GARRIGUES

TAX DECEMBER 2016

CONTENTS

1941-2016 GARRIGUES TAX

TAX NEWSLETTER

The flow of new legislation seen recently in the international tax system continues, notably with the preparation of the multilateral convention set out in Action 15 of the BEPS Action Plan. On November 24, the OECD announced that more than one hundred jurisdictions have concluded the preparation of this multilateral convention to implement some of the measures determined in other actions in the BEPS plan.

The convention is now open for the process of its signature and ratification by all of the countries that have participated in this preliminary preparation phase, including OECD countries, G-20 countries and others that have joined this action in the BEPS project.

As the OECD itself has said, the preparation of this multilateral convention means that an international tax system functioning on a bilateral treaty basis will now have a multilateral instrument that will solve the problem of burdensome bilateral negotiations, resulting in more predictability over the interpretation and implementation of the international rules in the tax treaties.

It will similarly ensure swift implementation of the measures in the BEPS plan, because it will save countries from the having to wait until these measures are included in their bilateral treaties, in that they will simply be able to ratify and include this multilateral instrument in their domestic law.

The contents of the treaty fall into three categories:

a) Firstly, measures are introduced on the treatment of entities and hybrid instruments, including entities with dual tax residence.

   In this field, article 5 of the Convention notably alters the application of the methods for elimination of double taxation provided for in article 23 of the OECD Model Convention.

b) It also contains the rules implementing actions 6 and 7 of the BEPS plan, on treaty abuse. They comprise a general anti-abuse rule and a simplified limitation on benefits rule.

c) Lastly, the multilateral convention sets out rules on mutual agreement procedures as a way of improving the existing mechanisms for resolving disputes between countries over international taxation matters.

The convention includes a long list of reservations and possible notifications by countries which will force the national authorities to make known their own standards on the subject.

01 JUDGMENTS

1.1 Corporate income tax.- The free movement of capital applies to third countries (Court of Justice of the European Union. Judgment of November 24, 2016, case C-464/14)

Portuguese tax law provides an exemption for the dividends received by a resident company, if they come from companies resident in Portugal or in other EU member states in which it owns at least 10% of their capital stock (not applicable to investments in companies resident in third countries).

In this context, the CJEU concluded that:

a) In a case such as that at issue, it is the exercise of the free movement of capital that may be compromised not the freedom of establishment (because the former prevails over the latter), because the relevant factor is the 10% threshold above which the exemption applies.

b) As has been settled in numerous judgments, the free movement of capital must be considered to apply also to third states; in this case, to the dividends from investments in third states.

c) In the case at issue, in which a potential breach of this freedom has been observed, the only justification for restricting that freedom would be the need to guarantee the effectiveness of fiscal supervision where the information necessary to apply the exemption cannot be obtained from the third state, which information is simply whether the entity distributing them is subject to an equivalent tax. In the CJEU's view, that information may be obtained under the tax treaty between Portugal and Tunisia and deprives the restriction concerned of any justification.

1.2 Corporate income tax.- The tax neutrality regime may only be denied if the main aim of the transaction is tax fraud or evasion (Supreme Court. Judgment of November 23, 2016)

Two non-monetary contributions were made with the aim of splitting up the appellant's assets to limit the liability in respect of a mortgage loan of which the appellant was the beneficiary. Tax auditors disallowed the neutrality regime because they considered the transaction had been performed with the aim to avoid the debtor's unlimited liability under article 1911 of the Civil Code.

Following an exhaustive study of the origin, grounds and case law of the neutrality regime, the Supreme Court held that:

a) The only element that is prohibited (and therefore prevents the neutrality regime from being claimed) is if tax fraud or evasion is the only goal sought.

b) The existence of valid economic reasons cannot therefore be denied on the ground that the goal of the reorganization was to limit liability, if that goal was not linked to the aim of evading tax.

1.3 Corporate income tax.- A branch may amortize financial goodwill on the acquisition of shares in a nonresident entity (Supreme Court. Judgment of October 26, 2016)

The branch acquired shares in a nonresident entity and considered that it could amortize the financial goodwill on that acquisition, by making a downward adjustment to its nonresident income tax base.

Tax auditors disallowed this option because (i) that adjustment had to be treated as state aid pursuant to Commission Decision of October 28, 2009, and (ii) in any case, this relief may not be claimed by a branch, considering that due to not having its own legal personality, it cannot acquire shares itself.

The court accepted the taxpayer's argument, affirming that:

a) Firstly, in a judgment rendered on November 7, 2014 (case T-219/10) the CJEU rendered void article 1(1) and article 4 of that Decision of October 28, 2009, which implies that the Decision may no longer be taken as a ground for the assessment at issue.

b) Also, a branch may be entitled to claim the incentive insofar as:

- Spanish law has defined a permanent establishment as a unit for attributing the income obtained in Spain by non-Spanish resident individuals or entities, precisely to tax that income in Spain.

- Branches are mentioned as one of the elements faling within that general definition of permanent establishment.

- The determining factor is the assignment of the asset generating the income attributable to the establishment rather than its formal ownership. Therefore, after the existence of a permanent establishment for tax purposes has been accepted, what may not be done is not apply the provisions set out in the tax laws in this respect and, among them, that relating to the tax amortization of the financial goodwill implicit in the acquisition of shares by (or assignment to) the permanent establishment.

1.4 Corporate income tax.- Not recording per diems on form 190 does not mean their deduction must be disallowed (Canary Island High Court. Judgment of May 23, 2016)

The enterprise had paid tax-exempt per diems but forgotten to record them in form 190 (annual summary of withholdings on salary income in cash and in kind), which contains a special code for reporting this type of exempt income.

Tax auditors questioned the deduction of the expenses concerned. They considered that their payment had not been substantiated precisely because they had not been included on form 190. Even though in the course of the tax audit the enterprise had produced pay statements proving the payment of those per diems.

The Canary Island High Court concluded that once proof of the payment of the per diems had been provided by producing the pay slips, and because the tax auditors had not proved that the payment of those per diems did not have matching revenues, those per diems are deductible, a conclusion that remains unaltered by the error on form 190 (which, besides, is not related to corporate income tax).

1.5 Transfer and stamp tax.- Article 108 of the Securities Market Law may only apply if the expressly stipulated conditions are satisfied (Supreme Court. Judgment of November 22, 2016)

A company acquired treasury stock to redeem shares, which resulted in one of its shareholders owning a majority interest in the enterprise.

The court examined the application of article 108 of Securities Market Law 24/1988, of July 28, 2016 (LMV) (in the wording given by Personal Income Tax Law 18/1991, of June 6, 1991). This article is now article 314 of Legislative Royal Decree 4/2015, of October 23, 2015 approving the revised Securities Market Law.

The wording applicable in the year the transaction took place required share transfers to be subject to transfer and stamp tax if (i) as a result of the transfer, the transferee obtained a position of control at the enterprise, and additionally, (ii) the transfer involved shares in the equity of a company at which more than 50% of its assets are real estate located in Spain.

The Supreme Court denied that the first of the requirements was satisfied in the examined acquisition of treasury stock, insofar as the company acquiring the investment did not attain, as a result of that transaction, a position allowing it to exert control over the company itself.

Although the legislation was subsequently amended to cover cases such as that at issue, the court mentioned that article 108 LMV is a specific anti-fraud measure and therefore the requirements in the article must be satisfied with no exception for the result provided in the legislation to be able to be applicable.

1.6 Transfer and stamp tax.- An audit of the value of a subdivided property cannot consist of apportioning a proportional value to the subdivided meters based on the value of the parent property (Andalucía High Court. Judgment of June 10, 2016)

The value of a subdivided parcel was audited for stamp tax purposes. The authorities' valuation method consisted of calculating the proportional part of the cadastral value of

the parent property based on the percentage that the subdivided number of square meters by the meters bore to the parent property.

Andalucía High Court disallowed the utilization of this method because the characteristics of the subdivided parcel are not necessarily the same as the characteristics of the parent property from which it was separated.

1.7 Administrative procedure.- When the statute of limitations starts to run for requesting payments made incorrectly because the rule on which they were based was held contrary to EU law (Supreme Court. Judgment of November 16, 2016)

The Supreme Court heard a cassation appeal for a ruling on a point of law in which it examined how the date on which the statute of limitations starts to run is determined in relation to a request for a refund of incorrect payments in respect of a VAT self-assessment under a rule later held contrary to EU law in a decision by the CJEU (in this case, the CJEU's judgment of October 6, 2005, C-204/2003).

The National Appellate Court held that the statute of limitations should have started to run from the publication of the CJEU's judgment, because it is only when the national law is held contrary to EU law that entitlement to action to apply for a refund arises. In other words, it echoed the actio nata theory, under which the right to request a refund and the legal standing for the deduction or refund only arise on the publication of the CJEU's ruling.

The Supreme Court, however, disallowed that reasoning insofar as the judgments the lower court used related to cases of financial liability, and different types of action arising from different instruments cannot be mixed up and rolled together under the same requirements. The reasoning is valid, therefore, in relation to action for financial liability but cannot be used in relation to a request for a refund of incorrect payments. In this latter case, the period for requesting a refund starts to run from the end of the voluntary filing period for the relevant return.

02 JUDGMENTS AND RULINGS

2.1 Corporate income tax.- On the reversal of impairment losses on shares acquired by related companies (Directorate-General for Taxes. Ruling V4560-16, of October 24, 2016)

Company B and company C had been taxed under the consolidated tax group regime since 2008, and were in the circumstances described below:

a) Before that fiscal year 2008, company C had acquired the whole of company E, tax-resident in the United States.

b) Company C recorded an impairment loss on its investment in company E, as a result of this company's losses between 2005 and 2012, an impairment loss that was deductible for corporate income tax purposes.

c) In 2013 company B subscribed to the whole of a capital increase at company E, after which it owned an 88.60% interest in this company, and company C saw its interest reduced to 11.40%.

d) In 2013, E started to record income, and therefore reversed the impairment loss on the interest which at the time was tax deductible.

The request concerned which company must be attributed the reversal made at the time for corporate income tax purposes at C. The DGT concluded that under article 11.6 of the Corporate Income Tax Law (LIS), 11.40% of the reversal must be attributed to company C and 88.60%, to company B (bearing in mind that they are both related companies). If B and C merged, insofar as both are taxed under the special consolidated tax group regime (and regardless of whether or not the neutral tax regime applies), the reversal must be attributed in full to the post-merger company.

2.2 Corporate income tax.- Deduction of the finance costs in leveraged share purchases (Directorate-General for Taxes. Ruling V4487-16, of October 18, 2016)

Under article 16.5 of the Corporate Income Tax Law, expenses related to debts incurred to acquire shares in companies may be deducted with an additional limit of 30% of the operating income of the transferee company, without including that of any company merging with it or any company joining its tax group in the 4 years following the acquisition (where the neutral regime is not claimed for the merger). This limit, however, is not applicable in the period in which the acquisition takes place if the acquisition is financed with debt in up to 70% of the cost price; and may not be claimed in later years if the debt is reduced by the proportional part relating to each of the following 8 years until the debt amounts to 30% of the cost price.

The following questions were asked in relation to that additional limit:

a) What treatment must be given to the debts related to the acquisition of an investment, where in the acquisition agreement it has been agreed to discharge those debts through the distribution of dividends by the acquired company. In these cases, according to the DGT:

  a. The dividends must reduce the cost price of the investment.

  b. As a result, the repayment made out of the dividends received will not be treated as a discharge of the debt related to the acquisition.

b) Whether in cases where, after the acquisition, more debt is acquired to enable the investors to recover their original investment, the new debt must be taken into account for the purposes of applying the additional limit mentioned above. According to the DGT, this new debt obtained to reduce the cost price for the investors may not be treated as debt related to the acquisition, even if other limits and tax rules apply to that new debt.

2.3 Corporate income tax.- The gain arising from bringing marketable securities to fair value is exempt (Directorate-General for Taxes. Ruling V4476-16, of October 18, 2016)

The request concerned whether the exemption provided in article 21 of the Corporate Income Tax Law may be elected for income arising from bringing the securities classed as marketable securities to their fair value.

The DGT affirmed that:

a) The income arising from bringing the securities classed as marketable securities to their fair value does not fall within income distributed by the investee, and therefore cannot be classed as dividends or shares in income.

b) Nevertheless, although that income cannot strictly speaking be classed as capital gains (because the assets have not been transferred), under an interpretation based on the spirit of the law it may be given the treatment provided for the income arising on the transfer of the assets, in that it represents the difference between the fair value and the book value arising from holding the shares (which will be realized when they are transferred).

c) Therefore, if the shares satisfy the requirements in article 21 of the Corporate Income Tax Law, that income will be exempt. For these purposes, the holding period of the investment must match the time elapsed between when they were acquired and the valuation date; or, failing that, the length of time it takes until the actual transfer of the investment takes place.

d) If after claiming the exemption for the increase in the fair value, a decrease in fair value occurs or a loss on the transfer of the investment, whether the rules in article 21 of the Corporate Income Tax for transfers between companies in the same group within the meaning of article 42 of the Commercial Code will be applicable, especially if the income or losses are no longer generated within the group, but at the same company.

Therefore, if a loss arises due to a decrease in fair value or on the transfer of the investment after an exemption has been claimed on an amount of income, that loss will not be deductible to the extent of the previously exempt income, and in respect of the exempt dividends received, under articles 21(6) and 21(7) of the Revised Corporate Income Tax Law (TRLIS).

e) If a loss arises first due to a decrease in fair value, that loss may be treated in the same way as the loss that would arise on the transfer of the investment to a company in the business group, and therefore, under article 11.9 of the Corporate Income Tax Law, that loss may not be included in the tax base until the shares are transferred to third parties.

In this case, the rule provided in article 21.4.b) of the Corporate Income Tax Law in relation to successive transfers of homogenous securities will not apply, in that it is provided for successive transfers of homogenous securities to third parties outside the business group.

It must be noted that these articles have been amended for the fiscal years beginning on or after January 1, 2017.

2.4 Corporate income tax.- Treatment of the revenue from a novation of financing agreements (Directorate-General for Taxes. Ruling V4444-16, of October 17, 2016)

A company received bank financing in 2006 and 2009, which it refinanced in October 2014 in novation and amendment deeds for the financing agreements.

In the auditors' view, this refinancing resulted in an exchange of debt instruments between lenders with materially different conditions for the purposes of Recognition and Measurement Standard 9 in the Spanish Chart of Accounts. When implementing this standard, the auditors calculated the market value of the new financial liability that must be recognized after the novation and retired the original liability. In accordance with that accounting rule, the difference between both liabilities was recognized in the income statement, which implied that the company recognized a financial revenue.

The valuation difference on the liabilities arose from discounting the cash flows associated with the loan at the market interest rate. The financial revenue mentioned above will be offset in full over the remaining terms of the financing agreements as a result of recognizing a finance cost higher than that covenanted in the novation and amendment agreements. In other words, the finance cost that will be recognized will be the "effective interest rate " determined by the auditors and not the interest rate actually covenanted in the novation agreements.

The following questions were asked:

a) Firstly, whether the revenue generated by the novation could be classed as a revenue resulting from a recomposition for the purposes of transitional provision thirty four of the Corporate Income Tax Law, which provides (in letter g)) that "the limit on the offset of net operating losses will not apply to amounts related to recompositions under an agreement with creditors not related to the taxable person, approved in a taxable period commenced on or after January 1, 2013".

The DGT specified that the recompositions mentioned in that article are not confined to recompositions under Insolvency Law 22/2003, of July 9, 2003, but include any type of recomposition that might occur. For these purposes, a recomposition must mean the release or remission by a creditor of all or part of a debt. Therefore, any reduction, even partial, of the debt, determines the existence of a recomposition from an economic standpoint.

Therefore, in the case of novations and amendments of debts which result in a reduction to the amount owed, a revenue resulting from a recomposition will be deemed to arise, which is not included when calculating the limit on the offset of net operating losses.

The special deferral regime in article 11 of the Corporate Income Tax Law, (and the similar regime in the Revised Corporate Income Tax Law), however, will only apply to recompositions falling within the Insolvency Law.

b) Secondly, whether the revenue may be treated as a financial revenue resulting from the assignment of own capital to third parties for the purpose

of reducing the net finance cost subject to the limit on the deduction of expenses of this type.

In a report requested from it, the Spanish Accounting and Audit Institute (ICAC) concluded that the book revenue arising from this transaction is treated as a financial revenue, even though it does not result from the assignment of own capital to third parties.

c) Lastly, whether the revenues resulting from the recomposition may be used to offset the net finance costs not deducted in prior years under article 20 of the Revised Corporate Income Tax Law. The DGT specified that, because the revenues resulting from the recomposition cannot be classed as revenues resulting from the assignment of own capital to third parties, they cannot reduce the net finance costs carried forward for deduction.

It may happen, however, that a portion of the book revenue resulting from the recomposition relates to finance costs that that were not tax-deductible in the past under the restrictions laid down in article 20 of the Revised Corporate Income Tax Law.

For this reason, the portion of the revenue associated with the recognition for accounting purposes of the novation and amendment which relates exclusively to the debt in respect of accrued finance costs which had generated net finance costs carried forward to be deducted for tax purposes under the limit under article 20 of the Revised Corporate Income Tax Law may not be included in the tax base, because the related finance cost was not tax-deductible and will not be so in the future after being written off as a result of the recomposition. As a result, the company may not include that revenue in its tax base, and it must also eliminate the related net finance costs that have been carried forward.

2.5 Corporate income tax.- The intention to claim the regime for residential leasing is not a valid economic reason for the tax neutrality regime (Directorate-General for Taxes. Ruling V4440-16, of October 17, 2016)

Company A, having among its assets several building plots, buildings, residential properties, business premises and garages, intended to elect the regime for entities engaged in residential leasing, for which it was considering splitting up into two separate companies, and transferring all the leased properties to one of them and its other properties (premises and building plots) to the other.

The request concerned whether the goal of electing the regime for entities engaged in residential leasing qualifies as a valid economic reason for claiming the tax neutrality regime.

The DGT concluded that if the only goal considered by the requesting party for carrying out the transaction was to achieve the tax advantages provided in the regime for entities engaged in residential leasing, the neutral regime cannot be claimed because it is an eminently tax-related reason.

2.6 Corporate income tax.- Calculation of the new useful lives of assets at enterprises of a reduced size (Directorate-General for Taxes. Ruling V4291-16, of October 6, 2016)

Enterprises of a reduced size may depreciate their assets at a rate equal to twice the maximum straight-line depreciation rate on the officially approved depreciation tables (article 103 of the Corporate Income Tax Law).

For any assets to which in the taxable periods commenced before January 1, 2015 a depreciation rate other than the rate applicable under the depreciation table set out in article 12.1 of the Corporate Income Tax Law was being applied, the law provides that they must be depreciated in the remaining taxable periods of their new useful lives (according to the table mentioned above) on the existing net tax value of the asset at the beginning of the first taxable period commencing on or after January 1, 2015.

The request concerned how to determine the new useful life of the asset. The DGT concluded that it must be determined by reference to the maximum straight-line rate provided on the depreciation table prescribed in the Corporate Income Tax Law such that after the useful life has been determined, the rate at which it will have to be depreciated over the taxable periods remaining to complete its new useful life must be multiplied by 2.

2.7 Corporate income tax.- Tax credit for reinvestment: the fact of the reinvesting enterprise leaving the tax group does not imply a breach of the holding requirement for the investment (Directorate-General for Taxes. Ruling V4228-16, of October 3, 2016)

This ruling concerned a tax group which in the fiscal years running up to 2015 obtained income on the transfer of assets for which it claimed the tax credit for the reinvestment of extraordinary income. The reinvestment was made by other companies in the tax group in the construction and development of a number of renewable energy plants. In 2015 shares were transferred in the companies that had made the reinvestment, and additionally, others were expected to be transferred in 2016. All of the above, before the end of the holding period for the reinvested assets. Those transfers would take the investees outside the tax group.

The DGT concluded that, in this case, the fact of the "reinvesting" enterprises falling outside the tax group does not imply a breach of the holding requirement for the investment, insofar as the asset in which the reinvestment was made (the renewable energy plants) continues to operate and remains in the assets of the enterprise that made the reinvestment until the end of the prescribed holding period.

2.8 Corporate income tax.- The international double taxation credit must be calculated on the net income (Directorate-General for Taxes. Ruling V4259-16, of February 5, 2016)

In the examined case a Spanish resident company engaged primarily in providing intragroup financing had provided loans to a Brazilian resident enterprise, and the funds needed to provide the loans came from loans provided by a group enterprise in Holland. This resulted in an interest spread at the Spanish enterprise between the amounts received from the Brazilian enterprise and the interest paid to the Dutch enterprise.

On this subject, the DGT affirmed that the tax liability that would have to be paid in Spain on that income if it had been obtained in Spain would have to be calculated on the net income, which in this case would be the interest received from the Brazilian enterprise less the interest paid to the Dutch enterprise, such that the base for the tax credit would consist of the spread between the interest payments to be made.

2.9 Personal Income Tax.- Treatment of an endowment insurance policy provided by an enterprise to one of its directors (Directorate-General for Taxes. Ruling V4251-16, of October 4, 2016)

An enterprise was considering taking out a unit-linked endowment policy for its director with coverage in the event of the survival or on the death of the insured. In relation to the policy:

a) The policyholder will be the enterprise, the insured will be the director and the beneficiaries will be the insured in the event of survival and the spouse and descendants in the event of death.

b) The policyholder will not be able to exercise surrender rights or change the policy beneficiaries, unless the insured breaches some minimum-stay and non-compete requirements.

The DGT concluded that the treatment of this policy (after assuming that it does not qualify as a pension obligation) is as follows:

a) Any amount of the premium not related to the capital at risk is not income for the director because there is no clear right to collection of the benefit by the beneficiary.

The portion of the paid premium related to the capital at risk for death, however, must be treated as salary income in kind in all cases (subject to a 35% withholding).

b) If at any time after the payment of the premium the enterprise's waiver of surrender rights and of the option to change the beneficiary became unconditional, a clear right to collection of the benefit would arise, and therefore the director would obtain at that time (from the policyholder) salary income in kind (unless this occurred simultaneously with the maturity of the contract).

If this circumstance took place in a period when the benefit was being paid to the director

following maturity of the contract, instead of compensation in kind an amount of monetary compensation would arise paid by the insurer.

In both cases the compensation would be subject to a 35% withholding either in respect of the income in kind paid by the policyholder or from the benefit paid by the insurer. The value of the income in kind would be the amount of the net level premium reserve when the income arose.

c) The benefit received by the director will be monetary compensation (subject to a 35% withholding by the insurer). If, however, the insurer determines that the enterprise has previously attributed the income in kind to the insured, then it will be income from movable capital (subject to the related withholding), and for these purposes the amount attributed to the requesting party in respect of the salary income in kind will be treated as paid premiums.

2.10 Transfer and stamp tax.- Dissolution of a Gibraltar company whose assets were composed of shares in a Spanish real estate company (Directorate-General for Taxes. Ruling V4405-16, of October 14, 2016)

Company A held all the shares in a Gibraltar company whose assets were composed of shares in a Spanish enterprise, having as its primary asset (i.e. more than 50% of its total assets) a property located in Spain rented to company A. This company A wanted to dissolve the Gibraltar company and assign to itself all the shares in the indirectly owned Spanish company.

Therefore:

a) If the Gibraltar company has actually engaged in transactions in its operations in Spain, its dissolution will be subject to capital duty (transfer tax under the corporate transactions heading). Otherwise, it will fall outside this tax.

b) Additionally, the deed recording the delivery of shares in a Spanish enterprise owning a property located in Spain will not be subject to stamp tax (notarial documents), because it does not have to be registered at a Spanish public registry.

c) Article 314 of the revised Securities Market Law (formerly article 108 of the Securities Market Law) does not apply in that the described transaction is not subject to transfer tax under the transfers for consideration heading.

2.11 Revenue procedure.- No late-payment interest may accrue after two months from the notification of the judgment (Central Economic-Administrative Tribunal (TEAC). Decision of November 23, 2016)

The taxable person challenged assessments at TEAC, requesting a stay of enforcement of the debt; they also challenged the penalty proceedings at TEAC. Against TEAC's judgment on both challenges (which was rendered outside the maximum one-year time limit for a decision), an appeal was lodged at the National Appellate Court, requesting also that the stay remain in force. This court partly upheld the pleadings against the assessments (and overturned the penalties).

In the enforcement procedure for the National Appellate Court's judgment, the Spanish finance authority retired the original penalties and assessments and issued fresh assessments. In a claim against this enforcement it was asked what period must be used to calculate the late-payment interest on these new assessments.

TEAC concluded that in cases where the judgments partly uphold claims for substantive or factual reasons (in other words, where they confirm the adjustment made but correct part of the adjusted amount), the challenged assessment must be rendered invalid and a fresh assessment made, in which late-payment interest must be charged on the new assessment, such that:

a. The date on which late-payment interest starts to accrue will be the same as the date that would have been the case for the retired assessment and the interest will accrue until the new assessment has been issued. The calculation will not include the length of time in which the time limit prescribed for deciding on appeals and claims in the administrative jurisdiction was exceeded.

This is what happened is the case examined on this occasion, in which TEAC rendered a decision after the end of the one-year time limit for deciding. And therefore it may not charge interest for the period between when TEAC itself exceeded the time limit

for deciding and notifying its decision, and the date on which that decision was actually notified.

b. In relation to the date on which interest stops accruing, it must be taken into account that the maximum time limit within which the authorities may enforce a judicial judgment is two months from when that judgment is communicated to the authority that carried out the activity challenged in the appeal against enforcement. Therefore, late-payment interest may not accrue after those two months have ended.

03 LEGISLATION

3.1 Form 217, self-assessment of special charge on dividends distributed by SOCIMIS (Spanish REITs)

SOCIMIS are subject to a special charge amounting to 19% of the gross amount of the dividends or shares in income distributed to shareholders whose stake in the capital stock of the SOCIMI is equal to or higher than 5%, where such dividends, in the hands of the shareholders, are tax exempt or are taxed at a rate below 10%. This charge is treated as a corporate income tax liability.

Accordingly, the Official State Gazette of December 21, 2016 published Order HFP/1922/2016, of December 19, 2016, approving form 217, corporate income tax self-assessment: special charge on dividends or shares in income distributed by listed corporations for investment in the real estate market.

The form will only be available in electronic format and must be filed on the website of the Spanish Tax Agency (AEAT) within two months after the due date of the special charge, that is, after the date of the resolution to distribute income adopted by the shareholders' meeting or equivalent body.

The order entered into force on December 22, 2016 and will apply for tax periods commenced on or after January 1, 2013. In cases where the filing period commenced before the entry into force of the order, taxpayers can file the form within two months after the date of its publication in the Official State Gazette (unless they have already filed another type of document and made the related payment).

3.2 Amendments to accounting legislation

The Official State Gazette of December 17, 2016 has published Royal Decree 602/2016, of December 2, 2016, amending the National Chart of Accounts approved by Royal Decree 1514/2007, of November 16, 2007; the National Chart of Accounts for Small and Medium-Sized Enterprises approved by Royal Decree 1515/2007, of November 16, 2007; the Rules for the Preparation of Consolidated Financial Accounts approved by Royal Decree 1159/2010, of September 17, 2010; and the Rules for the Adaptation of the National Chart of Accounts to nonprofit entities approved by Royal Decree 1491/2011, of October 24, 2011.

The Royal Decree constitutes the regulatory implementation of the accounting-related amendments introduced by Audit Law 22/2015, of July 20, 2015, as a result of the transposition of Directive 2013/34/EU, of 26 June 2013, on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings.

The reforms introduced by the royal decree fall into three categories:

a) Simplification of small enterprises' accounting obligations by eliminating the statement of changes in equity and reducing the number of disclosures to be included in the notes to the financial statements.

b) Implementation and adaptation of the recognition and measurement bases for intangible assets and, in particular, those relating to goodwill as a result of the new provisions introduced by the Audit Law.

c) Revision of the cases of dispensation and exclusion from the obligation to file consolidated financial statements, the treatment of consolidation goodwill and some improvements of a technical nature.

As regards the recognition and measurement bases for intangible assets, an accounting amendment also reflected in the tax legislation (since the Audit Law amended Corporate Income Tax Law 27/2014, of November 27, 2014), it is worth recalling that:

a) The Audit Law removed the distinction between intangible assets with a finite useful life and those with an indefinite useful life, so that now all intangible assets are deemed to have a finite useful life. Simultaneously, the law stipulated that they are to be amortized over their useful lives or, where they cannot be reliably estimated, in 10 years. As for goodwill, the law introduced a rebuttable presumption that any goodwill acquired will be recovered on a straight-line basis over 10 years.

b) The Corporate Income Tax Law has also simultaneously eliminated the finite and indefinite useful life distinction for intangible assets, stipulating that they will be amortized over their useful lives and, where they cannot be reliably estimated, subject to an annual cap of one twentieth of their amount. As for goodwill, its amortization for tax purposes will also be subject to this annual cap of one twentieth of its amount.

The newly published royal decree provides the regulations implementing this amendment by including in the National Chart of Accounts the subsequent measurement bases for intangible assets and including a transitional regime for the accounting treatment of goodwill, other intangible assets and the goodwill reserve.

3.3 Average sale prices for 2017 of certain means of transportation for the purposes of audits of amounts

The Official State Gazette of December 17, 2016 published Order HAP/1895/2016, of December 14, 2016, approving the average sale prices applicable for 2017 in the management of transfer and stamp tax, inheritance and gift tax and the special tax on certain means of transportation.

3.4 IIS system is approved

The Official State Gazette of December 6, 2016 published Royal Decree 596/2016, of December 2, 2016, on the modernization, enhancement and furthering of the use of electronic media in the management of VAT, amending the VAT Regulations, approved by Royal Decree 1624/1992, of December 29, 1992, the General Regulations on the steps and procedures for tax management and audits and implementing the common rules on the procedures for applying taxes, approved by Royal Decree 1065/2007, of July 27, 2007, and the Regulations on invoicing obligations, approved by Royal Decree 1619/2012, of November 30, 2012.

The royal decree approves the new Immediate Information Sharing (IIS) system for VAT on the website of the Spanish Tax Agency (AEAT) in addition to introducing new VAT legislation.

The changes introduced by the royal decree have been analyzed in VAT Commentary 1-2016, which can be found at the following link:

Access the link

3.5 Royal Decree-Law 3/2016 on tax measures aimed at the consolidation of public finances

On December 24, 2016, the Official State Gazette published the decision of December 15, 2016, of the Spanish Lower House, ordering the publication of the resolution approving the recognition of Royal Decree-Law 3/2016, of December 2, 2016, adopting measures in the tax field aimed at the consolidation of public finances and other urgent social security measures, published in the Official State Gazette of December 3, 2016, which contains a number of new pieces of legislation.

The changes introduced by the royal decree-law have been analyzed in Garrigues Tax Commentary 4-2016, which can be found at the following link:

Access the link

3.6 Personal income tax objective assessment method and simplified VAT scheme: implementation for 2017

The Official State Gazette of November 29, 2016 published Order HAP/1823/2016, of November 25, 2016, implementing for 2017 the personal income tax objective assessment method and the special simplified VAT scheme.

Although the structure and contents of Order HAP/2430/2015, of November 12, 2015, applicable in 2016, remain the same, the following may be noted:

- For personal income tax purposes, the net income indexes applicable to the service activity of breeding, keeping and fattening cattle are reduced to adapt them to the current circumstances in the sector. This reduction in the indexes will also apply to the 2016 tax period. For the other activities, the order maintains (i) the amount of the signs, indexes or modules and (ii) the 5% reduction in the module-based net income derived from the agreements reached on the Self-Employed Worker Board.

- The reduction to the net income calculated under the personal income tax objective assessment method and to the tax chargeable on current transactions under the special simplified VAT scheme for economic activities pursued in the municipality of Lorca is kept in place for 2017.

This order entered into force on November 30, 2016, and is effective for 2017.

3.7 Technical changes to a number of tax returns

a) Forms 165, 170, 193, 196, 280 and 282

On November 29, 2016, the Official State Gazette published Order HFP/1822/2016, of November 24, 2016, introducing certain technical changes to the physical and logical designs of the approved information return forms numbered 165, 170, 193, 194, 196, 280 and 282.

The order entered into force on November 30 and will apply to the information returns for 2016 that will be filed in 2017. However, in the case of form 282, the technical change introduced (its treatment is brought into line with the other information returns, specifying the filing method for any supplementary and correcting returns that may be required) will also apply to the return for 2015.

b) Forms 181, 182, 187 and 198

On December 21, 2016, the Official State Gazette published Order HFP/1923/2016, of December 19, 2016, introducing technical changes to various forms by amending the following orders:

a. Order EHA/3514/2009, of December 29, 2009, approving form 181, information return on loans and credit facilities, and financial transactions related to real estate.

b. Order EHA/3021/2007, of October 11, 2007, approving form 182, information return on gifts, donations and contributions received and disposals made.

c. Order EHA/2250/2015, of October 23, 2015, approving form 184, annual information return to be filed by pass-through entities.

d. Order HAP/1608/2014, of September 4, 2014, approving form 187, information return for shares or units representing the capital or the assets of collective investment institutions and annual summary of withholdings in respect of personal income tax, corporate income tax and nonresident income tax on income or capital gains obtained as a result of transfers or redemptions of those shares and units.

e. Order EHA/3895/2004, of November 23, 2004, approving form 198, annual information return on transactions in financial assets and other marketable securities.

The order entered into force on December 22, 2016 and will apply, for the first time, for the returns for 2016 that will be filed in 2017, except in the case of form 187, and as regards the adaptation to include, together with any gains on transfers and redemptions by collective investments schemes, those subject to the new tax regime for subscription right sales, its entry into force is deferred to 2018.

04 MISCELLANEOUS

4.1 Access by the tax authorities to anti-money laundering information

On December 16, 2016, the Official Journal of the European Communities included the publication of Council Directive (EU) 2016/2258 of 6 December 2016, amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities.

The directive seeks to ensure that tax authorities are able to access anti-money-laundering information, procedures,

documents and mechanisms for the performance of their duties in monitoring the proper application of Directive 2011/16/EU which implements the global Standard for Automatic Exchange of Financial Account Information on Financial Accounts (applicable to the 27 member states on and after January 1, 2016).

Therefore, the member states must approve and publish the laws, regulations and administrative provisions necessary to comply with the directive before December 31, 2017.

4.2 Provisional removal from the State Tax Agency's index of entities triggers debarment from the commercial registry

On December 15, 2016, the Official State Gazette published the decision of November 23, 2016, of the Directorate-General of Registries and the Notarial Profession (the "DGRN"), on the appeal filed against the assessment note issued by the registrar of Barcelona commercial and personal property registry no. 2, whereby the registrar stayed the registration of the removal of two directors acting severally of a company.

The DGRN confirmed (as it had on other occasions) that, where a company is provisionally removed from the State Tax Agency's index of entities, it is almost entirely debarred from the commercial registry, the only exception being the certification of the company's registration with such index. Accordingly, it denied the registration of certain deeds of removal and appointment of directors on the grounds these types of acts are not included among the exceptions to debarment from the commercial registry.

4.3 E-commerce. Proposed changes to EU VAT law

On December 1, 2016, the European Commission announced four legislative proposals aimed at changing the VAT treatment of e-commerce in the broadest sense.

The proposals made by the Commission have been analyzed in VAT Commentary 2-2016, which can be found at the following link:

Access to link

4.4 Multilateral instrument to amend thousands of tax treaties

On November 24, 2016, more than one hundred states approved a "multilateral instrument" aimed at amending tax treaties around the globe and officially known as the "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting". As its title suggests, the multilateral convention implements a raft of measures aimed at preventing tax avoidance and the shifting of profits between jurisdictions for tax purposes.

The multilateral convention, which is slated for signature in June 2017, represents the culmination of the work done on action 15 of the BEPS Action Plan developed by the OECD to combat tax evasion and aggressive tax planning. The entry into force of the multilateral convention will depend on the signature, ratification and parliamentary approval processes that need to be followed by the various signatory states.

Myriad issues are addressed in this multilateral convention which, to a certain extent, implements the recommendations relating to the various actions of the BEPS Action Plan (e.g. hybrid instruments and entities, international fiscal transparency, permanent establishments, etc.), although special interest and debate have been sparked by the measures introduced to prevent treaty abuse (i.e. treaty shopping), which were already announced in the discussion draft published on Action 6 (Prevent Treaty Abuse). In this regard, the multilateral convention introduces a limitation on benefits (LOB) clause and a principal purpose test (PPT) clause according to which the benefits of a treaty will not apply where the principal purpose of a person or entity or transaction is precisely to gain access to the benefits of that treaty.

Follow us

Hermosilla, 3 - 28001 Madrid (Spain)
T +34 91 514 52 00 - **F** +34 91 399 24 08

Hermosilla, 3
28001 Madrid
T +34 91 514 52 00
F +34 91 399 24 08
www.garrigues.com