December 2014

Law 31/2014, of December 3, 2014, amending the Corporate Enterprises Law to enhance corporate governance, has brought about a significant overhaul of Spanish corporate/commercial legislation, but also has important tax implications.

First of all, the Law places the control of tax risks within the responsibilities of the boards of directors of listed companies. The board of directors of a listed company may not delegate the determination of the company's policy on tax risk control and management and the supervision of internal information and control systems. The law also tasks the audit committee with supervising the effectiveness of internal control of the company, its internal audit and its risk (including tax) management systems. The audit committee must also give prior notice to the board of the creation or acquisition of investments in special purpose vehicles or entities domiciled in countries or territories classed as tax havens, as well as of transactions with related parties. Lastly, information must be included in the annual corporate governance report on the company's risk (including tax) control systems.

These provisions, aimed at limiting the tax risks borne by companies, only affect, as noted, listed companies but their effects may be considered to extend, in some way, to all commercial companies, given the clear connection that these duties have with the provisions of the Commercial Code on the liability of legal entities and the relationship between that liability and the existence of corporate compliance systems at the entity.

In addition, the reform has a determining effect on the setting of boardroom and senior management pay, which will need to be taken into account given the recent legal change (in the new Corporate Income Tax Law) according to which directors' remuneration for performing senior management or other tasks under an employment contract with the entity will not be treated as gratuities. In practice, the tax authorities have been examining this aspect closely in their audits of companies.

Lastly, the corporate/commercial law reform reinforces the directors' liability and enshrines the principle of differentiated liability taking into account the tasks conferred on each director. This principle does not appear to square with the principle usually followed in the area of tax liability, which rests on the equal and joint and several liability of all the directors.

Contents

I. Judgments

1. *Human rights.- The European Convention on Human Rights precludes imposing administrative penalties for facts that have already been the subject of a criminal proceeding (European Court of Human Rights. Judgment of November 27, 2014)*

The case tried by the court was that of a Swedish individual whose tax liability was revised upwards because she had not declared all of her income, which gave rise to a number of tax surcharges imposed under Swedish law. In addition, a criminal conviction was imposed on the individual for deficient bookkeeping.

The European Court of Human Rights (ECHR) analyzed the compatibility of tax surcharges and criminal penalties in relation to the same facts and, specifically, whether there had been a violation of article 4 of Protocol No. 7 of the Convention. The court concluded that the scope of this article covers both the right not to be tried and the right not to be punished for the same facts and, therefore, in a case such as this one in which an administrative penalty was finally imposed on the individual for the same facts of which she had been acquitted in the criminal jurisdiction—as she was only convicted of a bookkeeping offense—there was in fact a violation of article 4 of Protocol No. 7 of the Convention.

The ECHR therefore concluded that:

(i) criminal and administrative penalties may be imposed where the facts are not the same, as occurs in the case of a criminal penalty derived from a bookkeeping irregularity and an administrative penalty derived from an incorrect tax return;

(ii) but they may not where the facts are the same. Specifically, in the case analyzed, it concluded that there had been a violation of the Convention because the administrative penalty was imposed after the individual had been acquitted in a proceeding concerning a criminal penalty based on the same facts, thereby violating the *ne bis in idem* principle from the standpoint of the proceeding that was conducted to impose the administrative penalty.

2. *Tax on economic activities.- The increase in the situation multipliers in the Ordinance must be clearly justified (Basque Country High Court. Judgment of April 14, 2014)*

In the tax ordinance of the Vitoria Municipal Council in which the tax on economic activities was regulated, the situation multipliers applicable to the tax charge were increased. An appeal was filed against the ordinance on the grounds that the reasons for the increase had not been sufficiently supported, given that the criteria that had been followed were generic, detached from reality and vague.

The court rendered void the articles of the ordinance that had been appealed given that, based on the case law of the Supreme Court, it considered that the specific data and elements, both tangible and objective, that would substantiate the reasons for the modification had not been described and that it was not sufficient to put forward general reasons such as those included in the report approving the ordinance, relating, for example, to the trend in economic activity, new shopping centers and spaces, the trend in trade, the new collective valuation procedure, etc.

The court also noted that the contents of the supporting report for the increase in value did not square with the current social circumstances because in the context of a notably serious economic crisis, in which there was an extremely high number of closed businesses, of empty

commercial premises, etc., the increase in the tax should not have been supported on the basis of the trend in economic activity or by new economic centers and spaces. The court went on to say that, in fact, what the economic situation determined was not the need for an increase in the multipliers but rather for them to remain unchanged or even to be reduced.

3. *Tax on the value of electricity output.- Constitutionality of the tax (Constitutional Court. Judgment of November 6, 2014)*

The Official State Gazette of December 4 published the Constitutional Court's judgment of November 6, 2014 in which the court resolved action for unconstitutionality number 1780-2013 which had been brought by the Cabinet of the Andalucía Autonomous Community Government regarding several provisions of Law 15/2012, of December 27, 2012, on tax measures for energy sustainability, of Royal Decree-Law 29/2012, of December 28, 2012, on improving management and welfare protection in the special system for household employees and other measures of an economic and social nature, and of Royal Decree-Law 2/2013, of February 1, 2013, on urgent measures in the electricity system and in the financial sector.

Specifically, the issue of unconstitutionality concerned articles 4, 5 and 8 of the above-mentioned law which regulates, respectively, the taxable event, the taxpayers and the rate of the tax on the value of electricity output.

It was contended that the tax does not establish differences among the different producers of electricity and, in particular, between those who use renewable energy sources and those who do not, thereby affecting the very viability of those renewable sources, which would entail a breach of the principle of legal certainty.

The Constitutional Court set aside the action for unconstitutionality on the following grounds:

- First of all, because the complaint lodged by the Andalucía Autonomous Community Government related to a claim of unconstitutionality for want of differentiation, when the principle of the court is that art. 14 of the Spanish Constitution only prohibits an unfounded or discriminatory distinction, but does not enshrine a right to unequal treatment, nor does it protect an absence of distinction between cases that are not the same, because there is no subjective right to different legislative treatment.

- Second, because the contested provisions do not overstep the legislature's power of configuration, and nothing prevents the legislature from using taxes as an economic policy tool in relation to a certain sector, that is, with regulatory or non-fiscal aims.

  For the court, the generalized application of the tax in question stems from an option available to the legislature which, subject to observance of the constitutional principles, has broad latitude to establish and configure the tax, latitude which may not be constrained by requiring a differentiation which is not constitutionally mandatory, no matter how advisable or appropriate it seems to the plaintiff, nor by expectations of maintaining the pre-existing tax regime—which, in and of itself, would prevent any legislative innovation—and would not be consistent with the dynamic nature of the legal system.

- In short, the Constitutional Court concluded that the contended reasons were *"simply an expression of a legitimate criticism of the provisions approved by the parliament which may not be addressed within the scope of an action for unconstitutionality"*, given that the law at issue easily falls within the scope of the legislature's powers of configuration and the legislature is entirely free to choose between different possible options, within the scope of the Constitution.

4. Administrative procedure.- The authorities must evidence that they have informed the taxpayer of his inclusion in the electronic notice system (Madrid High Court. Judgment of July 3, 2014)

In this case, an assessment was notified to the taxpayer's e-mail address. An economic-administrative claim was filed against the assessment, but was not admitted on the ground that it was late. In a subsequent appeal against this non-admission, the taxpayer contended that he was not aware of the electronic notice because he had not been informed of the registration of his e-mail address and that for the purposes of the proceeding in question the notification date was different.

The Madrid High Court upheld the appeal on the ground that, given that the authorities had not informed the taxpayer of his registration with the electronic notice system, the notification of the assessment to the authorized e-mail address was not valid for the purposes of computing time periods. The court emphasized in this respect that the authorities were responsible for evidencing that the addressee of the notice was aware of his inclusion in the authorized e-mail system.

The court also noted that, in these cases in which this fact is not proven, the valid date for computing time periods will be that stated by the appellant, that is, that on which, once he has approached the State Tax Agency, he was notified of his inclusion in the system and assigned an e-mail address. Therefore, the claim could not be considered as having been filed late.

5. Review procedure.- Defects in previously produced documentation may be rectified in an appeal (Supreme Court. Judgment of November 10, 2014)

The Supreme Court analyzed a case in which the taxpayer provided a managing body with scaled plans of certain properties, as support for the area that should have been computed for the purposes of the tax on economic activities. The tax authorities did not accept this evidence on the ground that it was insufficient. The competent Regional Economic-Administrative Tribunal (TEAR) reiterated the insufficiency of this evidence on the ground, among others, that the plans had not been signed by a competent professional or approved by the relevant professional association and had not identified the areas of the various zones into which the floors of the properties were divided.

In an appeal to the Central Economic-Administrative Tribunal (TEAC), the taxpayer produced plans that met the requirements imposed by the TEAR, but its claim was dismissed yet again; this time because, according to the TEAC, these plans should have been included in the proceeding at first instance. The National Appellate Court took the same position.

In the cassation appeal to the Supreme Court, the following questions were debated: (i) to what extent the authorities were obligated to require the company in question to complete the documentation if they considered the documentation produced was insufficient and (ii) whether this insufficiency could be remedied by producing the pertinent documents in the appeal in the economic-administrative jurisdiction.

With respect to the first question, the Supreme Court said that if the authorities considered the documentation produced by the interested party as insufficient, they should have asked the party to produce the documentation that contained the elements necessary to consider it sufficient.

With respect to the second question, the court noted that evidence is only admitted in an appeal where it could not be included in the proceeding at first instance. However, this inability refers to a "subjective inability", not to an objective obstacle to producing it. In a case such as

this one, it turns out that until the TEAR expressed its opinion, the taxpayer could not have known why the documents provided to the management office were insufficient and, accordingly, it is clear that it was not given the opportunity to produce the proper documentation until it filed an appeal.

II. Decisions and rulings

1. *EU Law.- A state cannot rely on EU legislation in order not to apply its own domestic legislation to the detriment of individuals (Central Economic-Administrative Tribunal. Decision of October 23, 2014)*

In this case an entity transferred an economic unit and treated the transaction as non-taxable. The tax authorities considered that the transaction was taxable because there was no transfer of an independent part of the company, based on the case law of the CJEU on this subject, even though the Spanish legislation contradicted that case law. In response, the taxpayer contended that it is not possible for a member state not to apply its domestic legislation in reliance on the case law of the CJEU to the detriment of the taxpayer.

The TEAC confirmed the appellant's position, reiterating the view taken in its previous decisions of September 20, 2012 (issued as a definitive ruling on a point of law) and October 20, 2013. In this way, the TEAC reiterated that the "vertical downward direct effect" prevents a state, as a result of a breach in the transposition of a directive, from relying on the application of that directive against an individual, thereby generating obligations for the individual. In short, only the individual may rely on the direct application of EU directives against breaches by the state in what is known as vertical upward effect, but not in the opposite direction. Or, in other words, the state cannot rely on its own breach to apply a directive.

2. *Corporate income tax.- Dividends distributed after losses are offset against equity, are an indirect return of contributions to the shareholders (Central Economic-Administrative Tribunal. Decision of October 31, 2014)*

Company A acquired 100% of company B from a third party, who recorded a deductible loss on the sale. Company B had posted losses which required its former owner and, subsequently, company A, to perform successive transactions to offset the losses. Later, when company B began to turn a profit, it distributed dividends. The tax inspectors disallowed the elimination of the dividends at the tax group on the ground that it led to a double use of losses.

The TEAC upheld the adjustment made by the tax inspectors, ruling that, given the losses at the investee company which were offset by its owners, when dividends are subsequently distributed, they must be treated as follows:

(i) The dividends up to the amount of the losses offset by the former owner must be treated by the taxpayer as dividends without a right to the double taxation tax credit.

(ii) The dividends up to the amount of the losses offset by the appellant (company A) must be characterized as an indirect return of equity to the taxpayer who effectively offset the losses and, consequently, the dividends will reduce the value for tax purposes of its portfolio.

3. *Corporate income tax.- Revenues from debt write-offs and deferrals under insolvency proceedings are taken into account in the minimum tax prepayment to the extent that they are recognized in the tax base (Directorate-General of Taxes. Ruling V2806-14, of October 17, 2014)*

Law 16/2013 introduced a new rule whereby in 2014 and 2015 the amount to be paid over in respect of tax prepayments calculated using the taxable income method, for taxpayers that are required to apply this method and whose net revenues in 2014 or 2015 are at least twenty million euros, cannot under any circumstances be less than 12% of the income reported in the income statement for the fiscal year for the first three, nine or eleven months of each calendar year.

In turn, article 19.14 of the Revised Corporate Income Tax Law (TRLIS) establishes that the revenue arising from the recognition for accounting purposes of debt write-offs and deferrals under Insolvency Law 22/2003, of July 9, 2003, will be recognized in the debtor's tax base insofar as finance costs may subsequently be recorded in connection with the same debt and up to the limit of the above-mentioned revenue. This article is the instrument through which the tax legislation has reacted, given the current economic situation, to the tax treatment that would entail recognizing this revenue in the corporate income tax base one time only.

Taking into account the aim of this article, that revenue for accounting purposes should also be ignored when determining the minimum tax prepayment, and therefore only the portion of the revenue for accounting purposes that must be included in the tax base under the rules set out in article 19.14 of the TRLIS will be computed for these purposes.

4. *Corporate income tax.- Calculation of indexation allowance multipliers (Directorate-General of Taxes. Ruling V2739-14, of October 13, 2014)*

The TRLIS has provided an adjustment mechanism for the effect of inflation in real estate transfers (the indexation allowance). This mechanism consists of calculating the difference between the revalued net carrying amount of the property and its carrying amount. This difference must also be multiplied by a multiplier determined as:

(i) equity, divided by

(ii) equity plus total liabilities minus collection rights and cash.

This multiplier does not apply where it is higher than 0.4.

With respect to this multiplier, the Directorate-General of Taxes (DGT) has clarified the following:

(i) The term "collection right", which is not defined in the Law, must be interpreted as including all accounts representing debts owed by third parties to the company with an established due date, whether in the short or long term, such as, among others, all trade accounts receivable, accounts receivable and accounts for securities representing the assignment of own capital to third parties.

(ii) In calculating the multiplier, all its decimals must be taken into account, given that the article of the Law does not provide any rounding mechanism.

It should be noted that the new Corporate Income Tax Law (Law 27/2014) has eliminated this indexation allowance multiplier.

5. Corporate income tax.- The tax credit for environmental investments does not apply to expenses incurred to obtain the carbon footprint certificate or to purchase and plant trees to offset CO2 emissions (Directorate-General of Taxes. Ruling V2737-14, of October 13, 2014)

Investments in property, plant and equipment consisting of facilities of the company aimed at protecting the environment qualify for the tax credit for environmental investments if certain requirements are met.

With respect to this tax credit, the DGT held that:

(i) according to the law, the tax credit only applies to certain fixed or noncurrent assets, which therefore excludes cases where the cost is treated as a period expense, such as expenses incurred to obtain the carbon footprint certificate; and

(ii) the taxpayer may not apply the tax credit for purchasing and planting trees with the sole aim of reducing air pollution and offsetting carbon dioxide emissions, because this investment is not considered as "facilities". For these purposes, the DGT defines facilities as *"a set of machinery and other elements integrated with each other which, considered individually, are not functionally independent on their own, only achieving a function or benefit when integrated with each other".* The above-mentioned purchase and planting of trees does not fit within this definition.

It should be recalled that this tax credit has been repealed for fiscal years commencing on or after January 1, 2015 in accordance with the new Corporate Income Tax Law (Law 27/2014), although taxpayers may continue to apply unused tax credits generated in prior years.

6. Corporate income tax.- The temporary restriction on tax-deductible amortization/depreciation does not apply to companies of a reduced size even if they do not engage in economic activity (Directorate-General of Taxes. Rulings V2613-14, of October 6, 2014, and V2725-14, of October 10, 2014)

For fiscal years commencing in 2013 and 2014 a restriction was introduced on the deductibility of amortization/depreciation under which the amortization/depreciation for book purposes of property, plant and equipment, intangible assets and investment property relating to those tax periods will be deducted in the tax base up to 70% of the amount which would have been tax deductible had this percentage not been applied. This restriction does not apply to entities that meet the requirements laid down in subarticles 1, 2 or 3 of article 108 of the TRLIS ("special regime for enterprises of a reduced size").

The requesting entities in both rulings engaged in property leasing as their main activity and did not have any employees under employment contracts or any premises that were used for this activity. Although their net revenues did not exceed the amount of €10 million provided for in article 108 of the TRLIS, the entities did not qualify for the tax advantages under the "special regime for enterprises of a reduced size" because they did not have the necessary resources to engage in an economic activity, in accordance with the test established by the TEAC (Decision 2398/2012, of May 30, 2012).

In response to the doubt regarding the possible application of the restriction on the deductibility of amortization/depreciation to these kinds of entities, the DGT stated that it is a temporary measure aimed at partially restricting tax-deductible amortization/depreciation to large enterprises in order to increase the revenues collected from this tax, given that these enterprises have the necessary economic capacity to make these higher revenues possible. For

this reason, this measure does not affect entities whose net revenues are below €10 million, regardless of whether or not the tax incentives provided for "enterprises of a reduced size" apply.

7. *Corporate income tax.- The capitalization of a loan by the sole shareholder does not generate a gain at the debtor (Directorate-General of Taxes. Ruling V2578-14, of October 1, 2014)*

The DGT held that, after analyzing the transaction as a whole, the capitalization of the participating loan granted to an entity by its sole shareholder (just like a remission of a debt) does not generate any gain or expense for tax purposes because it takes place between a company and its sole shareholder, and this regardless of the accounting treatment that may be given to the debt where the borrower has difficulties to repay the loan.

The DGT asserted that the remission or capitalization of a debt by the sole shareholder simply reflects the conversion into equity of a collection right for an equivalent amount between the two parties (the lender and the borrower) and the fact that the borrower has difficulties to repay the loan is irrelevant, given that the capitalization or remission means precisely that the repayment no longer has to take place. In short, what occurs with the capitalization or remission is a shifting of assets in respect of the amount of the debt incurred at the time that it was generated, and the fact that the collection right now being contributed is impaired for accounting purposes is irrelevant for tax purposes.

Accordingly, the capitalization of collection rights will be valued at the debtor at the amount of the capitalized debt, without generating any gain. The shareholder, as the transferor of the collection right, will include in its tax base the difference between the amount of the capital increase and the additional paid-in capital, if any, in the proportion corresponding to it, and the value for tax purposes of the capitalized collection right.

8. *Corporate income tax.- An impairment loss on a holding caused by the devaluation of a foreign currency is not tax deductible (Directorate-General of Taxes. Ruling V2566-14, of October 1, 2014)*

The requesting entity had a 100% holding in the capital of a Turkish company that was not listed on any organized secondary markets. Over the course of fiscal year 2013, the underlying carrying amount of the shares per the balance sheet, denominated in the Turkish currency, rose. However, the Turkish lira experienced a considerable devaluation with respect to the euro, in an amount that absorbed the increase in the underlying carrying amount and caused, at the end of fiscal year 2013, the value of the portfolio in the national currency to fall below that existing at January 1, 2013.

From an accounting standpoint, according to recognition and measurement base 11 of the Spanish National Chart of Accounts, when it comes to determining the impairment loss on a holding, the entity in question must include the portion relating to the exchange rate, without it being possible to separate both components: that relating to the exchange rate and that relating to the value of the holding in the local currency.

As there is no specific rule in the tax legislation, the accounting treatment must be followed. Accordingly, the gain or loss for tax purposes on a holding must include the impact of the exchange rate resulting from the local currency of the investee. In this respect, if the impairment provision is not deductible, it will be in the two components mentioned above, even if one of them results from the change in the exchange rate.

9. Personal income tax.- VAT must be included in the cost for the purposes of calculating compensation in kind consisting of the right to use a dwelling (Directorate-General of Taxes. Ruling V2779-14, of October 15, 2014)

Effective January 1, 2013, the valuation rule applicable to salary income in kind resulting from the use of a dwelling was modified so that if the dwelling being used is not owned by the payer, the compensation in kind is valued at the cost to the payer, including the taxes levied on the transaction, which may not be less than the result of applying the relevant percentage (5% or 10%) to the cadastral value.

According to the DGT, this means that the cost will be the amount paid by the payer, including the expenses and taxes levied on the transaction. Consequently, all of the VAT that has been paid must be included regardless of whether or not it is deductible (in whole or in part) by the payer.

10. Administrative procedure.- It is lawful not to consider a document in the case file that has not been translated into any official language (Central Economic-Administrative Tribunal. Decision of October 23, 2014)

The National Tax Management Office of the State Tax Agency issued a decision rejecting a VAT refund on the ground that the taxpayer had not produced a receipt, document or any other means permitted by law that evidenced that the services received or goods acquired in Spain were used in transactions that gave the right to the refund requested. The appellant contended that the available documentation had been produced, even if it had not been translated.

The TEAC reiterated the position it had taken in previous decisions, that is, that the rules applicable in tax proceedings are those on the means and assessment of evidence contained in the Civil Code and in the Civil Procedure Law, which state that any document drafted in a language other than Spanish or, as the case may be, the official language of the autonomous community must be accompanied by the relevant translation.

11. Administrative procedure.- The statute-barring of the right to collect tax entails the statute-barring of the right to assess tax (Central Economic-Administrative Tribunal. Decision of October 23, 2014)

In the context of an audit and inspection proceeding concerning VAT, the tax authorities issued an assessment decision, in addition to imposing a penalty. The taxpayer filed respective economic-administrative claims against the two acts, although they were dismissed by the Andalucía TEAR. The taxpayer proceeded to file an appeal with the TEAC, which upheld the claim in part. The tax authorities issued a new assessment against which the taxpayer filed a motion contending that (i) the right to collect the payment had become statute-barred and, consequently, (ii) the right to assess tax had as well.

The appellant based its reasoning on the fact that the enforcement of the original assessment had not been stayed, meaning that the last act aimed at collecting it had been the publication of the enforced collection proceeding in the Official State Gazette, which had taken place more than 4 years earlier.

The TEAC upheld the appeal and acknowledged the interrelationship between the statute-barring of the right to assess and the statute-barring of the right to collect established by the Supreme Court in its judgment of June 18, 2004, among others. Accordingly, the TEAC concluded that if the right to collect has become statute-barred, then the right to assess is extinguished for want of subject matter.

12. Special procedure for rectifying errors.- The incorrect assessment of a document contained in the case file may be considered a factual error (Central Economic-Administrative Tribunal. Decision of October 23, 2014)

The TEAC had issued a decision confirming that it was not necessary to provide a guarantee in a VAT refund request pursuant to a judgment from a commercial court that had confirmed the validity of the sale and purchase to which the VAT related. The Madrid Central Office for Large Taxpayers of the State Tax Agency submitted a document to the TEAC requesting information on the above-mentioned decision issued pursuant to a judgment that was not final.

In these circumstances, the Office of the Secretary for the TEAC resolved to commence, of its own initiative, an error rectification procedure on the ground that the decision might be defective due to an error made in assessing the facts, based on the documents contained in the case file (specifically, in relation to the commercial court's judgment).

The claimant objected to the modification to the decision being made through an error rectification procedure on the ground that this procedure does not permit a modification to the detriment to the taxpayer of such significance and that the correct procedure, if applicable, would have been the procedure for the declaration of detrimental effect regulated in the General Taxation Law.

The TEAC confirmed the rectification of errors on the grounds that the 2003 General Taxation Law had broadened the definition of substantive error, including a new case of error, namely, the factual error, which affects the formation of the intent of the authorities who issue the decision, since they have arrived at a conclusion contrary to that which results from the documents included in the case file, as occurred in the case in question in which the fact that the judgment pursuant to which the decision was issued was not final was not taken into account.

III. Legislation

1. General State Budget for 2015

On December 30, 2014, the Official State Gazette published Law 36/2014, of December 26, 2014, on the General State Budget for 2015 which, in the field of tax, basically only revises the aspects of the law that are traditionally amended by the Budget Law and affect some of the main elements of the tax system.

The main new features introduced by this Law are summarized in the Commentary available at the following link:

http://www.garrigues.com/en/Publicaciones/Novedades/Documents/Tax-Commentary-11-2014.pdf

2. Regulatory adaptation of amendments by Law 28/2014 to the VAT Law

The Official State Gazette of December 20, 2014 published Royal Decree 1073/2014, of December 19, 2014, amending the Value Added Tax Regulations, approved by Royal Decree 1624/1992, of December 29, 1992, on General Regulations on tax management and inspection procedures and proceedings and implementing the common rules on tax management,

collection and inspection procedures, approved by Royal Decree 1065/2007, of July 27, 2007, and the Regulations governing billing obligations, approved by Royal Decree 1619/2012, of November 30, 2012.

As a result of the amendments introduced by Law 28/2014 in the field of VAT (analyzed in "Garrigues Commentary – Tax Reform: New legislation on value added tax, the Canary Island general indirect tax, excise and special taxes and environmental taxation" the link to which is provided in point 12 below), Royal Decree 1073/2014 introduces the pertinent adaptations to the regulations. Specifically, the main new features introduced are as follows:

(i) As regards the Value Added Tax Regulations:

- The conditions for exercising the waiver of exemptions in certain real estate transactions are brought into line with the new requirements laid down in the VAT Law.

- The notices and other existing rules for applying the reverse-charge mechanism are brought into line with the new cases included in the VAT Law (specifically, with respect to supplies of mobile phones, videogame consoles, laptop computers and digital tablets).

  Accordingly, in the case of customers that habitually engage in the resale of the above-mentioned goods, they must notify the tax authorities of their reseller status on the relevant census notification, and they must evidence this status to their supplier by providing a certificate that can be obtained from the State Tax Agency's website, which will be valid for one calendar year at the most.

  Under transitional provision one, exclusively for 2015, the notice of reseller status to the State Tax Agency may be sent until March 31 of the same year in the case of traders or professionals who engaged in their activities in 2014.

- An election to apply the new special schemes applicable to telecommunication, radio or television services and to those supplied electronically, where Spain is the member state of consumption, will mean that the refund of VAT borne in the territory in which VAT applies to traders or professionals not established in that territory, as a result of the acquisition or importation of goods and services that are used to supply the above-mentioned services must be processed under the special procedures for refunds to traders or professionals not established in the territory where VAT applies provided for such purpose in the VAT Law.

  As regards these special schemes, a new chapter is added to the Regulations to introduce the conditions under which taxable persons may elect to apply them, waive them or be excluded from them and the resulting effects.

- The simplified scheme and the special agriculture, livestock and fisheries scheme are brought into line, effective January 1, 2016, with the new limits imposed on their application in the VAT Law.

- As regards the special travel agency scheme, the royal decree regulates the election to apply the general VAT scheme, which must be made transaction by transaction and must be notified in writing to the customer before or when the services to which the transaction relates are supplied, although, for the sake of simplicity, this notice may be included in the invoice or sent together with the invoice.

- In the special VAT grouping scheme, the different levels of financial, economic and organizational links are defined, and there is a rebuttable presumption that if the financial link is present, the others are present.

  In addition, taking into account the aim and operation of this special scheme, the special deductible proportion rule is established as mandatory for the advanced scheme.

- With respect to the election envisaged in the VAT Law of deferring the payment of import VAT to when the relevant periodic VAT return is filed, the royal decree implements the procedure whereby certain operators, specifically those which pay tax to the central government and have a monthly assessment period, will be able to make the election (on a census notification during the November before the year in which it is to take effect).

  Exclusively for fiscal year 2015, transitional provision two establishes an additional period, until January 31, 2015, to be able to elect to defer the payment of VAT in that year, which will take effect from the first assessment period commencing after the date on which the election has been made.

- In turn, the following technical improvements are made to the tax:

  - The requirements to apply certain exemptions, such as those for the travelers scheme, are relaxed, by (i) allowing the supplier of the goods to reimburse the tax using a credit card or other means of payment that evidences the reimbursement, and (ii) allowing entities that assist with reimbursements to send suppliers invoices in electronic format in order to obtain the reimbursement.

    Furthermore, with respect to the exemption on the supply of goods to certain bodies recognized for their exportation, it is established that the State Tax Agency may extend, following a request, the three-month period established for the export of those goods.

  - It is established that evidencing the sending of the correcting invoice to the recipient of the transaction, in order to modify the taxable amount, is only required in the case of a debtor subject to an insolvency order or uncollectible debts.

  - The rules for administrative and judicial condemnation proceedings are adjusted in cases where the reverse-charge mechanism provided in the VAT law applies.

(ii) It is also necessary to adapt the General Regulations on tax management and inspection procedures and proceedings and implementing the common rules on tax management, collection and inspection procedures, basically concerning the impact that the new provisions introduced in the VAT Law have had on the contents of the census notification.

(iii) Lastly, the necessary adaptations are introduced in the Regulations governing billing obligations as a result of the changes made to the special travel agency scheme and of the new cases in which the reverse-charge mechanism applies.

The provisions of the Royal Decree will generally enter into force on January 1, 2015.

3. Changes in the regulations for excise and special taxes, the tax on fluorinated greenhouse gases and personal income tax

The Official State Gazette of December 20, 2014 published Royal Decree 1074/2014, of December 19, 2014, amending the Excise and Special Tax Regulations, approved by Royal Decree 1165/1995, of July 7, 1995, the Regulations for the Tax on Fluorinated Greenhouse Gases, approved by Royal Decree 1042/2013, of December 27, 2013, and the Personal Income Tax Regulations, approved by Royal Decree 439/2007, of March 30, 2007.

The changes introduced in the field of excise and special taxes by Law 28/2014, of November 27, 2014, have made it necessary to adapt the legislation in force in this area. The main new features introduced are as follows:

(i) As a general rule, authorized warehousekeepers will be required to file the self-assessment even in periods in which the result is no tax payable.

(ii) In relation to the special electricity tax:

- Given that this tax has changed from being configured as a tax on production to a tax that is levied on the supply of electricity for consumption, it has become necessary to overhaul the regulations as well as to correct the references to the regulations in several articles that regulate excise taxes on production.

- Furthermore, in order to reduce administrative costs for the various operators in the electricity market, together with the reduction in the number of taxpayers, certain obligations are eliminated, such as the obligation to keep accounting records of inventories or to comply with rules relating to losses in the transmission and distribution of electricity.

- Lastly, rules are introduced for procedures for applying certain tax relief, registering at the territorial registry and calculating and paying the tax.

(iii) As regards the oil and gas tax and, in particular, with respect to natural gas:

- First of all, the new legislation regulates the requirements for requesting a refund of the amount paid in domestic territory where the natural gas is sent, by means other than fixed piping and outside the suspensive procedure, to operators domiciled in another EU member state.

- Also clarified is the procedure for rectifying tax that has been charged provisionally in applying the reduced rates established for natural gas.

(iv) In relation to the excise tax on alcohol and alcoholic beverages:

- On the one hand, the contents of the technical report to be provided by certain users of alcohol are standardized.

- In addition, a special procedure is established whereby parties that carry out processes aimed at purifying and recovering alcohol within the same establishment where the alcohol has been used or may be reused are exempt from certain obligations.

- The rules on destroying alcoholic products where the original alcohol is "clean" or totally denatured are broadened.

- Transitional provision one sets out the requirements to be met by owners of industrial establishments and laboratories that wish to apply certain alcohol regeneration procedures.

(v) With respect to the special tax on certain means of transportation, the General Budget Laws for both 2013 and 2014 introduced two exemptions from the obligation to adapt the Spanish legislation to EU legislation, so the relevant regulatory provisions are being adapted now.

In addition, after the entry into force of the regulations for the tax on fluorinated greenhouse gases, it became evident that certain improvements needed to be introduced, including most notably the following:

- First of all, certain technical adjustments have been made, such as regulating the obligation to register at the territorial registry of the tax for importers or intra-Community purchasers of fluorinated greenhouse gases contained in the products the use of which inherently emits greenhouse gases into the atmosphere.

- The period for filing the annual return for the preceding calendar year is extended to March 30.

- It is clarified that the relevant self-assessment must be filed in tax periods in which the self-assessment results in no tax payable.

- The new legislation also implements the procedure to be followed in the case of registrations and removals from the territorial register for the tax, and establishes the documentation to be provided and other formal obligations that must be met by parties that, having reseller status, are removed from the registry, thereby becoming final consumers, and vice versa.

- Transitional provisions two and three establish, respectively, the period for registration on the territorial register for the tax of the importers and intra-Community purchasers of certain products containing those gases (2 months from the publication of the royal decree) and the period for filing applications for registration and removal from the register in 2015 (in the calendar month following the entry into force of the royal decree).

Lastly, the personal income tax regulations are amended to clarify that amounts received in respect of tax-exempt per diems and travel expenses will continue to be exempt from personal income tax withholdings.

The Royal Decree is set to enter into force on January 1, 2015.

4. Amendment to the economic and tax regime of the Canary Islands

On December 20, 2014, the Official State Gazette published Royal Decree-Law 15/2014, of December 20, 2014, amending the economic and tax regime of the Canary Islands, which amends Law 19/1994, amending the economic and tax regime of the Canary Islands.

The main new features introduced by this royal decree-law are summarized in the Commentary available at the following link:

http://www.garrigues.com/en/Publicaciones/Novedades/Documents/Comentario-Fiscal-Canarias-2-2014-eng.pdf

5. Changes to VAT forms 390, 303 and 322 and to form 763, self-assessment for the tax on gaming activities

The Official State Gazette of December 19, 2014 published Order HAP/2373/2014, of December 9, 2014, amending Order EHA/3111/2009, of November 5, 2009, approving form 390, for the annual VAT recapitulative statement, and VAT forms 303, for self-assessment of the tax, approved by Order EHA/3786/2008, of December 29, 2008, and 322, for individual monthly self-assessment under the special grouping scheme, approved by Order EHA/3434/2007, of November 23, 2007, as well as form 763, for self-assessment of the tax on gaming activities in cases of annual or multiyear activities, approved by Order EHA/1881/2011, of July 5, 2011. The main changes are as follows:

(i) As regards form 390, for the annual VAT recapitulative statement, the changes basically involve introducing new boxes (i) to include information for taxable persons applying the special VAT cash-basis accounting scheme, (ii) to identify rectifications of deductions in respect of intragroup transactions, or (iii) to include data in the event of the rectification of VAT deducted in self-assessments for the period being reported due to an insolvency order made by a court.

In addition, the Order defines the groups that may be exempt from the obligation to file form 390, for the annual VAT recapitulative statement, which will only be those taxpayers with a quarterly assessment period who pay tax only in the "common territory" (i.e. Spain excluding the Basque Country and Navarra) and engage in activities under the simplified VAT scheme and/or whose activity consists of leasing urban real estate, provided that they fill in the additional boxes in the return for the last assessment period.

(ii) As regards VAT form 303, the Order introduces new boxes for taxable persons exempt from filing form 390 (for identifying the activities to which the return relates and providing a breakdown of the total number of transactions performed in the fiscal year).

In addition, to enable the import VAT assessed by the customs authorities to be collected and paid over on the VAT return for the period in which the documents stating the assessment made is received, an additional box has been included on both form 303 and 322, "Grouping. Individual form. Monthly assessment", in the self-assessment result section in which the unpaid import VAT assessed by the customs authorities must be included. Given that this election is effective on or after January 1, 2015, this box will only be enabled for assessment periods commencing on or after that date.

Finally, the Order also introduces for assessment periods commencing on or after January 1, 2015, a new box of a technical nature on both form 303 and 322, in order to identify and take into account the result of the VAT that may be owed by the trader or professional who is the recipient of a transaction on which he has not been entitled to deduct the VAT in full.

(iii) Lastly, the change to the Economic Accord with the Basque Country Autonomous Community has entailed changing form 763, for self-assessment of the tax on gaming activities in cases of annual and multiyear activities in order to continue to include all the information relating to activities subject to this tax and to distinguish the applicable proportion and the tax that is payable to each of the tax agencies, namely that of the central government and that of the historical territories of the Basque Country.

The provisions of the Order entered into force on December 20, 2014, subject to the specific time limits mentioned above.

6. *Average sale prices for 2015 of certain means of transportation for the purposes of value verification*

The Official State Gazette of December 19, 2014 published Order HAP/2374/2014, of December 11, 2014, approving the average sale prices applicable for 2015 in the management of transfer and stamp tax, inheritance and gift tax and the special tax on certain means of transportation.

The Order entered into force on January 1, 2015.

7. *Automatic exchange of information in the field of taxation*

December 16, 2014 saw the publication in the Official Journal of the European Union of Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation.

The main new features introduced by the directive are as follows:

- The financial information which is required to be reported and exchanged should concern not only all relevant income (interests, dividends and similar types of income) but also account balances and sale proceeds from financial assets.

- Reporting financial institutions could meet their information obligations towards individual reportable persons by following the detailed arrangements on communication provided for by their internal procedures in accordance with their domestic law.

- Reporting financial institutions, sending member states and receiving member states, in their capacity as data controllers, should retain processed information for no longer than necessary to achieve the purposes thereof. The maximum retention period should be set by reference to the statute of limitations provided by each data controller's domestic tax legislation.

- In implementing this directive, member states should use the Commentaries on the Model Competent Authority Agreement and Common Reporting Standard, developed by the OECD, as a source of illustration or interpretation and in order to ensure consistency in application across member states.

- The condition that automatic exchange may be subject to the availability of the information requested as provided for in article 8(1) of Directive 2011/16/EU should not apply to the new items as introduced into Directive 2011/16/EU. In addition, the review of the condition of availability to be undertaken in 2017 should be extended to all the five categories referred to in article 8(1) of Directive 2011/16/EU, so that the case for exchange of information by all member states on all those categories could be examined.

- The reference to a threshold in article 8(3) of Directive 2011/16/EU should be removed.

The directive will enter into force on the twentieth day following that of its publication in the Official Journal of the European Union and requires member states to adopt it and publish its transposition into domestic law by December 31, 2015, applying its measures from January 1, 2016.

8. *Approval of forms 591 "Tax on the value of electricity output. Annual return of transactions with taxpayers" and 588 "Tax on the value of electricity output. Self-assessment due to cessation of activity from January to October"*

The Official State Gazette of December 13, 2014 published Order HAP/2328/2014, of December 11, 2014, approving forms 591 "Tax on the value of electricity output. Annual return of transactions with taxpayers" and 588 "Tax on the value of electricity output. Self-assessment due to cessation of activity from January to October" and establishing the manner and the procedure for filing them.

The provisions of the Order enter into force on December 14, 2014. Form 591 must be used for the first time for transactions relating to fiscal year 2013 and following years, whereas form 588 will be used to file self-assessments resulting from cessations of activity between January and October that occur after January 1, 2015.

9. *Personal income tax regulations*

The Official State Gazette of December 6, 2014 published Royal Decree 1003/2014, of December 5, 2014, amending the personal income tax regulations, approved by Royal Decree 439/2007, of March 30, 2007, on advance payments of tax and tax credits for large families or persons with a disability under care. These regulations will enter into force on January 1, 2015.

The changes are made to adapt the regulations to certain new provisions introduced by Law 26/2014, of November 27, 2014, amending, among others, Law 35/2006.

The main new legislation in this royal decree is summarized in the Commentary available at the following link:

http://www.garrigues.com/en/Publicaciones/Novedades/Documents/Tax-Commentary-10-2014.pdf

10. *Law amending the Corporate Enterprises Law to enhance corporate governance*

The Official State Gazette of December 4 published Law 31/2014, of December 3, 2014, amending the Corporate Enterprises Law to enhance corporate governance.

The law introduces specifically tax-related references for the first time among the obligations that corporate/commercial law establishes in relation to corporate governance. These obligations refer to listed companies, although it appears that they should be taken into account as guidelines by other entities.

Notable among the changes introduced by the reform in this area are the nondelegable powers that are established for the managing body:

- The determination of the company's tax strategy.
- The determination of the policy on risk (including tax) control and management and on the supervision of internal information and control systems.
- The approval of investments and transactions of all kinds which, due to their high amount or special characteristics, have a strategic nature or special tax risk, unless their approval falls to the shareholders' meeting.

- The approval of the creation or acquisition of shares in special purpose vehicles or entities domiciled in countries or territories classed as tax havens, as well as any other similar transactions or operations which, due to their complexity, may impair the transparency of the company and its group.

Similarly, the following are established among the minimum tasks of the audit committee (i) supervising the effectiveness of internal control at the company, internal audit and risk (including tax) management systems, as well as discussing with the financial auditor any significant weaknesses in the internal control system detected in the course of the audit; and (ii) giving prior notice to the board of directors, among other matters, of the creation or acquisition of investments in special purpose vehicles or entities domiciled in countries or territories classed as tax havens as well as of transactions with related parties.

Along the same lines, and with respect to the annual corporate governance report, the law specifies what the risk (including tax) control system must contain.

In addition, the law amends the corporate/commercial law rules on determining directors' remuneration, which must be taken into account for the purposes of matters such as its deduction for corporate income tax purposes or its personal income tax treatment.

All of these and other new features from the law are summarized in the Commentary available at the following link:

http://www.garrigues.com/en/Publicaciones/Novedades/Documents/Comentario-Gobierno-Corporativo-RSE-2-2014-eng.pdf

11. Personal income tax objective assessment method and simplified VAT scheme for 2015

The Official State Gazette of November 29, 2014 published Order HAP/2222/2014, of November 27, 2014, implementing for 2015 the personal income tax objective assessment method and the special simplified VAT scheme.

Although the Order maintains the structure and contents of Order HAP/2206/2013, of November 26, 2014, applicable in 2014, it introduces some provisions, including most notably (i) the inclusion, on the one hand, of a new corrective index for crops on irrigated land that use electricity and (ii) the establishment of a new net income index for taxpayers engaged in the forestry activity of extracting resin who, due to the modification of the scope of application of the special VAT scheme for agriculture, livestock and fisheries, will be able to apply the objective assessment method from this year forward.

The provisions of the Order entered into force on the day following that of its publication in the Official State Gazette, with effect for 2015; however, the new corrective index for crops on irrigated land that use electricity will also apply, as noted, in the 2014 tax period.

12. Tax reform

The Official State Gazette of November 28, 2014 published three Laws which entail a major overhaul of several taxes.

Specifically:

(i) Law 26/2014, of November 27, 2014, amending Personal Income Tax Law 35/2006, of November 28, 2006, the Revised Nonresident Income Tax Law, approved by Legislative Royal Decree 5/2004, of March 5, 2004, and other tax provisions.

The new legislation introduced by this Law has been summarized in our Tax Commentary available at:

http://www.garrigues.com/en/Publicaciones/Novedades/Documents/Tax-Commentary-6-2014.pdf

(ii) Corporate Income Tax Law 27/2014, of November 27, 2014.

The new legislation introduced this by Law has been summarized in our Tax Commentary available at:

http://www.garrigues.com/en/Publicaciones/Novedades/Documents/Tax-Commentary-7-2014.pdf

(iii) Law 28/2014, of November 27, 2014, amending Value Added Tax Law 37/1992, of December 28, 1992, Law 20/1991, of June 7, 1991, amending the tax aspects of the Canary Islands tax and economic regime, Excise and Special Tax Law 38/1992, of December 28, 1992, and Law 16/2013, of October 29, 2013, establishing certain measures in the field of environmental taxation and adopting other tax and financial measures.

The new legislation introduced by this Law has been summarized in our Tax Commentary available at:

http://www.garrigues.com/en/Publicaciones/Novedades/Documents/Tax-Commentary-8-2014.pdf

13. Law on treaties and other international agreements

The Official State Gazette of November 28, 2014 published Law 25/2014, of November 27, 2014, on treaties and other international agreements, which replaces the only piece of legislation hitherto governing treaties in Spain (Decree 801/1972, of March 24, 1972, regulating the activity of the central government in the field of international treaties) with a new law which, in a systematic and updated manner, regulates the activity of the state in the field of international treaties and other international agreements. The main highlights from the new Law are as follows:

- On the powers to negotiate, enter into and conclude international treaties, as well as the general principles governing their application and interpretation and the meaning of the reservations, the Law addresses issues that are increasingly important in relation to tax treaties and other international tax agreements.

- In light of this Law, the nature and value of not only the OECD Model Convention but also in particular the commentary, reservations and observations that accompany it in the Spanish legal system will continue to be debatable.

- Additional provision five of Law 25/2014 excludes from its scope of application the implementing acts of tax treaties and, in particular, mutual agreement procedures for resolving disputes that arise in applying these treaties. The Law will not apply to

agreements concluded between tax administrations for the purpose of valuing transactions performed with related persons or entities. Accordingly, these agreements will be governed by the domestic legislation and, in particular, by additional provision one of the Revised Nonresident Income Tax Law.

The Law entered into force twenty days after its publication in the Official State Gazette.

14. Calendar of non-business days in matters pertaining to the central government for 2015

The Official State Gazette of November 27, 2014 published the Decision of November 17, 2014, of the Office of the Secretary of Public Administration, which establishes the calendar of non-business days in matters pertaining to the central government for 2015, for the purposes of computing time periods.

By way of this Decision, the central government sets, for matters pertaining to it, the calendar of non-business days for the purposes of computing time periods, subject to the official work calendar, which was set in the Decision of October 17, 2014, of the Directorate-General of Employment, which published the list of public holidays for 2015 (Official State Gazette of October 24).

IV. Others

1. Instruction on execution of special agreements with taxpayers subject to an insolvency order

The Collection Department of the State Tax Agency has published Instruction 3/2014, of November 19, 2014, of the Head of the Collection Department of the State Tax Agency, on the execution of special agreements with taxpayers subject to an insolvency order, to organize the standards in this field for formally approving and coordinating the activities of the collection bodies of the Tax Agency, while laying down general conditions for executing these agreements.

It is expressly indicated that the standards set out in the Instruction are not new and do not contradict the standards followed until now, but that it has been considered necessary to clarify certain aspects. Specifically:

- The Instruction will apply to specially preferred claims against debtors subject to an insolvency order where, to enable collection, a special agreement among those provided for in articles 164 of the General Taxation Law and 10 of the General Budget Law must be executed by the competent body and in agreement with the debtor.

- The special agreement must be the general framework of the conditions for satisfying the tax claim that is classed as preferred within the insolvency proceeding.

- Given the possibility of linking preferred government claims to the conditions of the arrangement with creditors, it also considered advisable, as a general rule, for the understanding on these kinds of claims to be set out in a special agreement rather than through a potential accession to the general arrangement with creditors, because this could imply an undesired drag-along of other government claims without a prior agreement with the holders of those claims.

- The standard determining that the deadline for executing the special agreement is the effective date of the arrangement with the creditors is confirmed.

- Under certain circumstances, it is permitted to execute a special agreement in the case of insolvent debtors with an approved general arrangement with creditors and with whom no special agreement has been executed in the past but rather deferred or installment payments of the claim that was originally classed as a specially preferred claim.

- Lastly, it sets out the control and monitoring procedure as well as the consequences of a breach, which will trigger prior notice of termination of the agreement.

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