July 2014

The Supreme Court has just handed down three interesting judgments which we discuss in this newsletter:

1. In the judgment of June 18, 2014, in cassation appeal 1933/2011, the Court analyzes (along the same lines as in its well-known judgment of January 12, 2012) the concept of permanent establishment in a case where, after a business reorganization, activities formerly carried out in Spain by a subsidiary of a multinational group are taken over by the nonresident parent, with the subsidiary being in charge of apparently ancillary or preparatory activities to those of the parent.

   Specifically, in this case, after the reorganization, the parent resident in the United Kingdom started to sell in Spain and Portugal the products previously sold by the subsidiary, whose activity became confined to the processing and storage of the parent company's products and to the promotion of the parent's sales. The National Appellate Court had ruled that the presence of the nonresident entity did not lie in ancillary or preparatory facilities given that, although individually considered, those places were used to store or process the goods, that was not the sole purpose of the structure nor did the structure as a whole have that ancillary nature.

   The Supreme Court backs up that conclusion highlighting the continuity of the activities that were already being performed by the group in Spain before the restructuring that gives rise to the permanent establishment.

2. In the judgment of June 30, 2014, in cassation appeal 2164/2013, the Supreme Court confirms the view of the National Appellate Court (contrary to the view of the Central Economic-Administrative Tribunal) on the obligation to pay new late-payment interest in case of delay in the payment of the interest accrued in a tax refund.

   In particular, in the case analyzed by the Court, the entity had received a refund without late-payment interest because the tax authorities had considered that it was a refund derived from the management of the tax. After the relevant claims, the Central Economic-Administrative Tribunal ("TEAC") upheld the taxpayer's right to that interest, but when the TEAC's decision was enforced, the taxpayer only received interest up to the date on which the tax was refunded. However, the payment of the interest was made three years after that tax refund was made. The Supreme Court, making a reasonable interpretation, upheld the appropriateness of the accrual of late-payment interest on the actual late-payment interest not paid on a timely basis.

3. Lastly, in its judgment of July 4, 2014, in cassation appeal 581/2013, the Court held that a finding of fraud cannot be made in transactions carried out in a statute-barred year not inspected, even if the transaction has effects in open fiscal years subject to inspection. Otherwise, according to the Court, the tax authorities could reopen, without time limits, the inspection of transactions carried out in statute-barred years (the data and figures of which have become final) in order to alter the tax treatment, thereby disregarding the principle of legal certainty and contradicting the concept of statute of limitations. In this judgment, the Supreme Court also maintains this conclusion in relation to the inspectors' authority to review the tax losses generated in statute-barred years.

Index

I. CASE LAW 4

1. Corporate income tax.- Transactions carried out in statute-barred years cannot be reviewed even if they have effect on the tax base of open periods (Supreme Court. Judgment of July 4, 2014) 4

2. Corporate income tax.- The tax inspectors cannot judge the validity of notarial acts (National Appellate Court. Judgment of March 27, 2014) 4

3. Nonresident income tax.- A nonresident company that makes use, through its subsidiary, of a warehouse from which to make sales, has a permanent establishment in Spain if the subsidiary performs other processing and agency activities in relation to the goods sold (Supreme Court. Judgment of June 18, 2014) 5

4. Inheritance and gift tax.- The tax authorities must sufficiently reason the assessment to enable the taxpayer to know the legislation and calculation methods applied (Extremadura High Court. Judgment of March 6, 2014) 5

5. Tax on the emission of greenhouse gases into the atmosphere.- Legitimacy of autonomous community non-fiscal taxes and absence of overlapping with economic activities tax (Supreme Court. Judgment of June 19, 2014) 6

6. Collection proceeding.- If the tax authorities delay the execution of a refund, the late-payment interest must be calculated on both the principal and on the interest that should have been paid on time (Supreme Court. Judgment of June 30, 2014) 7

7. Review proceeding.- The notice of a correction of errors in relation to a decision opens a new period to appeal against (National Appellate Court. Judgment of March 27, 2014) 7

8. Review proceeding.- It is possible to furnish documentation with the appeal for reconsideration that was not furnished in the inspection (Andalucía High Court. Judgment of January 2, 2014) 7

9. Administrative proceeding.- On the declaration of joint liability in relation to events carried out by a different legal entity (Supreme Court. Judgment of June 20, 2014) 8

II. DECISIONS AND RULINGS 8

1. Corporate income tax.- Tax losses to be considered when their amount has been questioned by the tax inspectors (Directorate-General of Taxes. Ruling V1296-14, of May 14, 2014) 8

2. Corporate income tax.- On the licensing of intangible assets pursuant to a framework agreement executed while the former wording of article 23 of the Revised Corporate Income Tax Law was in force (Directorate-General of Taxes. Ruling V1232-14, of May 7, 2014) 9

3. Personal income tax.- Requirements for the tax credit for renovation of the habitual residence (Central Economic-Administrative Tribunal. Decision of July 3, 2014) 9

4. Personal income tax.- "Inbound expatriates" regime: obtaining exempt salary income triggers the exclusion from the regime (Directorate-General of Taxes. Ruling V1405-14, of May 27, 2014) 10

5. Valuation procedure.- It is not possible to indirectly contest the comparative appraisal of properties for determining cadastral values through an appeal against an individual cadastral value (Central Economic-Administrative Tribunal. Decision of June 12, 2014) 10

6. Penalty proceeding.- The proceeding is appropriate when the self-assessment is filed after receiving an official request in a monitoring procedure (Central Economic-Administrative Tribunal. Decision of July 3, 2014) 11

7. Penalty proceeding.- On the maintenance of the 25% reduction in cases of request of deferral/split payment (Central Economic-Administrative Tribunal. Decision of June 25, 2014) 11

8. Penalty proceeding.- In case of late filing of an appeal or claim, the stay should also be granted and maintained until the decision is final in the economic-administrative jurisdiction (Central Economic-Administrative Tribunal. Decision of May 29, 2014) 12

9. Inspection proceeding.- The verification of census obligations is an inappropriate proceeding to verify the veracity of facts in certain transactions (Central Economic-Administrative Tribunal. Decision of June 17, 2014) 12

10. Administrative proceeding.- Appeals or claims filed to obtain a declaration of time-barring do not toll the statute of limitations of the tax authorities' right to determine the tax debt (Central Economic-Administrative Tribunal. Decision of June 17, 2014) 12

11. Data verification proceeding.- The inappropriate use of this proceeding results in its nullity or voidability (Central Economic-Administrative Tribunal. Decision of June 17, 2014) 13

III. LEGISLATION 14

1. Regime for shipping entities based on tonnage 14

2. Single Administrative Document (SAD) 14

3. Forms 322 and 353, monthly self-assessment under the special VAT system for groups of entities. Form 309, non-periodic VAT return 14

4. Urgent tax measures 15

5. Spain-Dominican Republic tax treaty 16

6. FATCA agreement between Spain and the United States. Order approving the annual informational return on financial accounts 17

7. Tax treatment of preferred shares and of certain debt instruments 18

8. Compatibility of the reductions in the social security contributions of research personnel with the R&D&i tax credit in corporate income tax 19

IV. OTHER ISSUES 19

1. Tax reform: measures submitted for public consultation 19

I. CASE LAW

1. *Corporate income tax.- Transactions carried out in statute-barred years cannot be reviewed even if they have effect on the tax base of open periods (Supreme Court. Judgment of July 4, 2014)*

In the case analyzed, the entity had acquired, through a sale and purchase with intragroup financing, a holding in an entity that already belonged to its same group. The tax authorities considered that the transaction, carried out in a year that was already time-barred, was carried out in fraud upon the law, disallowing the effects which that transaction had in open fiscal years under inspection.

Confirming the view of the National Appellate Court (and in the appeal for cassation filed by the Government Lawyer), the Supreme Court affirmed that in the context of the inspection of corporate income tax of some years in which the taxpayer deducted the interest derived from some transactions considered to be carried out in fraud, it is not possible to review those transactions if they took place in a statute-barred year, even though they have effects in the open years under review (given that the figures of that statute-barred year have become final precisely as a consequence of the statute of limitations).

It is interesting that, in the judgment, the Court also maintains this conclusion, in general, in relation to the inspection of tax losses of statute-barred years. In this regard, the Court held that:

(a) The tax authorities cannot review the returns of statute-barred years in order to modify the tax losses generated and reported in them, even if they have been used in open years.

(b) Article 23.5 of Law 43/1995 (now article 25.5 of the Revised Corporate Income Tax Law) and articles 70.3 and 106.4 of General Taxation Law of 2003, do not allow for a different conclusion from the foregoing. In this judgment, reference is made to other judgments of the Supreme Court of 2012 and 2013 which the Court says do not alter this view, meaning that, where the taxpayer has proven the concordance of the tax losses intended to be offset in the open fiscal year with those reported in the statute-barred year, the latter cannot be modified: the tax authorities can verify that the transactions that gave rise to the tax losses were carried out and that the mathematical sum is that claimed by the taxpayer, but cannot analyze, among others, the reasons for the transactions.

2. *Corporate income tax.- The tax inspectors cannot judge the validity of notarial acts (National Appellate Court. Judgment of March 27, 2014)*

The inspectors questioned the acquisition value taken into account by the appellant to calculate the capital gain obtained on the transfer of a building. The cost of that building derived from a capital contribution the valuation of which had been modified through a public deed of remedy of errors subsequent to the public deed documenting the contribution; both the contribution and the subsequent remedy of errors were registered at the Commercial Registry. The inspectors considered that the purpose of that remedy was to reduce the profit from the subsequent transfer of the building.

The National Appellate Court, however, considered that the inspectors' criterion was inappropriate, on the ground that the field inspector cannot judge the validity of notarial acts. Thus, the Court held that if the inspectors considered that the act was aimed at harming the interests of the public finance authorities, they should have initiated a fraud proceeding in

relation to the transaction. It also highlighted that the tax authorities did not make any effort to determine the actual value of the building nor did they respond to the submissions made in the complaint on this matter, so the Court found in favor of the appellant.

3. Nonresident income tax.- A nonresident company that makes use, through its subsidiary, of a warehouse from which to make sales, has a permanent establishment in Spain if the subsidiary performs other processing and agency activities in relation to the goods sold (Supreme Court. Judgment of June 18, 2014)

This case involved an entity, resident in the United Kingdom, which uses a warehouse in Spain assigned to it by its Spanish subsidiary; that warehouse is the center for distribution of its goods in Spain and Portugal. The subsidiary, besides assigning the space, also provides services of milling, cleansing, packaging and quality analysis of the goods, among others, until their final sale to customers; and, on the other hand, it provides an agency service whereby it promotes orders with the prices and conditions set by the nonresident entity. This structure derives from a reorganization carried out years before, the result of which was that the sale activity, formerly carried out by the subsidiary, was taken up by the parent.

Just as the inspectors and then the TEAC did, the Supreme Court concluded that the UK parent company performs an activity which closes the commercial cycle in Spain, through a fixed place of business and, therefore, through a permanent establishment. Thus, the Court ruled that:

(a) All the activities carried out by the subsidiary in relation to the goods, even though they constitute the subsidiary's activity, are carried out on behalf of the parent.

(b) The warehouse which the parent has in Spain at the subsidiary's facilities is not maintained "with the sole aim" of storing, exhibiting or delivering the goods given that those goods undergo processing and sale while they remain at the facilities.

(c) Nor are the goods stored "with the sole aim" of being processed by another company, given that, regardless of whether the processing must be interpreted as carried out by the subsidiary or by the parent through the subsidiary, the goods are then sold in Spain from the same establishment.

According to the Court, this conclusion is supported by the fact that the activities of the subsidiary are the same as those carried out before transferring its business to the parent (even selling its inventories); the only thing that has happened is that their owner has changed (before it was the subsidiary, now it is the parent, which has become owner of the goods and sole titleholder of the legal relations with clients and suppliers) but without changing the location of the activity and its characteristics as regards the close of the commercial cycle.

4. Inheritance and gift tax.- The tax authorities must sufficiently reason the assessment to enable the taxpayer to know the legislation and calculation methods applied (Extremadura High Court. Judgment of March 6, 2014)

The taxpayer had contended the lack of reasoning of a provisional assessment of inheritance and gift tax, because the explanations contained in the assessment did not enable it to know how the assessed amounts had been determined.

The Chamber ruled that it is logical to assume that the tax authorities have assessed the tax following the provisions of the Inheritance and Gift Tax Law but stated that at no time did they include in the assessment a detailed explanation of the provisions and of the arithmetical

operations made so that the taxpayer could know how they determined the amounts of the boxes of the assessments. For that reason, the Court ruled that it entails an evident case of lack of reasoning.

In conclusion, as the Court stated, assessments must contain a specific reference to the applicable provisions and indicate how the tax authorities quantify each element of the tax, preventing the lack of knowledge which assessments such as those issued can entail for taxpayers. In short, it is not the taxpayer's obligation to make a search for the tax provisions applied and make a breakdown of the arithmetical operations which the tax authorities might have made to establish the elements of the tax, given that it is a legal duty which falls to the tax authorities.

5. *Tax on the emission of greenhouse gases into the atmosphere.- Legitimacy of autonomous community non-fiscal taxes and absence of overlapping with economic activities tax (Supreme Court. Judgment of June 19, 2014)*

The Supreme Court ruled on a cassation appeal based mainly on:

- The nullity of the Order of October 22, 2004, approving the forms for tax prepayments and for the annual tax return for tax on the emission of greenhouse gases into the atmosphere and determining their place of payment, approved by the Department of Economy and Finance and the Environment of the Andalucía Autonomous Community Government. This nullity would be based on the presumed unconstitutionality of Law 18/2003, of December 29, 2003, of the Andalucía Parliament, creating said tax, because it affects exclusive powers of the State.

- The illegitimacy of autonomous community non-fiscal taxes and the possible coincidence of the tax on the emission of greenhouse gases into the atmosphere with the taxable event of economic activities tax.

The Court, starting from an analysis of the constitutional case law on the matter, recognized that the Andalucía Autonomous Community has assumed powers in the area of energy and environmental protection, and therefore has not only the material authority to issue, in the context of the basic legislation of the State, provisions implementing legislation and enforcement in relation to environmental protection and the energy system but the financial authority to adopt those measures in the form of levies, within the context and limits established by State legislation and, specifically, by the Autonomous Community Financing Organic Law.

Regarding the second question contended, the Court ruled that, based on the analysis of the tax on the emission of greenhouse gases into the atmosphere and the economic activities tax, it may be affirmed that they are different tax concepts and taxable events, even though both are levied on certain circumstances of the same activity.

In other words, while one is levied on the emission of polluting gases into the atmosphere, the other is levied on the production, intra-EU acquisition or import of electricity. In fact, the judgment emphasizes that this conclusion is in no way contradicted by the fact that the taxable emission of gases subject arises mainly as a consequence of electricity production activities, since that simply entails the taxation of the same activity from different perspectives according to the different facts or circumstances involved.

In view of the foregoing, the Court rejected the cassation appeal filed and thus reconfirmed the lawfulness of the tax on the emission of greenhouse gases into the atmosphere created by the Andalucía Autonomous Community.

6. *Collection proceeding.- If the tax authorities delay the execution of a refund, the late-payment interest must be calculated on both the principal and on the interest that should have been paid on time (Supreme Court. Judgment of June 30, 2014)*

In this case, the taxpayer had received a refund derived from corporate income tax of fiscal year 2000. The relevant amount was refunded in 2006 but the tax authorities did not pay late-payment interest, on the ground that it was a refund derived from the management of the tax. The TEAC upheld the entity's claim and recognized its right to receive that interest. In the enforcement of the TEAC's decision, the tax authorities paid in 2009 the late-payment interest, but only that accrued up to 2006 (in 2006, they had already paid the principal of the tax refund). The entity submitted an enforcement motion claiming the payment of interest on the actual interest due to the delay in the payment of the latter between 2006 and 2009. The TEAC rejected that motion on the ground that tax legislation did not provide for that payment of interest on interest. The National Appellate Court, on the other hand, upheld the appeal against the TEAC decision and ruled in favor of the taxpayer.

The Supreme Court has now rejected the cassation appeal filed by the Government Lawyer, ruling that in 2006, the tax authorities should have refunded a debt which included some interest which the tax authorities did not pay until 2009. Therefore, on the part of that debt that was not paid until 2009, that is, on the late-payment interest on the principal, interest must continue to be charged until that part of the debt was settled in 2009.

7. *Review proceeding.- The notice of a correction of errors in relation to a decision opens a new period to appeal against (National Appellate Court. Judgment of March 27, 2014)*

In the case analyzed by the Court, the Canary Islands Regional Economic-Administrative Tribunal tried to notify a decision to the appellant, but after two unsuccessful attempts to serve the notice, the appellant was deemed to be "unknown" and therefore could not contest the decision. Two years later, the appellant was notified of a correction of errors in the previous decision at the tax authorities' own initiative, and on the understanding that a new period to appeal had been opened up, the appellant filed an appeal against the decision with the Central Economic-Administrative Tribunal. That appeal was not given leave due to late filing.

In contrast, the National Appellate Court ruled that as the decision had been issued with correction of errors by the tax authorities themselves, it must be considered that the notice of appeal is valid and has been filed on time, for which reason it ordered the retroaction of the proceeding.

8. *Review proceeding.- It is possible to furnish documentation with the appeal for reconsideration that was not furnished in the inspection (Andalucía High Court. Judgment of January 2, 2014)*

The Andalucía Regional Economic-Administrative Tribunal had not accepted documentation justifying a tax credit that had been questioned, because it was furnished along with the notice of appeal for reconsideration and not during the inspection.

The Andalucía High Court, however, ruled in its judgment that the appellant had not breached the duty to evidence the facts constituting its right to the deduction. In this regard, it stated that, as it was furnished with the notice of appeal filed with the same body that issued the

assessment decision, that body has not been deprived of the possibility of carrying out the inspection, and therefore legal certainty is not affected, given that its power of inspection remained intact when deciding on the appeal for reconsideration.

The result is a balance between the recognition of the right to file documentation and the fight against abusive maneuvers by taxpayers, thereby validating the filing of documentation in the notice of appeal for reconsideration, due to the fact that it is an appeal filed before the same body that issued the appealed decision.

9. *Administrative proceeding.- On the declaration of joint liability in relation to events carried out by a different legal entity (Supreme Court. Judgment of June 20, 2014)*

An entity "A", which forms part of a group of companies subject to insolvency proceedings, carries out two transactions with another entity "B", in order to reduce the assets of A before filing for its own insolvency along with that of the entities of its group. The tax authorities claimed the joint liability of B for the transactions carried out by A. In view of the succession of events, the Court considered that the shifting of the liability to B was justified. That conclusion was based on:

(a) The relationship and unity of the decision-making power (with the same directors and representatives) at both entities.

(b) The fact that B's collaboration in the transactions of A was essential in order to strip the assets from A, given that the transactions consisted of the transfer of the assets from A to B with the clear aim of emptying out A.

(c) The fact, also verified, of the concealment of the transfers through a corporate framework.

II. DECISIONS AND RULINGS

1. *Corporate income tax.- Tax losses to be considered when their amount has been questioned by the tax inspectors (Directorate-General of Taxes. Ruling V1296-14, of May 14, 2014)*

The requesting entity filed a corporate income tax self-assessment for fiscal year 2009, reporting tax losses. The tax inspectors verified that return and reduced the tax losses, and after the confirmation of the adjustment proposed in the assessment, the company filed an economic-administrative claim, on which a decision had not yet been issued by the tribunal when the ruling request was filed.

Against this backdrop, the taxpayer asked about the tax losses that should be taken into account for purposes of their offset in the corporate income tax return of a fiscal year after 2009: that derived from the return filed by the entity in 2009 or that derived from the inspectors' assessment, which had not become final because it had been appealed and the decision on the claim was outstanding.

The Directorate-General of Taxes started by recalling that the mere filing of an economic-administrative claim against an administrative assessment does not stay its execution and that the stay, in cases were the assessment contested in the economic-administrative jurisdiction

does not give rise to a tax debt or amount payable, can be decided by the economic-administrative tribunal, at the interested party's request, in two cases (article 233.5 and .10 of the General Taxation Law):

(a) Where it is detected that a mathematical, material or factual error could have been made when the decision was issued.

(b) Where the interested party justifies that its execution could cause harm that is impossible or difficult to repair.

Consequently, the Tribunal is the one that can, at the interested party's request, decide on the stay of the decision contested in the administrative jurisdiction in the cases mentioned previously. Therefore, as a decision was not issued by the Tribunal in this regard, the administrative decision will be enforceable, and so the taxpayer must be taken into account the tax losses derived from the assessment made by the inspection bodies for purposes of the corporate income tax return of the following fiscal year.

2. *Corporate income tax.- On the licensing of intangible assets pursuant to a framework agreement executed while the former wording of article 23 of the Revised Corporate Income Tax Law was in force (Directorate-General of Taxes. Ruling V1232-14, of May 7, 2014)*

The case raised consisted of a licensing of intangible assets pursuant to a framework agreement dated prior to the entry into force of the amendment of article 23 of the Revised Corporate Income Tax Law ("TRLIS"), implemented by Law 14/2013, the effects of which arose afterwards.

According to the transitional regime introduced by said Law, intangible asset licenses executed prior to the entry into force of that Law (September 29, 2013) shall be regulated by what is established in the legislation in force at that time.

Accordingly, in the specific case analyzed, the Directorate-General of Taxes ruled that:

(a) In the case of the framework agreement analyzed, as it had been signed before September 29, 2013, all the intangible licenses shall receive the treatment given prior to the amendment of the law, because the conditions applicable to the licenses were established before the amendment.

(b) The conclusion does not change even if the licenses are implemented after the entry into force of the legislative amendment.

3. *Personal income tax.- Requirements for the tax credit for renovation of the habitual residence (Central Economic-Administrative Tribunal. Decision of July 3, 2014)*

The taxpayer took the tax credit for renovation in his personal income tax return for the amounts paid in the work performed on a residence that was not his habitual residence at that time, but which would be in the future, specifically, once the works were completed. The tax authorities did not consider the tax credit appropriate on the ground that the building did not meet the requirements to be deemed a habitual residence, as the taxpayer did not reside there prior to the renovation works.

In that scenario, both the Asturias Regional Economic-Administrative Tribunal and the Central Economic-Administrative Tribunal held that the tax credit was appropriate because personal income tax legislation does not require that the residence on which the relevant restoration works are done must be the taxpayer's habitual residence prior to those works, it being possible to meet that requirement once the works have ended.

4. *Personal income tax.- "Inbound expatriates" regime: obtaining exempt salary income triggers the exclusion from the regime (Directorate-General of Taxes. Ruling V1405-14, of May 27, 2014)*

An individual elected to apply the special regime applicable to workers assigned to Spain (the "inbound expatriates" regime), and asked if the fact of receiving exempt income constitutes a ground for exclusion from that special regime. In this connection, the following should be noted:

(a) In order to apply the special regime, among other requirements, the salary income deriving from that employment relationship must not be exempt from nonresident income tax.

(b) The income items that are exempt from nonresident income tax are regulated in article 14 of the Revised Nonresident Income Tax Law, and subarticle 1a) includes among that exempt income the exemptions of article 7 of the Personal Income Tax Law (with the exception of the exemption established in letter y) of said article 7).

(c) The Directorate-General of Taxes considers that the exemptions established in article 7 of the Personal Income Tax Law (such as the exemptions for severance pay) apply to taxpayers who choose to be subject to the special inbound expatriates regime. Thus, if the requesting person receives salary income derived from his employment relationship that is exempt from the tax, it would trigger his exclusion from the special regime.

5. *Valuation procedure.- It is not possible to indirectly contest the comparative appraisal of properties for determining cadastral values through an appeal against an individual cadastral value (Central Economic-Administrative Tribunal. Decision of June 12, 2014)*

The Supreme Court held in its judgment of July 11, 2013, that the comparative appraisal of properties cannot be indirectly contested on occasion of the contesting of the individual cadastral value of a building affected by that comparative appraisal.

Based on that judgment, the TEAC changed its previous view and, as stated by the Supreme Court, considers that comparative appraisals of property for determining cadastral values are general administrative acts (addressed to various interested parties) but are not general provisions; and that, therefore, it is not possible to indirectly appeal against them on the basis that the provision is null and void and, consequently, the decision issued pursuant to it is also null and void.

As a result of this interpretation, the only way to contest a comparative appraisal is to appeal directly against it, with the disadvantage that the period for filing a direct appeal is before the interested party knows the effects of the new comparative appraisal on the properties owned by him.

6. Penalty proceeding.- The proceeding is appropriate when the self-assessment is filed after receiving an official request in a monitoring procedure (Central Economic-Administrative Tribunal. Decision of July 3, 2014)

After receiving a request in the context of a procedure to monitor the formal obligation to file returns/self-assessments, the taxpayer filed supplementary self-assessments to include income derived from accounts abroad that had not been reported in a timely manner. The tax authorities subsequently initiated a penalty proceeding (for an infringement consisting of failure to make payment in voluntary period) despite that reassessment.

The TEAC validated the penalty on the ground that:

(a) The reassessment by the taxpayer through supplementary self-assessments, after receiving an official request such as that stated cannot be deemed "voluntary".

(b) Where the data or proof necessary to establish in the penalty proceeding the elements which determine the infringement and the penalty, it is possible to apply the tax penalty regime without needing to first carry out a tax application proceeding aimed at verifying the tax payable. Those data or proofs must have been obtained, in any case, in the context of a prior tax application proceeding which may not necessarily have been aimed at verifying material tax obligations but which is appropriate for its aim.

7. Penalty proceeding.- On the maintenance of the 25% reduction in cases of request of deferral/split payment (Central Economic-Administrative Tribunal. Decision of June 25, 2014)

The TEAC analyzed a situation in which it imposed a penalty on a taxpayer with the reduction of 30% for acceptance of the adjustment made and of 25% for acceptance of the penalty. In the voluntary period for paying the penalty, the taxpayer requested a deferral of the debt, so the tax authorities then claimed the payment of the 25% reduction because the payment had not been effectively made in the voluntary period.

After the taxpayer requested a deferral of the debt, the Collection Department required the remedy of certain defects within the period of ten days. However, rather than remedying those defects, the taxpayer paid the penalty.

In this scenario, the TEAC admitted the maintenance of the 25% reduction, stating as follows:

(a) Where, after requesting a deferral in the voluntary period and without breaching any period or contesting the penalty or, as the case may be, the assessment, the taxpayer proceeds to pay over the total reduced penalty, it must be understood that the taxpayer has desisted from its request for a deferral, based on the proportionality principle.

(b) This same view would apply in case of desisting from requests for deferral or split payment made with other guarantees being offered, where the payment of the total debt is made before the deferral or split payment is granted (as was stated by the National Appellate Court in its judgment of March 7, 2013).

8. Penalty proceeding.- In case of late filing of an appeal or claim, the stay should also be granted and maintained until the decision is final in the economic-administrative jurisdiction (Central Economic-Administrative Tribunal. Decision of May 29, 2014)

In this case, the tax authorities denied the stay of execution of the penalty because they did not have record of a claim having been filed on time against the decision resolving on the penalty proceeding.

The TEAC stated that the stay of execution of tax penalties without needing to furnish a guarantee takes place once an appeal or claim has been filed against them, even if filed late, according to article 212.3 of the General Taxation Law, because the penalty decision will not become final until the administrative jurisdiction has been exhausted. Consequently, the collection bodies cannot initiate the enforced collection of contested penalties on the pretext that they have been contested late.

9. Inspection proceeding.- The verification of census obligations is an inappropriate proceeding to verify the veracity of facts in certain transactions (Central Economic-Administrative Tribunal. Decision of June 17, 2014)

In the context of a proceeding to verify census obligations, the tax authorities imposed a penalty for the breach of certain invoicing obligations.

The TEAC upheld the taxpayer’s claim on the ground that the verification of census obligations is formal in nature and confined to determining the veracity of the data communicated in census returns for registration, modification and deregistration of the activity, and cannot be used to verify (in the scope of that type of review) the transactions which the taxpayer carries out in the course of its business.

In short, the census verification has a specific aim and grants the tax authorities some powers of review which are different from those pursued with inspection proceedings that permit the tax authorities to analyze the veracity of certain transactions.

Accordingly, the Tribunal annulled the penalty because the facts on which it was based had been determined in a proceeding that was not suitable for verifying their veracity due to the limited scope of the inspection proceeding in this case).

10. Administrative proceeding.- Appeals or claims filed to obtain a declaration of time-barring do not toll the statute of limitations of the tax authorities’ right to determine the tax debt (Central Economic-Administrative Tribunal. Decision of June 17, 2014)

In the case analyzed, the time-barring of a limited inspection in relation to VAT was not declared at the initiative of the tax authorities, so the interested party had to formally request that declaration. The tax authorities, considering that the taxpayer’s claim tolled the statute of limitations on their right to determine the tax debt, initiated a new proceeding.

The TEAC ruled that said right of the tax authorities was statute-barred given that the document filed in order to have that time-barring recognized cannot in any way toll the statute of limitations.

The importance of this decision, which reiterates a settled view of the TEAC, lies in that it sets forth the reasons why said view is maintained despite the existence of Supreme Court judgments (such as that dated October 5, 2010, in appeal 412/2008, to which the judgment of October 23, 2012 in appeal 306/2012 refers) which appear to make a contrary interpretation.

In this regard, the TEAC affirms that unless the Supreme Court issues future judgments establishing otherwise, these judgments do not apply to the case in question for the following reasons:

(a) Firstly, because they were issued in relation to the reimbursement of public aid and not to the tax authorities' right to assess tax.

(b) Moreover, because they refer to the General Taxation Law of 1963, in which the concept of time-barring in tax application procedures did not exist.

Lastly, the TEAC clarified that it does not agree with the view set forth in the judgments by the Cataluña High Court holding that a proceeding should not be deemed statute-barred when the statute of limitations has been exceeded by just one day, based on arguments such as (i) the deficient functioning of the postal service (beyond the control of the tax authorities), (ii) the difficulty in analyzing delays and whether or not they are attributable to the tax authorities, or (iii) the tax authorities' workload. The TEAC is emphatic in denying the validity of those arguments, stating that the tax authorities and the taxpayer must be treated equally. Thus, if an appeal or claim filed by the taxpayer only one day late triggers the late filing of that appeal or claim, then the same thing must happen when it is the tax authorities who exceed the statute of limitations by one day.

11. Data verification proceeding.- The inappropriate use of this proceeding results in its nullity or voidability (Central Economic-Administrative Tribunal. Decision of June 17, 2014)

In a sale and purchase of some rural properties, the parties considered the transaction subject to and exempt from VAT, waiving the exemption pursuant to article 20.2 of the VAT Law. The assessment office considered that the acquirer, at the time of the sale and purchase, was not entitled to deduct the total tax borne, given that in the preceding year, it had declared a deductible proportion of 50%, for which it considered that the transaction was subject to transfer tax, issuing the relevant assessment. This assessment was issued in a data verification proceeding.

The TEAC ruled that:

(a) The data verification proceeding is not appropriate for issuing an assessment such as that mentioned, since the discrepancy or inappropriate application of the law that may arise is "patent" which falls within a case where the law is highly complex.

(b) In this regard, the aim is to determine whether or not the acquirer-trader has the right to deduct the full amount of tax borne, for which an analysis must be made not only of its activity but also of the application of the provisions relating to the general or special deductible proportion, which has a direct impact on the taxation of its business.

(c) Therefore, the assessment issued must be rendered null and void.

III. LEGISLATION

1. *Regime for shipping entities based on tonnage*

Maritime Shipping Law 14/2014, of July 24, 2014, published in the Official State Gazette of July 25, 2014, has implemented a broad reform of Spanish shipping law to bring it into line with international shipping law and adapt it to the current practices of sea carriage.

In the tax area, a transitional provision is introduced in relation to the regime for shipping entities based on tonnage established in chapter XVII of title VII of the Revised Corporate Income Tax Law, establishing that, for purposes of applying that regime, the definitions and other concepts established in Maritime Shipping Law 14/2014, of July 24, 2014, shall apply to the requests for the regime filed as from its entry into force.

That Law will take effect two months after its publication in the Official State Gazette, on September 25, 2014.

2. *Single Administrative Document (SAD)*

The Decision of July 11, 2014, by the Department of Customs and Special and Excise Taxes of the State Tax Agency was published in the Official State Gazette of July 21, 2014, providing instructions for formalizing the single administrative document (SAD).

The main changes include most notably: (i) the adaptation to the new Customs Representatives Register, with the EORI/TIN number being the only way to identify customs declarants and representatives; (ii) the extension of the scope of the simplified procedure to include dispatches from the Canary Islands to other Member States; (iii) the instruction on how to apply for the VAT exemption due to inclusion in warehousing arrangements other than customs, for the import of products of article 108.b of the Special and Excise Tax Regulations, when its destination is premises authorized to manufacture or store products to be used as fuel; and (iv) the adaptation of the instructions relating to the loading of provisions on ships and aircraft to the content of the single additional provision of Law 16/2013, and to final provision four of Organic Law 9/201, regulating a customs duty for this type of transaction.

Also worthy of note is the creation of an online form, filled out electronically, for citizens to comply with customs formalities in their private purchases.

This Decision took effect on July 22, 2014. However, the elimination of the customs agent code in box 14 of the SAD and annex XVI (simplifications in national exchanges of EU goods with the Canary Islands) will apply starting on January 13, 2015.

3. *Forms 322 and 353, monthly self-assessment under the special VAT system for groups of entities. Form 309, non-periodic VAT return*

Order HAP/1222/2014, of July 9, 2014 (Official State Gazette of July 15) has introduced changes in the individual (form 322) and aggregate (form 353) monthly VAT returns for entities that apply the special system for groups of entities, as a consequence of the changes deriving from the latest amendments to the VAT Law and Regulations.

Specifically:

(a) In form 322, boxes are included to permit electing or revoking the application of the special deductible proportion in the last tax return of the year, and to permit specifying whether the declarant has been recipient, in the relevant period, of transactions to which the special cash-basis accounting scheme applies.

(b) Also in form 322 new boxes are included to permit breaking down the modifications of taxable amounts relating to both intragroup transactions and to general schemes and transactions under the special compensatory charge scheme. Additional boxes are also included to permit identifying intra-EU acquisitions of goods and services, other transactions in which there is reversal of the tax liability other than intra-EU acquisitions of services, transactions to acquire investment goods and the rectified taxable amounts and deductible amounts of VAT.

The new forms shall be used for self-assessments filed for tax periods starting on or after January 1, 2015. However, form 322 relating to the last period of 2014 is expected to include the possibility of electing the special deductible proportion.

The filing period for forms 322 and 353 is modified, eliminating the possibility of filing the return relating to July in the first 20 calendar days of September. Thus, starting in fiscal year 2014, both forms must be filed in the first 20 calendar days of the month after the end of the monthly tax period, with the exception of the December return, which will continue to be filed in the first 30 calendar days of January.

Lastly, form 309 for the non-periodic VAT return is modified (starting from the date of its publication in the Official State Gazette), extending the cases in which this return must be filed, including, among others, the case of persons or entities that do not have the status of traders and traders that only perform exempt transactions contained in articles 20 and 26 of the VAT Law which are debtors of a claim in favor of the Public Finance Authorities as a consequence of the change of the taxable amount of transactions which are wholly or partially unpaid.

Moreover, the parties obliged to file the non-periodic VAT return include the beneficiaries of the application of the super-reduced rate in supplies or acquisitions of vehicles for persons with reduced mobility who are not VAT taxable persons and breach the requirement established by regulations, and any person who is not a VAT taxable person and must regularize his tax situation due to the breach of the requirements for applying tax benefits in relation to VAT.

4. Urgent tax measures

Royal Decree-law 8/2014, approving urgent measures for growth, competitiveness and efficiency, was published in the Official State Gazette of July 5, 2014, with, broadly speaking, a threefold objective: (i) to promote competitiveness and the efficient functioning of the markets, (ii) to improve access to financing, and (iii) to stimulate employability and jobs. In the tax area, specifically, the measures introduced are aimed at stimulating economic activity and mitigating the effects of the economic downturn.

The main tax-related changes introduced by this law were summarized in our Tax Commentary 3-2014 of July, found at the following link:

http://www.garrigues.com/es/Publicaciones/Novedades/Documents/Comentario-Fiscal-3-2014.pdf

5. *Spain-Dominican Republic tax treaty*

The Spain-Dominican Republic tax treaty and its Protocol, signed in Madrid on November 16, 2011, were published in the Official State Gazette of July 2, 2014. The most noteworthy aspects are the following:

(a) The withholding rates applicable according to the type of income obtained will be the following:

- Dividends: 0% if the beneficial owner is a company (excluding partnerships) that directly owns at least 75% of the capital of the company that pays the dividends; 10% for all other cases.

- Interest and royalties received by their beneficial owner: 10%.

- Income from international air or sea navigation: 2.5% of the gross income received, with the limit of the lowest rate recognized in an agreement or convention with a third State on that income.

- Income from provisions of services: This income, which will not fall within the scope of article 7 on business income, unless the services are provided through a permanent establishment in a Contracting State, can be taxed in the State where the services are provided, subject to the limit of 10% of the gross amount.

  The definition of "services" includes those of advisory, consulting or technical assistance in all area's of knowledge, as well as those of business management not related to the sale and purchase of goods, representation, and any type of activity that entails the application of knowledge or technical or professional abilities not associated to the sale and purchase of goods.

(b) Gains derived from real estate companies: Those obtained from the transfer of shares or other holding rights where 40% or more of the value derives directly or indirectly from real estate located in the other State shall be taxed at source.

(c) Spain will eliminate the international double taxation using the ordinary credit method in general and the underlying tax credit method for dividends. If any income is exempt from tax in Spain, the exemption with progression method will apply.

(d) In turn, section IV of the Protocol, in relation to information exchange, is worth noting. It states that *"each contracting State guarantees, for the purposes expressed in article 25, its capacity to obtain and provide, upon prior request, information in the possession of banks, other financial intermediation institutions and any person acting in a representative or nominee capacity, including designated agents and fiduciaries."*

This tax treaty will enter into force on July 25, 2014, and its provisions will take effect:

(a) In relation to taxes withheld at source on the amounts paid or owed to nonresidents, starting on July 25, 2014.

(b) In relation to other taxes, with respect to fiscal years starting on or after July 25, 2014.

(c) In all other cases, starting on July 25, 2014.

6. *FATCA agreement between Spain and the United States. Order approving the annual informational return on financial accounts*

The Agreement between the Kingdom of Spain and the United States of America to improve international tax compliance and implement the Foreign Account Tax Compliance Act - FATCA (Law on tax compliance of foreign accounts), made in Madrid on May 14, 2013, was published in the Official State Gazette on July 1, 2014.

The Agreement establishes a system for automatic exchange of information for tax purposes in the area of the mutual assistance between both States in order to, among others, advance in the fight against fraud and facilitate the legislative framework which permits Spanish financial institutions to fulfill the obligations derived from FATCA.

The Agreement establishes, on the one hand, the obligation to obtain and exchange information regarding the accounts which are specified therein as being reportable for each case. In this regard, for example, Spanish financial institutions in general (except for Spanish financial institutions excluded from such obligation and which are detailed in Annex II to the Agreement) shall identify the so-called "US reportable accounts" by applying the provisions on due diligence specified in detail in Annex I of the Agreement.

The information to be exchanged on those accounts is not identical in both cases. In the case of Spain, it includes, among other information, the US TIN (where that data is available, otherwise the date of birth) and identity of the account holder, the account number, name and identification of the financial institution obliged to provide information, the balance, in the case of a custodial account (as defined in the Agreement), gross interest, dividends and other income generated in relation to the assets deposited in the account, paid or debited to the account and the gains derived from the transfer or reimbursement of assets paid or debited to the account, and, in the case of a depository account, the amount of interest paid or debited to the account.

Moreover, in relation to the treatment of Spanish financial institutions obliged to report information according to the US FATCA legislation, with a view to considering them as complying with that legislation, the financial institution must, among other issues, (i) report the name of all non-participating financial institutions to which payments have been made in 2015 and 2016, and the amount thereof, (ii) under certain circumstances, make withholdings of 30% from all payments of US sources paid to a non-participating financial institution, and (iii) where those circumstances are not met, in relation to such payments, provide to the immediate payer the information that permits the withholding.

In addition, Order HAP/1136/2014, regulating certain matters related to the Agreement and approving a new form 290 of annual informational return on financial accounts of certain US persons was published in the Official State Gazette of July 2, 2014. In the articles of the Order, certain relevant issues are developed and clarified regarding the interpretation and application of the Agreement. Among other issues, with respect to the obligations of Spanish financial institutions obliged to report, besides the obligations mentioned previously, it adds that of registering with the US IRS and obtaining an identification number called "GIIN" (Global Intermediary Identification Number).

Furthermore, in relation to the periods for application of the Agreement, the Order clarifies that pursuant to article 7 of the Agreement (more favorable terms), there is not an obligation to obtain and supply information regarding 2013 even though the Agreement initially established it. The first supply of information shall be made in 2015, exclusively in reference to information relating to 2014. The Agreement in this regard also establishes, in the case of Spain, a progressive implementation of the obligation for Spain to provide information to the US until the full supply of information regarding 2016 (in 2017).

Amongst the rest of issues regulated in the Order, the following are worthy of note:

(a) Regarding the due diligence measures, the reference dates initially included in the Agreement are revised and, in many cases, pushed back to June 30, 2014 (or later).

(b) Form 290 must be filed online between January 1 and March 31 of each year, reporting the financial information relating to the immediately preceding year.

(c) The Annex of the Order includes a list of the information that must be specified in form 290 in relation to both the financial institution (which includes, for example, the GIIN obtained when registering with the IRS), and in relation to each financial account and each account holder.

7. Tax treatment of preferred shares and of certain debt instruments

Law 10/2014, of June 26, 2014, on the organization, supervision and solvency of credit institutions was published in the Official State Gazette of June 27, 2014. It is aimed at boosting the adaptation of Spanish legal system to the legislative changes imposed in the financial sector at international and EU level.

In the tax area, it regulates the treatment applicable to preferred shares which, among other requirements, have been issued by a Spanish credit institution or by a listed company resident in Spain or in a territory of the European Union, that does not have the status of tax haven, the voting rights of which fully pertain, directly or indirectly, to a Spanish credit institution and whose exclusive activity is the issuance of preferred shares.

In particular, the tax treatment is designed as follows:

- The remuneration of the preferred shares will be deemed a tax deductible expense in the corporate income tax of the issuer entity.
- The income derived from the preferred shares will be classified as income obtained on the transfer to third parties of own capital, pursuant to the Personal Income Tax Law.
- In cases of issuances made by a subsidiary, withholdings will not apply to the income generated by the deposit of the resources obtained at the parent company, and the exemption established in article 14.1.f) of the Revised Nonresident Income Tax Law will apply, as the case may be.
- The income derived from preferred shares obtained by nonresident income taxpayers without a permanent establishment will be exempt from that tax on the same terms as those established for income derived from government debt securities.
- The transactions derived from the issuance of preferred shares will be exempt from transfer tax under the "corporate transactions" heading.
- The credit institution that is the parent of a consolidable group or subgroup of credit institutions will have the obligation to report to the tax authorities and to the institutions in charge of financial supervision on (i) the activities carried out by the subsidiaries (in the cases of issuances made by them) and (ii) the identity of personal income taxpayers or corporate income taxpayers that own or obtain income derived from the securities issued by those subsidiaries, and of nonresident income taxpayers that obtain income derived from such securities through a permanent establishment located in Spain.

The tax treatment described will also apply to:

- The issuance of debt instruments made by credit institutions that meet certain requirements.
- Securities listed on regulated markets, multilateral trading systems or other organized markets and issued out of mortgage securitization funds or asset securitization funds regulated by additional provision five of Law 3/1994.
- Preferred shares issued by listed entities that are not credit institutions or by a company resident in Spain or in a territory of the EU, that is not deemed a tax haven, the voting rights of which fully pertain, directly or indirectly, to listed entities that are not credit institutions, provided they meet certain requirements.
- Debt instruments issued by companies resident in Spain or public business entities that meet certain requirements.

The Law took effect on the day after its publication in the Official State Gazette (i.e., on June 28, 2014) and the tax treatment established therein applies to preferred shares and other debt instruments issued after that date.

8. *Compatibility of the reductions in the social security contributions of research personnel with the R&D&i tax credit in corporate income tax*

Royal Decree 475/2014, of June 13, 2014, on reductions in the social security contributions of research personnel was published in the official State Gazette of June 14, 2014, establishing a reduction of 40% in the employer's contributions to the social security payments for common contingencies of the research personnel that meet certain requirements.

At the same time, it regulates the scope of the compatibility of these reductions with the tax credit for research and development and technological innovation activities established in article 35 of the TRLIS (or relevant provincial legislation).

The changes made in this area were summarized in our Labor/Employment Commentary 8-2014, found at the following link.

http://www.garrigues.com/es/Publicaciones/Novedades/Documents/Comentario-Laboral-8-2014.pdf

IV. OTHER ISSUES

1. *Tax reform: measures submitted for public consultation*

On June 20, 2014 the Council of Ministers approved four Preliminary Bills proposing an overhaul of various tax concepts.

In particular, (i) the Preliminary Bill 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; (ii) the Preliminary Corporate Income Tax Bill; (iii) the Preliminary Bill amending Value Added Tax Law 37/1992, of December 28, 1992, Law 20/1991, of June 7, 1991, modifying the tax aspects of the Canary

Island Economic and Tax 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 area of environmental taxation and adopting other tax and financial measures; and lastly, (iv) the Preliminary Bill partially amending General Taxation Law 58/2003.

The changes proposed by these preliminary bills were summarized in our Garrigues Tax Commentary - Tax Reform: analysis of the measures submitted for public consultation, found at the following link.

http://www.garrigues.com/es/Publicaciones/Novedades/Documents/Comentario-Fiscal-Reforma-2014.pdf

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