GARRIGUES

bulletin TAX

2-2013
February, 2013

At the end of October 2012, with a view to supplementing the numerous anti-fraud measures emerging in the course of 2012, a statutory obligation was established to report assets and rights owned and held by residents of Spain and situated abroad.

On January 31, 2013, form 720 was published and will be used to fulfill this reporting obligation. Under one single return, information must be provided on the three types of assets to be reported: (i) accounts, (ii) financial assets (including insurance and term or life annuities), and (iii) real estate and real rights.

The fact that the form must be filed online and cannot be submitted in hard-copy format is important, because readers will recall that the General Taxation Law has established as a punishable infringement not only the failure to file a return, or the filing of a return containing false or incorrect data, but also the use of a method other than that required by the legislative provision to file the return.

Apart from the above, the fact is that the legislation raises numerous doubts over what assets and rights are covered and to whom it applies. In this Bulletin we comment on some of the answers to FAQs posted by the State Tax Agency (the “AEAT”) on its website and on a recent ruling by the Directorate-General of Taxes (the “DGT”) (ruling V0443-13, of February 13, 2013), which establishes that there is no need to report units in foreign collective investment undertakings marketed in Spain. For instance, here are some highlights from the AEAT’s answers:

- Taking a wholly reasonable stance, the AEAT says that in the case of securities traded during the fiscal year, only securities held at year-end need to be reported; however, note that this is qualified by the requirement that the sale proceeds must have been fully reinvested. This makes it difficult to fulfill the reporting obligation if there have been cash outflows from the relevant trading account.

- As in the case of units in collective investment undertakings, there will be no obligation either to report shares in other foreign entities deposited at establishments in Spain belonging to custodian institutions, provided that the custodian institutions are under an obligation to provide information on such shares.

- To calculate the limits excluding the reporting obligation, regard must be had to the overall value of the asset or right, without dividing it by the number of owners or holders.

- Individuals applying the special “inbound expatriates” regime need not file the return.

The fact that this is a new return means that there will be new clarifications on specific doubts as and when taxpayers raise them with the tax authorities.

CONTENTS

1. JUDGMENTS 4

1.1 Direct taxation.- Taxation in Spain of nonresident entities for services provided in relation to the production and management of concerts by a band (Supreme Court. Judgment of December 7, 2012) 4

1.2 Stamp tax.- Liability for stamp tax on second deed recording crystallization of rights already acquired (Castilla y León High Court. Judgment of November 8, 2012) 4

1.3 Tax management procedure.- Certain criteria on reasons for verifying values (Castilla-La Mancha High Court. Judgment of July 23, 2012) 5

1.4 Characterization procedure.- It is not possible to revisit and find certain transactions performed in a statute-barred fiscal year to be a fraud upon the law (National Appellate Court. Judgment of January 24, 2012) 5

2. DECISIONS AND RULINGS 6

2.1 Account revaluation.– Procedure for application (Directorate - General of Taxes. Ruling V0371-13 of February 8, 2013; ICAC. Ruling 5 Spanish Accounting and Audit Institute Gazette 92) 6

2.2 Corporate income tax.- Rental of real estate can be considered a business activity “without premises or persons”; there may also be no business activity even though there are “premises and a person” (Central Economic-Administrative Tribunal. Two decisions of December 20, 2012) 7

2.3 Corporate income tax.– Tax credit for environmental investment can be taken if it arose in statute-barred or inspected years (Directorate-General of Taxes. Ruling V2396-12, of December 12, 2012) 8

2.4 Inheritance and gift tax.- A communication of change of representative with the consequent communication of change of address for the purpose of service of notices tolls limitation period (Central Economic-Administrative Tribunal. Decision of December 13, 2013) 9

2.5 Value added tax.– Modification of taxable amount in claim for uncollectable debt by making a request for arbitration (Directorate-General of Taxes. Ruling V2512-12 of December 20, 2012) 9

2.6 Value added tax.- Rule on actual use in Spain for purposes of determining place of supply of services (Central Economic-Administrative Tribunal. Decision of December 18, 2012. Decision no. 3581/2009) 10

2.7 Obligations to report assets and rights abroad.– Clarification of various aspects (Directorate-General of Taxes. Ruling V0443-13, of February 13, 2013; FAQs on the State Tax Agency website) 10

Hermosilla, 3 - 28001 Madrid - Spain Telephone +34 91 514 52 00 - Fax +34 91 399 24 08

2.8 Inspection procedure.- Burden of proof in case of discrepancy between data obtained from third parties and tax return data rests with tax authorities (Central Economic-Administrative Tribunal. Decision of December 18, 2012) 13

3. LEGISLATION 14

3.1 Special tax on certain lottery and betting prizes: forms 230 and 136 14

3.2 Forms to be used for returns and information on the excise tax on oil and gas, in particular, and on excise and special taxes, in general 14

3.3 Informational return on assets and rights situated abroad: form 720 15

4. MISCELLANEOUS 15

4.1 Events of exceptional public interest: criteria for applying tax reliefs relating to advertising and publicity expenditure 15

1. JUDGMENTS

1.1 Direct taxation.- Taxation in Spain of nonresident entities for services provided in relation to the production and management of concerts by a band (Supreme Court. Judgment of December 7, 2012)

Two Irish companies were paid for services provided in relation to the production and management of concerts by a band in Spain. The issue was whether the payments to them should have been subject to direct taxation in Spain.

It should be recalled for these purposes that:

- In general, business profits obtained by an Irish company are not taxable in Spain (unless they are deemed to be obtained through a permanent establishment) pursuant to article 7 of the Spain-Ireland tax treaty.

- However, paragraph 2 of article 17 of that tax treaty provides that where income in respect of personal activities exercised by an entertainer or an athlete in his capacity as such accrues not to the entertainer or athlete himself but to another person, that income may be taxed in the Contracting State in which the activities of the entertainer or athlete are exercised.

The Supreme Court interpreted paragraph 2 as meaning that the income derived from concert production services (sound, lighting, stage, laser and video effects, and organization or consultancy services for the concerts) was taxable in Spain, since the services were necessarily for the physical performance of the concerts and, in reality, the payments remunerated the band's tour in Spain.

1.2 Stamp tax.- Liability for stamp tax on second deed recording crystallization of rights already acquired (Castilla y León High Court. Judgment of November 8, 2012)

The appellant assessed and paid stamp tax on a deed of acquisition of future rights in land lots under development (the deed did not specify the properties to which the rights related). Subsequently, at the time of allocation of the specific properties over which the development rights had crystallized, the appellant made a self-assessment of the second deed as not being subject to stamp tax, on the ground that it was merely recording the specific allocation of rights that had previously been assessed.

The Castilla y León High Court took the view, however, that the second deed was subject to stamp tax, since it contained an act that was registrable at the Property Registry as a right on a separate sheet. In other words, according to the Court, it was a new registrable act having economic value and, therefore, a new taxable event arose, separate from the taxable event of the first deed. It could not concluded that it was merely ratifying what had already been recorded in the first deed; instead, it was a new allocation of rights in specific properties.

1.3 Tax management procedure.- Certain criteria on reasons for verifying values (Castilla-La Mancha High Court. Judgment of July 23, 2012)

In relation to a procedure to verify the values of certain urban properties that had been transferred as a gift, the Castilla-La Mancha High Court held that:

- The appraisal method used by the tax authorities was appropriate, because it was based on an expert's report (as provided for in article 52.1d) of the General Taxation Law).
- The reasons given for the verification of values were correct, because the reports issued determined the method and sources used to arrive at the value of each of the assets, explaining the operations carried out, the indicators used for each operation, as well as their source and origin.
- The inspection of the outside of the properties (and the photographs taken of the façade) was sufficient for the purposes of appraising the assets, and it was not necessary to inspect the inside, above all in a case where, given the length of time elapsed, it was impossible to ascertain the original state of the various properties. The original state therefore had to be appraised by reference to the general module on age.

1.4 Characterization procedure.- It is not possible to revisit and find certain transactions performed in a statute-barred fiscal year to be a fraud upon the law (National Appellate Court. Judgment of January 24, 2012)

The tax inspectors disallowed the deductibility of certain finance costs as a result of the finding that the transaction giving rise to the indebtedness on which such costs had been incurred was a fraud upon the law, even though the transaction had been performed in a fiscal year that had become statute-barred.

Without embarking on an analysis of whether the transaction had been performed as a fraud upon the law, the National Appellate Court concluded that it was not possible, in the context of an inspection of non statute-barred fiscal years (in which the interest had been deducted) to revisit a transaction performed in an earlier statute-barred fiscal year.

The Court held that the fraud lay, and had to be characterized as such, in relation to events, acts or legal transactions performed as a fraud upon the law, and it was not legally admissible for the fraud to apply solely to the legal and economic consequences of the performance of such acts or transactions.

The Court then added that the fact that the appellant had signed a proposed assessment on an uncontested basis relating to the inspection of fiscal years subsequent to those examined by the judgment did not detract from the reasoning mentioned above, because it was the result of other different inspections.

2. DECISIONS AND RULINGS

2.1 Account revaluation.– Procedure for application (Directorate - General of Taxes. Ruling V0371-13 of February 8, 2013; ICAC. Ruling 5 Spanish Accounting and Audit Institute Gazette 92)

The Spanish Accounting and Audit Institute (“ICAC”) has published a ruling on the accounting aspects of the account revaluation approved by Law 16/2012, of December 27, 2012, and has reached the following conclusions:

- Revaluation is a measure compatible with the historical cost measurement method; a new cost therefore arises that is comparable to the asset acquisition cost (without prejudice to the obligation to include due information on these events in the notes to the financial statements), thereby preventing it from being deemed that there has been a contravention of the principle of uniformity.

- Revaluation will have retroactive accounting and tax effects, on an uninterrupted basis, as from January 1, 2013, bearing in mind that the revalued assets are those included in the balance sheet as of December 31, 2012.

- If the shareholders’ meeting opts for revaluation, it may only do so in due time and form; in other words, within the same time period as that permitted for approval of the 2012 financial statements and after preparation of an ad hoc revaluation balance sheet, since revaluation is conditional on approval by the competent body (the shareholders’ meeting, in the case of corporate enterprises) of the revalued balance sheet.

- From the accounting standpoint, the revalued amount will form part of the asset depreciation/amortization base as from January 1, 2013, while from the tax standpoint, the effectiveness of the depreciation/amortization for tax purposes of the net increase in value will be deferred until FY2015.

- No deferred tax liabilities can be recognized at December 31, 2012, since the carrying amount and the tax base of the revalued assets will be modified in FY2013.

- The one-off tax charge entailed by the accounting and tax adjustment will be recognized in FY2013, when the competent body approves the revaluation balance sheet, with a charge to the account containing the reserve generated by the revaluation.

- The procedure to be followed at corporate enterprises will be as follows:

  - In FY2013, the board of directors will prepare the 2012 financial statements without including the value adjustment in the balance sheet, but disclosing the status of the revaluation process in the notes to the financial statements.

  - Also in FY2013, the shareholders’ meeting will approve the 2012 financial statements without including the value adjustment, and will also approve the relevant revaluation.

- In the 2013 financial statements, the amount of the revaluation reserve will be shown in an item with the adequate breakdown under heading III. “Balance Sheet Equity Reserves.”

  The notes to the financial statements must also disclose the most significant items revalued, indicating their amount, the impact of the revaluation on the depreciation/amortization charge and on income/loss for the year, quantification of the equity account called “Law 16/2012, of December 27, 2012, Revaluation Reserve,” changes in that account during the year, etc.

In line with the ICAC ruling, the DGT has clarified the following in relation to the account revaluation rules introduced by Law 16/2012 (assuming that the financial statements are as of December 31, 2012):

- To implement the account revaluation, a specific ad hoc revaluation balance sheet must be prepared, separately from the balance sheet included in the 2012 financial statements.

- The *ad hoc* balance sheet must, however, have the same year-end date as that of the balance sheet included in the financial statements for the fiscal year serving as reference for the account revaluation operations and must be approved by the competent body within the same period as that for approval of the 2012 financial statements.

- The *ad hoc* balance sheet will be included in the relevant return for the one-off account revaluation tax charge.

- The preparation of the *ad hoc* balance sheet does not mean that the effects of the account revaluation have to be included in the 2012 financial statements; instead, the accounting effects and, therefore, their inclusion in the financial statements of the entity requesting the DGT ruling and of its subsidiaries will take place in FY2013 with the approval of the *ad hoc* balance sheet by the competent body. The *ad hoc* balance sheet will have retroactive effects – in the specific case of the ruling, as from January 1, 2013. The effects will also be retroactive for tax purposes.

- The one-off tax charge will become due when the *ad hoc* balance sheet is approved by the competent body and must be self-assessed and paid over together with the 2012 corporate income tax return.

2.2 Corporate income tax.- Rental of real estate can be considered a business activity “without premises or persons”; there may also be no business activity even though there are “premises and a person” (Central Economic-Administrative Tribunal. Two decisions of December 20, 2012)

The Personal Income Tax Law, to which numerous pieces of legislation refer for these purposes, provides that in order for the rental of real estate to be an economic activity, there must be premises on which the activity is engaged in, and one full-time employee managing it. In theory, according to the literal wording of the Law, these are minimum requirements.

Despite having analyzed the scope and sufficiency of these requirements on numerous occasions, the DGT and the tribunals have not adopted a uniform stance. In its latest decision on this issue, the Central Economic-Administrative Tribunal (“TEAC”) ruled that:

- The requirements that there be one person and premises were merely indicative of the pursuit of an activity.
- It was therefore possible that even if there were premises and one person, an economic activity might not be carried on; or, in the absence of a person or premises, there was an “organization of resources” and, therefore, an economic activity being carried on.

In particular, in one of the cases examined, the TEAC concluded that an economic activity was not being carried on because the premises were not fit for the pursuit of the activity, the employee was hired as an IT expert, and there was no other evidence of the pursuit of the activity.

In the other case, the TEAC concluded that despite having premises and an employee, no economic activity was being carried on because the premises were diaphanous and it had not been proven that an individually demarcated part of the premises was being used for the exclusive pursuit of the activity. As for the employee, the TEAC found that this requirement had not been validly met either, because the activity was, in reality, being managed by an agent of the owner.

2.3 Corporate income tax.– Tax credit for environmental investment can be taken if it arose in statute-barred or inspected years (Directorate-General of Taxes. Ruling V2396-12, of December 12, 2012)

As mentioned in previous bulletins, the DGT has allowed a tax credit to be taken for environmental investments made in prior years and for which a certificate of validation was not sought at the time they were made.

In particular, the DGT ruled that it was possible to take the tax credit in another tax period subsequent to that in which the investments came into operation, if, before the start of the period for filing a tax return for the tax period in which it was sought to take the credit, an application had been made for the issue of a certificate of validation, and so long as the tax credit was taken within not more than 15 years from the end of the tax period in which the investments were made.

In confirming this interpretation (which has gained traction over recent years), the DGT analyzed in this ruling the potential effect of the investments having been made in statute-barred or inspected years, and reached the following conclusions:

Hermosilla, 3 - 28001 Madrid - Spain Telephone +34 91 514 52 00 - Fax +34 91 399 24 08

- An application could be made for the issue of a certificate of validation in a period after that in which the investments came into operation, even if such period was statute-barred, provided that it was borne in mind that the time limit for taking the credit was 15 years from the end of the tax period in which the investments were made. Since the 15-year time limit was originally 10 years (it was extended by Royal Decree-Law 12/2012), the tax credit could be taken on investments made in or after FY2002.

- The fact that the investments came into operation in a fiscal year inspected by the tax authorities did not mean that the above interpretation was inapplicable, since the final nature of the decisions rendered did not, in principle, affect future self-assessments for other years, provided that no contingency related to the genuineness of the investments or other issues affecting the ability to take the credit in the future was disclosed.

2.4 Inheritance and gift tax.- A communication of change of representative with the consequent communication of change of address for the purpose of service of notices tolls limitation period (Central Economic-Administrative Tribunal. Decision of December 13, 2013)

In the specific case heard by the TEAC, the decedent had named a legal entity as her universal heir and additionally left 30% of her estate to a company and an association. The heirs executed a deed of representation and acceptance of inheritance, filing it at the assessment office by the deadline in order for the latter to assess inheritance tax. More than four years later, a provisional assessment was issued, and it was argued that such assessment had become statute-barred. It so happened that in the interim, a communication of change of representative and, therefore, of change of address for the purpose of service of notices had been filed.

The TEAC took the view that the communication had tolled the limitation period, since a communication of change of representative was essential in order to be able to serve all necessary notices for the assessment of the tax.

2.5 Value added tax.– Modification of taxable amount in claim for uncollectable debt by making a request for arbitration (Directorate-General of Taxes. Ruling V2512-12 of December 20, 2012)

Article 80.Four of the Value Added Tax (“VAT”) Law allows the taxable amount to be reduced where claims relating to VAT charged on taxed transactions become wholly or partly uncollectable if the taxable person has sought their recovery by filing a court action against, or having a notary serve a demand on, the debtor, even in the case of claims secured by public entities.

The DGT examined whether this requirement had been met where the contract provided for private arbitration, in which case it would be necessary to take into consideration the provisions of Arbitration Law 60/2003, of December 23, 2003. After analyzing the

arbitration legislation, the DGT pointed out that an arbitration agreement was a substitute for filing a debt recovery action at court, it was in keeping with the principles that both sides should be heard and treated equally, the necessary evidence would be taken in the course of the arbitration, and it would culminate in an enforceable award.

In such circumstances, the DGT confirmed the interpretation adopted in earlier rulings, pursuant to which the safeguards taking the form of the requirement for a debt recovery action to have been filed at court by the creditor in order to modify the taxable amount by reason of the customer's default had to be regarded as complied with where the contract in question included a clause on arbitration, which was actually sought.

2.6 Value added tax.- Rule on actual use in Spain for purposes of determining place of supply of services (Central Economic-Administrative Tribunal. Decision of December 18, 2012. Decision no. 3581/2009)

One entity transferred to another entity domiciled in Andorra SIM cards for cell phones and telephone/SIM card packages which it treated as VAT-exempt exports. According to the contract, the SIM cards could only be used in Spain. The tax authorities took the view that it was a telecommunications service which, in accordance with the provisions of the contract, was actually going to be used in Spain. Accordingly, it was appropriate to apply the exception to the special rule in article 70.Two of the VAT Law, resulting in the service being deemed supplied for VAT purposes in the territory in which Spanish VAT applied.

Against the above, it was argued that although the service was actually going to be used in Spain, it was not subject to Spanish VAT because it was not going to be used by the recipient of the service, but rather by third parties. In other words, the recipient was a trader established in Andorra, but the services was actually going to be used by its customers, which was why the transaction should fall outside the scope of Spanish VAT.

The TEAC relied on the case law of the European Court to conclude that while the service was actually going to be used in Spain, the exception to the special rule had to apply, regardless of who the direct recipient of the service was.

2.7 Obligations to report assets and rights abroad.– Clarification of various aspects (Directorate-General of Taxes. Ruling V0443-13, of February 13, 2013; FAQs on the State Tax Agency website)

Royal Decree 1558/2012 establishes new obligations on the owners or holders of certain kinds of property, assets and rights situated abroad to report them to the tax authorities. These assets and rights include (in newly-inserted article 42.ter.2 of Royal Decree 1065/2007) units and shares in collective investment undertakings, although the DGT has taken the view in ruling V0443-13 that it is not necessary to include in the return units in foreign collective investment undertakings that are marketed in Spain, on the following ground:

- The rationale behind the Royal Decree, as set forth in its Preamble, is to ascertain the assets or rights owned or held by persons or entities resident in Spain and deposited, situated or managed abroad.

- In the case (examined in the ruling) of shares and units in foreign collective investment undertakings acquired by investors resident in Spain through entities marketing such undertakings in Spain or from managers marketing them in Spain under the freedom to provide services and with a representative who is tax resident in Spain, it should be noted that:

  - According to the applicable legislation, the marketing in Spain of foreign collective investment undertakings is subject to a system of prior communication to, or authorization by, the Spanish National Securities Market Commission ("CNMV"), as the case may be. This means (and ensures) that the relevant undertaking is required to meet certain obligations.

  - On the other hand, the legislation requires that the marketing be engaged in through authorized intermediaries and on the conditions established in the legislation, and that the CNMV may require the intermediary marketing foreign collective investment undertakings in Spain to provide periodic information for statistical purposes on the undertakings marketed in Spain, and any other information needed to comply with its supervisory duties.

  - These obligations in the financial area are supplemented by obligations in the tax area (including those of an informational nature), on both entities marketing foreign collective investment undertakings in Spain and representatives designated by managers operating in Spain under the freedom to provide services.

  - In short, where the marketing is engaged in through intermediaries situated in Spain or by managers under the freedom to provide services, it must be deemed that (pursuant to the applicable financial and tax legislation) they occupy a position of relevance vis-à-vis the investor and the Spanish public authorities, from which it follows that they are required to fulfill formal and substantive tax obligations to the same extent as managers and other parties under obligations in respect of collective investment undertakings formed in Spain.

- In keeping with the above, it must be concluded that personal income taxpayers, corporate income taxpayers and nonresident income taxpayers with a permanent establishment in Spain do not need to report shares or units, the holding of which is channeled through the above-mentioned marketing entities, while the securities remain recorded by their holders at those entities.

The AEAT has also posted on its website a number of answers to FAQs concerning the obligation to report assets and rights situated abroad. We highlight the following:

- Subject-matter: assets and rights:
  - There is no obligation to report stock options.
  - There is no obligation either to report shares in foreign companies kept at establishments belonging to custodian institutions situated in Spain, provided that the custodian institutions are under an obligation to disclose information on those shares.
  - Similarly, there is no obligation to report shares or units of foreign collective investment undertakings acquired through entities marketing such undertakings in Spain or through representatives in Spain of managers operating under the freedom to provide services. This has been confirmed by the DGT in recent ruling V0443-13, of February 13, 2013, as commented on earlier in this section.
  - There is also no need to report all securities that cease to be held in the course of the fiscal year and before December 31, where title is no longer held as a result of a sale and the proceeds have been **fully** reinvested in the acquisition of new securities that must be reported.
  - Where a "global or custody account" contains different assets, such as shares, units or deposits, each of them must be reported on an itemized basis.
- Parties to whom the reporting obligation applies:
  - Where an asset or right is formally owned/held by one of the spouses under a community property matrimonial arrangement, both spouses (if they fall within the scope of the obligation as parties to whom it applies) are under the obligation to file a return. In such case, the spouse who is not the formal owner/holder must file a return as the beneficial owner/holder.
  - Individuals resident in Spain and applying the special tax regime for workers assigned or posted to Spain ("inbound expatriates" regime) do not have to file a return.
  - Assets recorded in books of account by one of the owners/holders: an individual is under the obligation to report a bank account located abroad if he/she holds 30% of the account, the account has a balance of €150,000 at December 31, 2012, and the other account holder is a resident entity (70%) that has recorded it in its books of account. In such case, the individual must file a return reporting the total account balance, indicating that his/her stake is 30%, notwithstanding that the balance pertaining to him/her individually is €45,000 (30% of €150,000) and does not exceed the exempt limit of €50,000.
  - Revocation of authority, cessation as account-holder, and changes of residence:
    - An authorized individual in an account at a financial institution situated abroad is under the obligation to file a return if his/her authority was revoked in June 2012 and the balance existing at the date of revocation gave rise to the obligation to file a return at December 31.

- An individual holding a bank account abroad and who has never been under an obligation to report it need not do so when closing down the account.

- An individual need not report a bank account located abroad when he/she ceases to be its holder, if the account is identified and recorded in the books of account of an entity and is closed in the course of the fiscal year. This exemption also applies to an attorney-in-fact, authorized person, or any other beneficial owner of the account.

- However, if an entity filed form 720 in relation to the obligation to report accounts at financial institutions situated abroad because the balance of €50,000 was exceeded, and in another fiscal year the balance did not exceed that amount and it closed down the account, it must file a return.

- If an individual relocates abroad after the beginning of FY2012 and must file a personal income tax return for that year, he/she must also file a return provided that he/she is subject to the reporting obligation.

- Securities to be reported:

  The applicable exchange rate where assets are owned in a currency other than the euro will be the rate at December 31 of the year to which the reported information relates; this will apply to demand deposits/checking accounts in the case of both the average balance in the last quarter and the balance at December 31, or to real estate in the case of acquisition cost. However, in the case of accounts which cease to be held during the fiscal year, regard must had to the exchange rate prevailing on the date on which the account ceased to be held.

  Exchange rate fluctuations must also be taken into account when valuing each set of assets and determining whether they need be reported again.

2.8 Inspection procedure.- Burden of proof in case of discrepancy between data obtained from third parties and tax return data rests with tax authorities (Central Economic-Administrative Tribunal. Decision of December 18, 2012)

In a limited VAT review procedure, the taxable person was notified that the tax authorities had in their possession data furnished by third parties, which indicated that the taxable person had not reported certain sales.

The taxable person did not make any submissions and a provisional assessment was issued increasing the taxable amount by the amount of the sales. In an appeal for reconsideration, the taxable person argued that it had not made the sales, submitting evidence of the transactions that it had actually carried out. In the subsequent claim, the taxable person contended that although it was unable to show that the sales attributed to it did not exist, the tax authorities had the onus of proving otherwise.

In upholding the taxable person's argument, the TEAC concluded that where the tax authorities were going to use information supplied by others to regularize a taxable person's situation, if the taxable person objected to the truth of that information, then the burden of proof would lie with the tax authorities, which would have to demonstrate with other evidence that the data they used were true.

3. LEGISLATION

3.1 Special tax on certain lottery and betting prizes: forms 230 and 136

Order HAP/70/2013, of January 30, 2013, was published in the Official State Gazette on January 31, 2013. The Order approves the following forms to be used for the returns relating to the new tax on lottery and betting prizes:

- Form 230: "*Personal income tax and nonresident income tax: withholdings on payments in cash and in kind in respect of the special tax on certain lottery and betting prizes; corporate income tax: withholdings on certain lottery and betting prizes paid in cash and in kind. Self-assessment*."

  The form must be filed telematically within the first 20 calendar days of each month (or the first 15 calendar days in the case of bank direct deposit) in relation to the tax withheld on prizes paid in cash or in kind in the immediately preceding month, except in the case of self-assessment and payment of the tax for July, which must be made between August 1 and September 20.

- Form 136: *"Personal income tax and nonresident income tax: special tax on certain lottery and betting prizes. Self-assessment"*

  The form must be filed online or in printed format (generated by using the printing service developed by the AEAT) within the first 20 calendar days (or the first 15 calendar days in the case of bank direct deposit) of April, July, October and January in relation to prizes collected in the immediately preceding quarter.

3.2 Forms to be used for returns and information on the excise tax on oil and gas, in particular, and on excise and special taxes, in general

As a result of the changes introduced in the course of last year in relation to the integration of the tax on retail sales of certain oil and gas products into the excise tax on oil and gas and the recent amendment of the Excise and Special Taxes Regulations, Order HAP/71/2013, of January 30, 2013, amending Order EHA/3482/2007, of November 20, 2007, approving certain forms and revising and updating certain management rules in relation to excise taxes on production and the tax on retail sales of certain oil and gas products, was published in the Official State Gazette of January 31, 2013.

Among other matters, the Order regulates the following:

- The oil and gas excise tax return will be filed on form 581 (instead of form 564). However, the reference to the previous form (564) is preserved, given the possibility of filing supplementary or rectifying returns for periods that have already been assessed and paid.

- A new form 582 is created ("*Excise tax on oil and gas: regularization for forwarding of products to another autonomous community*") and must be used by parties having the status of forwarders.

- The obligation to simultaneously file form DDC disappears as a result of the design of the new form 581 for cases where centralized filing is used for various establishments, as it directly includes a breakdown by establishment.

- Form 590 "*Excise taxes on production. Application for refund due to export or dispatch*" is adapted to the revamped excise tax on oil and gas and to the new wording of article 7 of the Excise and Special Taxes Regulations.

3.3 Informational return on assets and rights situated abroad: form 720

Order HAP/72/2013, of January 30, 2013, approving the informational return on assets and rights situated abroad was published in the Official State Gazette on January 31, 2013. As established in the Order, readers should note that the same return will be used to report (i) accounts, (ii) securities, rights, insurance, and term or life annuities, and (iii) real estate and real rights.

The Order entered into force on February 1, 2013 and will apply for the first time to the informational return to be filed for FY2012. On this occasion, the time period for filing will run from February 1, 2013 through April 30, 2013 (instead of between January 1 and March 31, as will be the case in future years).

The return must be filed telematically. In this connection, readers are reminded that Law 7/2012 establishes specific penalties if returns are not filed by this method.

4. MISCELLANEOUS

4.1 Events of exceptional public interest: criteria for applying tax reliefs relating to advertising and publicity expenditure

A draft Order is being prepared to establish certain interpretational or clarifying criteria for the rules on tax incentives derived from advertising and publicity expenses incurred in connection with events of exceptional public interest.

Hermosilla, 3 - 28001 Madrid - Spain Telephone +34 91 514 52 00 - Fax +34 91 399 24 08

In particular, the draft Order includes a Manual which establishes the criteria on how to calculate the 15% deduction base. To do so, it is necessary to:

- determine the advertising content of each medium used by the collaborator;
- quantify or value the advertising content of the medium used, i.e., the projected multi-year expenditure on advertising and publicity;
- determine the degree of compliance with the requirement of essentiality, pursuant to which the deduction base may be the total expenditure (essential content) or only 25% (non-essential content).

The Manual will also list the advertising media used by collaborators to publicize the event, including those regarded as being of a purely advertising nature or others whose main purpose is not to advertise the event, and exhaustively define the requirement of essentiality for each of them.

This Bulletin contains general information and does not constitute a professional opinion, or tax and legal advice.

© January 2013. J&A Garrigues, S.L.P., all rights reserved. This work may not be used, reproduced, distributed, publicly communicated or altered, in whole or in part, without the written permission of J&A Garrigues, S.L.P.