, under Spanish legislation, the members of a timeshare club do not hold legal title to the properties, the court concluded that the entity should be considered the true owner of the properties and that, since the properties are used by the members, there is a loan of use by the entity to the members, which entails allocating the relevant presumed amount of income.

1.5 Administrative proceeding. Shifting of joint and several liability for malicious concealment of assets and rights (National Appellate Court. Judgment of February 6, 2012)

A debtor had been granted the right to deferred payment of a tax debt by posting the pledged shares of a company as a bond. When the debtor failed to pay on the dates granted for deferred payment, the tax authorities tried to enforce the bond, albeit unsuccessfully because the company that had pledged its shares had transferred its assets and rights to another company owned by the debtor's family members, a company at which the debtor himself held bylaw positions and which was continuing the business and commercial activity of the first-mentioned company.

As a result of these facts, the tax authorities concluded that joint and several liability should be shifted to the company that had acquired the assets and rights, since it had taken part in a malicious concealment of assets and rights with the aim of preventing the public treasury from collecting the tax debt. The National Appellate Court upheld this conclusion.

1.6 Review proceeding. Implementing proceedings retroactively does not allow substantive defects to be corrected (Supreme Court. Judgment of March 26, 2012)

The tax inspectors reassessed the corporate income tax of a company, applying a rule that was no longer in force. For this reason, the Regional Economic-Administrative Tribunal (the "TEAR") considered that the proceedings should be implemented retroactively for the tax authorities to correct the defect.

In ruling on the above, the Supreme Court recalled in its judgment its view that implementing proceedings retroactively is not a suitable case for correcting the substantive defects of an administrative decision, giving the authorities the opportunity to bring it into line with the law. Accordingly, since the defect was not formal or procedural but rather substantive, and concerns the applicable rule for issuing the assessment, the Supreme Court concluded that the TEAR should have confined itself to rendering the assessment void without returning the case to the tax authorities.

However, the Supreme Court considered that nothing prevents the tax authorities from reassessing a tax where their power to do so has not become statute-barred.

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1.7 Review proceeding. Proceeding for revocation due to patent infringement of the law may be brought by taxpayers (Murcia High Court. Judgment of January 25, 2012)

The taxpayer filed a petition for revocation of an administrative decision, on the ground of an explicit infringement of the law, in that the decision, rendered in a management proceeding had not been issued within 6 months (and therefore the right of the authorities to issue the relevant assessment in that proceeding had expired).

Since the petition was filed with the authority that had issued the assessment and on the basis that a revocation proceeding may only be commenced ex officio, the authorities concluded that the appeal was an optional appeal for reconsideration, and as result dismissed it because it had been filed late.

The Murcia High Court held that, although a revocation proceeding must be commenced *ex officio*, tax law authorizes taxpayers to seek the commencement of this proceeding by filing a petition with the authority that issued the decision, as occurred in this case. Consequently, the authorities should have handled the petition appropriately so that the authority concerned could decide it as it saw fit.

1.8 Electronic notices. The rules on electronic notices do not infringe the rules on tax notices in the General Taxation Law (Supreme Court. Judgment of February 22, 2012)

An appeal was filed against Royal Decree 1363/2010, of October 29, 2010, on the mandatory use of electronic means for notifications and communications by State Tax Agency, one of the grounds being that when applied with Law 11/2007, June 22, 2007, on citizens' electronic access to public services, they disapplied the rules on tax notices in the General Taxation Law.

The Supreme Court held that there was no infringement because, among other reasons, it is a case of there being two ways to give notices: that described in the General Taxation Law and another different way set out in the above-mentioned royal decree. Accordingly, there are two forms of notification, with separate scopes of application, which coexist and do not therefore overlap or contradict each other.

In addition, the court confirmed full legal authorization for the way in which, via regulations, the electronic notices system had been implemented. This authorization was granted in the above-mentioned Law 11/2007.

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2. DECISIONS AND RULINGS

2.1 Corporate income tax. Goodwill derived from the indirect acquisition of companies through intermediate holding companies can be written off (Directorate-General of Taxes. Ruling V0608-12, of March 21, 2012)

In the scenario put forward by the taxpayer, an entity had acquired control over a group, in which some of its entities had been acquired through various intermediate holding companies. It was asked whether it was allowed to deduct the financial goodwill attributable to the shares acquired indirectly, i.e., not just the financial goodwill attributable to directly acquired shares.

In the opinion of the Directorate-General of Taxes (the "DGT"), an interpretation consistent with the law should allow the deduction to extend to the various levels of investments. To this end, it would be necessary to prove, using the consolidated balance sheet or any other means of proof permitted by law, that, at the time of the acquisition, part of the price of the directly acquired holding company unambiguously related to financial goodwill of the indirectly acquired company.

The DGT considered that this interpretation found support in article 21 of the Revised Corporate Income Tax Law (the "TRLIS"), in the Decisions of the European Commission of October 28, 2009 and January 12, 2011, and in the economic truth that investments in nonresident operating companies are often acquired indirectly by acquiring shares in holding companies.

2.2 Nonresident income tax. Most favored nation provision concerning interest is bidirectional (Directorate-General of Taxes. Ruling V0569-12, of March 14, 2012)

The Spain-Mexico tax treaty provides that the maximum withholding tax rate for interest is 10% (where received by a bank that is the beneficial owner of the interest) or 15% (in other cases).

However, the most favored nation provision of the tax treaty sets out that, if during the five years following the entry into force of the treaty, Mexico concludes for the first time a tax treaty with an EU member state in which it restricts its withholding tax on interest (or royalties) to a rate that is lower than that of the Spain-Mexico tax treaty, the lower rate will apply, provided that the higher rate established in the new treaty signed by Mexico is identical to the rate established in the Spain-Mexico tax treaty.

In that five-year period, Mexico has signed a tax treaty with Denmark which sets out a rate for interest received by a bank (5%) which is lower than the rate set out in the tax treaty with Spain (10%). The DGT has drawn two conclusions from this:

- That, in accordance with the most favored nation provision, the 5% rate will apply for this category of income.

- That this rate will apply both to income originating from Mexico and paid to a Spanish resident and to the income originating from Spain and paid to a Mexican resident.

2.3 VAT and insolvency proceedings. Various issues relating to the review of an insolvent party's VAT (Central Economic-Administrative Tribunal. Decision of March 27, 2012)

An insolvency order was issued on a company after a monthly VAT assessment period had begun and before it had ended. The company filed two self-assessments for the month but in the first one it did not pay over any VAT on the understanding that the debt was a prepetition claim.

In subsequent periods, the company received correcting invoices from its suppliers (which amended invoices issued before the insolvency proceeding) in which the originally charged VAT was reduced, but it did not take these corrections into account in its self-assessments (that is, it did not reduce the VAT to be deducted) also on the understanding that the lower VAT to be deducted formed part of the assets available to the creditors.

The tax inspectors reviewed the company's self-assessments. For the month in which the insolvency order was made they issued a single assessment (not two) and considered that the entire debt resulting from the assessment was not a prepetition but rather a postpetition claim. The assessments issued for the subsequent periods included the lower VAT to be deducted resulting from the correcting invoices.

The Central Economic-Administrative Tribunal (the "TEAC") analyzed various points of interest concerning VAT returns of companies in insolvency proceedings and the powers of the authorities in these kinds of situations, concluding as follows:

- That taxable persons, even in insolvency proceedings, must file their self-assessments and pay over the relevant amounts (where allowed according to the classification of the debts). Specifically in relation to VAT self-assessments, it is not valid to "break up" the assessment period when the insolvency order is made, given that the period is always monthly (or quarterly, as the case may be).

- That management and inspection bodies have the power to issue assessments to insolvent parties, in order to properly determine public claims and the claims payable to creditors.

- That, however, the tax authorities are not authorized to classify or determine the legal treatment of the claims resulting from their tax assessments with respect to companies in insolvency proceedings; in other words, they cannot classify a given claim as a postpetition or prepetition claim, since this falls solely within the powers of the insolvency court. The tax authorities have powers, therefore, to assess tax but not to conclude as to whether the debt or claim resulting from the assessment is of one or another nature.

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2.4 VAT. The transfer of a waterfall without assigning the maintenance and monitoring agreement is not a transfer of an independent economic unit (Directorate-General of Taxes. Ruling V0477-12, of March 5, 2012)

The DGT has been holding, when it comes to transfers of facilities for harnessing renewable energy and, in particular for photovoltaic facilities, that the transfer of the assets making up these facilities constitutes a transfer of an independent economic unit and is therefore exempt from VAT, provided that transfer is accompanied by the appropriate technical/administrative support.

In this new ruling, the DGT analyzed the transfer of all the assets of a waterfall used to produce electricity, that is, the land where the fall was located, the machinery and the processing equipment and control panels, the administrative concession and the subrogation to the electricity sales contracts. The transferor did not have any staff to carry on the activity of producing electricity and maintaining the plant, as this activity was outsourced to a third party. The agreement with the third party was cancelled prior to the transfer.

Basing itself on its past rulings and the circumstances of the case, the DGT concluded that this transaction did not constitute a transfer of a totality of assets capable of independent operation in accordance with the terms of the case law of the European Court of Justice, given that the maintenance and monitoring agreement for the plant had not been transferred.

2.5 Transfer and stamp tax. Acquisition of control over an entity as a result of a capital reduction with repayment of contributions to the shareholder that exercises its right of withdrawal is a transaction subject to article 108 of the Securities Market Law (Directorate-General of Taxes. Ruling V0566-12, of March 14, 2012)

A shareholder owning 50% of the shares of a company owning real estate which accounts for more than 50% of its assets came to control the whole of the company as a result of a capital reduction with the repayment of contributions to the other shareholder, which exercised its right of withdrawal.

In this case, the requirements of article 108 of the Securities Market Law for the transaction to be subject to transfer tax under the “transfers for consideration” heading were met since control of the real estate company was obtained, and the party that acquired control was liable to the tax. According to the DGT, in these cases the rule laid down by article 108 concerning purchases of securities in the secondary market does not cease to apply because the company that acquires control has not purchased any shares; the fact that control of the real estate company is obtained as a result of the capital reduction is sufficient to trigger its application.

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2.6 Review proceeding. Economic-administrative claim against assessment should be joined with appeal for consideration against penalty and handled as single economic-administrative claim (TEAC. Decision of March 1, 2012)

A taxpayer contested an assessment by filing an economic-administrative claim, but contested a penalty by filing an appeal for reconsideration. The tax management office in question forwarded the appeal against the penalty to the Economic-Administrative Tribunal so that it could it rule on it together with the other claim. However, the tribunal (i) partially upheld the claim against the assessment, (ii) returned the penalty proceeding to the tax management office so that it could rule on the appeal for consideration, and (ii) ordered the tax management to take the partial upholding of the assessment into account when ruling on the appeal (given that it would lead to a reduction in the penalty).

The TEAC concluded in this decision that, in accordance with the General Taxation Law, the appeal and the claim should have been joined and handled as a single economic-administrative claim.

The TEAC recalled that this rule seeks to avoid decisions being rendered on appeals against the penalty without knowing the outcome of the claim against the related assessment, since it is precisely on the basis of this outcome that the penalty is calculated; this is the only way to protect from issuing inconsistent decisions.

2.7 Inspection proceeding. An assessment issued in the name of an entity that has already been wound up is not void if the entity was the taxpayer of the tax in the reassessed year (TEAC. Decision of March 1, 2012)

The company had been paying tax as a pass-through entity. After it was wound up with liquidation, the tax inspectors reviewed years prior to the winding-up and issued an assessment. The assessment was issued to the already wound-up entity rather than to its shareholders (its successors).

The successors contended that the assessment was void due to "want of a taxpayer", given that it should have been issued to its successors. Contrary to this, the TEAC considered that the assessment was valid because:

- In accordance with the General Taxation Law, the party that triggers the taxable event is the taxpayer and, in accordance with the Corporate Income Tax Law, the taxable event is the obtaining of income. Therefore, since the entity was the taxpayer in the reassessed year, the fact that the assessment was issued in the name of the entity (even if wound up at the time it was issued) does not render it invalid.

- Besides, the proceedings were continued with the successors, so the fact that the assessment was issued against a wound-up company did not cause a denial of due process.

2.8 Economic-administrative proceeding. The taxpayer-requested expert valuation procedure is a challenge procedure of which the taxpayer should be informed and which prevails over any economic-administrative claim that is filed simultaneously (Central Economic-Administrative Tribunal. Decision of March 15, 2012)

A taxpayer filed an economic-administrative claim against a corporate income tax assessment derived from the tax authorities' valuation of certain spun-off assets. The taxpayer stated in the claim that it reserved the right to the taxpayer-requested expert valuation procedure.

The TEAR dismissed the claim but granted the request for the valuation procedure, and ordered for it to be conducted by the tax management office. The chief inspector filed an appeal against the TEAR decision seeking a holding that the valuation procedure did not apply because the corporate income tax legislation did not provide for the right to reserve such a procedure.

The TEAC concluded, as it had in its decisions of February 17, 2010 and June 30, 2011, that:

- The General Taxation Law provides, as a general rule, that taxpayers may request an expert valuation against valuations issued by the tax inspectors, but the right to reserve a procedure it is not established in the corporate income tax legislation, so no reservation may be made in relation to this tax. For this reason, in these cases the taxpayer can only apply for the procedure within the time limits set for the first claim, and may not reserve the right to exercise it when the claim against the assessment becomes final.

- The inspectors should, however, have informed the taxpayer of this procedure, that is, they should have informed it of its right to apply for the procedure, identifying the body with which to file the application and the time limit for doing so and explaining to the taxpayer that it could not be conducted simultaneously with the claim.

  This duty to inform exists because the taxpayer-requested valuation procedure is a challenge procedure, given that (i) the resulting valuation may in fact lead to the confirmation, cancellation or replacement of the original assessment, and (ii) the request for the valuation stays the enforcement of the assessment and the time limit for filing the appeal or economic-administrative claim.

Lastly, the TEAC confirmed that if a taxpayer-requested valuation procedure and an economic-administrative claim are commenced at the same time, the taxpayer-requested valuation procedure will prevail.

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3. LEGISLATION

3.1 New financial reform

Royal Decree-Law 18/2012, of May 11, 2012, on the clean-up and sale of real estate assets in the financial industry, takes forward the reform initiated with Royal Decree-Law 2/2012 aimed at restoring trust in the solidity of the Spanish financial system, which has been weakened by falling asset values in the real estate industry.

Although this royal decree-law deals primarily with corporate/commercial matters, it contains the following tax measures:

- Tax neutrality regime for contributions of assets by credit institutions to asset management companies

  Transfers of assets and liabilities carried out under Royal Decree-Law 18/2012 to form asset management companies now qualify for the tax neutrality regime laid down in chapter VIII of title VII of the revised Corporate Income Tax Law, regardless of whether they fall within any of the transactions defined in articles 83 or 94 of that law.

- Article 108 of the Securities Market Law and transfers of asset management companies and credit institutions regulated in Royal Decree-Law 9/2009

  The subsequent transfer of the shares received as a result of the creation of these companies set up to manage real estate assets will not be subject to transfer tax under the "transfers for consideration" heading.

  This tax exemption is also provided for transfers of shares in credit institutions affected by the combination plans regulated in Royal Decree-Law 9/2009.

- Exemption for income and/or gains from transfers of certain properties

  To kickstart the real estate market, the new royal decree-law makes 50% of income and capital gains from transfers of urban properties acquired for consideration from May 12 through December 31, 2012 exempt from corporate income tax, personal income tax, or nonresident income tax, subject to certain requirements and specific rules for each tax (for nonresident income tax there is no express mention that the assets must have been acquired for consideration).

  For all three taxes, the exemption does not apply where the transferor and the subsequent transferee are spouses or relatives, in a direct or collateral line, by consanguinity or affinity, up to and including the second degree; and where the properties are acquired from, or transferred to, an entity with respect to which the taxpayer or any of the above-mentioned persons are in any of the circumstances provided for in article 42 of the Commercial Code, regardless of their residence and the obligation to prepare consolidated financial statements.

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4. OTHERS

4.1 Housing rental market

At the meeting of the Council of Ministers on Friday, May 11, a preliminary bill was drawn up with the aim of adding flexibility to and boosting the housing rental market. It proposes the following tax measures:

- To improve the tax treatment of SOCIMIs (i.e. Spanish REITs)

  - The period during which developed properties must be rented is reduced from 7 to 3 years.
  - Diversification requirements are eliminated.
  - Income distribution requirements are reduced to encourage reinvestment.
  - Requirements necessary to qualify for trading on a regulated market are relaxed.
  - The minimum capital stock required is reduced from €15 to €5 million.
  - The requirement that debt financing not exceed 70% of assets is eliminated.

  The preliminary bill also proposes that SOCIMIs be taxed according to their income/loss for the year (like any other entity), that the proportion of exempt income be increased from 20% to 25% where more than 50% of the SOCIMI's assets consist of housing units, and that the tax rate be 19%.

- To boost the rental of housing units

  New nonresident income tax exemptions are proposed for income obtained from renting housing units (except in tax havens):

  - 60% for leases, applicable to nonresident individuals, and
  - 100% for EU-resident individuals where the lessee is aged 18 to 30 and has earned income above the IPREM (i.e. the public multi-purpose income indicator).

- Special nonresident levy

  The preliminary bill proposes eliminating the special levy on real estate, which currently amounts to 3% of its cadastral value (except for entities resident in tax havens).

4.2 Tax offense

The preliminary bill prepared at the May 11 meeting of the Council of Ministers also includes amendments to the rules governing tax offenses, including most notably the following:

- To raise the maximum sentence for a tax offense from 5 to 6 years and the statute of limitations period from 5 to 10 years, both of these for a new sub-category of aggravated offense for the most serious acts.

  Specifically, this new sub-category of offense is envisaged for cases where the evaded tax exceeds €600,000, where the evasion has been committed in a criminal organization or group or where businesses, entities or territories are used that make it difficult or impossible to identify the taxpayer or to determine the amount that has been evaded.

- To encourage voluntary disclosure by introducing a mitigating circumstance as a result of remedying the financial detriment caused to the public treasury.

  This would apply where the taxpayer makes a voluntary disclosure within the first 2 months after receiving a court summons and where the taxpayer assists in identifying other responsible parties.

- To facilitate the collection of tax debts by giving the tax authorities the discretion not to stay collection proceedings due to the existence of a criminal proceeding.

- To give greater scope for action where fraudulent schemes are involved. Currently it is necessary to deal with the amount evaded in the entire calendar year, which means that you have to wait until the end of the year to report a tax offense. The preliminary bill proposes making it not necessary to wait until the end of the year where more than €120,000 has been evaded.

4.3 Tax treatment of shareholders and partners of business entities

The treatment of income obtained by shareholders and partners of business entities has traditionally been a controversial issue in various spheres, mainly where the shareholder or partner is a professional and/or member of the board of directors.

In Note 1/12 of the Tax Management Department of the State Tax Agency, of March 22, 2012, concerning only personal income tax, the State Tax Agency attempts to cover the most general or common cases, by providing a number of guidelines to be taken into account, as follows:

- First of all, the note recalls that the concept of earned income is not confined to the income earned under an employment relationship subject to employment law, given that (i) there are types of earned income that do not originate from employment relationships (such as directors' income), or (ii) there are employment relationships that do not generate earned income but rather income from economic activities

(special employment relationship of certain artistes). There are also types of earned income that do not result from services, such as contributions to the protected assets of disabled persons.

- The note also underscores the point that we are dealing with a question of fact that must be assessed by the administrative authorities.

That said, the note distinguishes between:

- Shareholders who are members of managing bodies of Spanish SA companies (public limited companies or corporations) or SL companies (limited liability companies)

  In these cases, the fact of shareholders being members of the managing body does not affect how their income is characterized, as it will be earned income, even in cases where a shareholder's director's relationship prevails over his simultaneous position as an employee under a senior management contract.

  Their income is characterized as earned income regardless of whether or not it is deductible for corporate income tax purposes.

- Shareholders who provide services to the SA or SL company other than the services provided by members of the managing body

  In these cases, the fact of a person being both a shareholder and director does not affect the how their income is characterized either. The service will generate earned income or income from economic activities depending on whether the shareholders organize their work for their own account and have means of production:

  - To ascertain whether they organize the work for their own account, the characterization of their contract is irrelevant; the key factor is whether the requirements for there to be dependence and for them to work for another are met (if so, their income will be earned income). In relation to these requirements:

    - The fact of being shareholders is proof that there is no dependence and they do not work for another.

    - However, the shareholders might not organize their work for their own account. We are again dealing with a question of fact.

    - In any event, where the shareholding is 50% or above, these requirements cannot be deemed to be met.

  - The note stresses that the fact of the shareholders having their own means of production is an essential condition for the income to be deemed income from economic activities. The note also indicates that, in particular, in the case of professional services, the main means of production lies in the shareholders, that is in their competence.

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- Professional partners of professional partnerships

  The note recalls that partnerships are pass-through entities which are not personal income taxpayers but which pass their income through to their partners.

  The nature of this income will be determined by the activity or source from which it originates. This means that partners' income from their work in the professional partnership is not included in their personal income tax returns as earned income or income from activities but rather as income from the partnership via the pass-through mechanism (but taking into account the nature of the income according to how the partnership obtained it).

- Partners who work at cooperatives

  Income from the work performed by the partners is earned income.

4.4 Pharmaceutical levy

The State Budget Law for the year 2005 introduced into Medicine Law 25/1990 the so-called payment concerning volume discounts on sales to the National Health System. Persons or groups engaged in Spain in manufacturing or importing medical products that are supplied in Spain under official national health system prescriptions must make a payment (known as the "pharmaceutical levy") calculated on the basis of the number of sales of the products.

Subsequently, Law 29/2006, on the safeguards and rational use of medicinal products and medical devices, began to refer to this concept as "Contributions for volume of sales to the National Health System" and expanded its scope of application to the parties that supply these products (not only those manufacturing or importing them) and introduced certain other qualifications.

Although the "pharmaceutical levy" has been challenged due its tax-like nature (and its incompatibility, therefore, with numerous statutory and constitutional provisions), the authorities and certain courts have been holding that it is a discount (this issue is currently before the constitutional court). In light of this, it has been asked whether the provision of this discount makes it possible to modify the VAT-able amount of the sales that serve as the basis for calculating the discount, thereby recovering the implicit VAT charge.

The DGT (ruling V0647-12, of March 29) applied the theory of "successive discounts" (referring to the case law of the European Court of Justice as reflected in its judgments of October 24, 1996, case C-317/94, Elida Gibbs, and of October 15, 2002, case C-427/98, Commission v Germany, among others) and concluded that the discounts carry an implicit VAT charge which can therefore be recovered by modifying the VAT-able amount. This requires issuing the relevant correcting invoices, which will be addressed to the distributor but which will be kept by the issuer.

In turn, the DGT noted that these transactions should not be included on Form 347 for transactions with third parties.

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Taking an arguable but already reiterated view, the DGT considered that the taxable person's position with respect to past years can only be adjusted in the VAT return for the period in which the correction should be made or in subsequent returns for a period of up to one year, and not by the procedure for the refund of incorrectly paid tax (for which the legislation provides four years). The reasonable approach, given that the law is silent on this matter, would be for the taxable person to be able to choose either procedure.

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