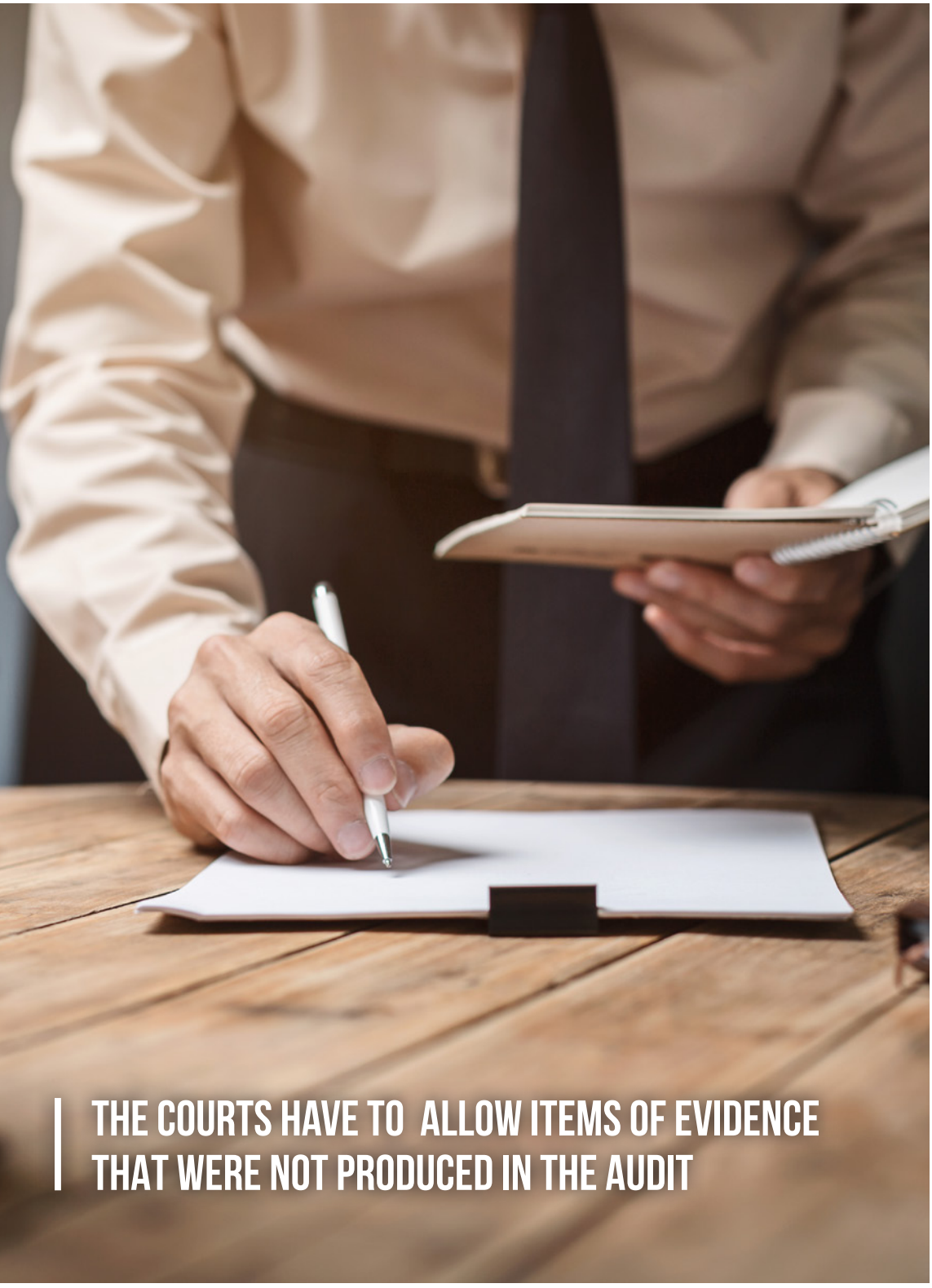
GARRIGUES

NEWSLETTER
TAX

DECEMBER 2017



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NEWSLETTER TAX

In recent years there has been a raft of judgments examining whether the taxpayer is allowed to produce in court items of proof that were not produced in the audit or management procedure. The trend generally seemed to be against allowing this option, on the basis that all the taxable person's efforts at providing evidence should be directed at the tax authorities.

This trend appears to be changing, however, from the standpoint of allowing taxpayers to exercise their rights to defend themselves.

Below we discuss a number of judgments and decisions to this effect:

a) The Madrid high court judgment rendered on September 14, 2017 related to an application for a refund of withholdings from dividends paid by a Spanish subsidiary to its parent, because the dividends were paid before the minimum period to apply the parent/subsidiary exemption had elapsed. After the tax authorities disallowed the refund because all the requirements for the exemption had not been proven, the taxable person produced the appropriate items of proof in a judicial proceeding. The court concluded that it must be allowed to produce items of proof in a judicial proceeding, because this is the only way that will enable the court to render a decision on the taxable person's dispute with the tax authorities.

b) In a decision rendered on November 2, 2017 the Central Economic-Administrative Tribunal (TEAC) also leaned (on the basis of the recent supreme court judgment of April 20, 2017) towards considering that the taxpayer is allowed to produce to an economic-administrative tribunal documents and items of proof that were not produced in the audit.

   TEAC clarified, however, that this will be so if (i) they are documents or items of proof that substantively evidence the taxable person's claims, and (ii) it is not necessary for the tribunal to carry out any enquiring or auditing activities to verify that point, because any such type of activity is prohibited for it.

   The TEAC was definitely right to rule out it performing any enquiring or auditing activities, but it is questionable whether there is a clear difference between those auditing activities and the activities performed simply to make a combined and complete assessment of the evidence which are the responsibility of any reviewing body and of a tribunal.


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1 Judgments

1 CORPORATE INCOME TAX. GAINS ARISING ON TRANSFER OF PERMANENT ESTABLISHMENT TO NONRESIDENT COMPANY ARE NOT TAXABLE IF NOT REQUIRED IN AN EQUIVALENT NATIONAL TRANSACTION (COURT OF JUSTICE OF THE EUROPEAN UNION. JUDGMENT OF NOVEMBER 23, 2017, CASE C-292/16)

Finnish tax law provides that, where a Finnish resident company transfers a nonresident permanent establishment (PE) to a company that is also nonresident, the gains arising on that transaction will be taxed immediately, and does not allow deferred collection of the tax owed. In an equivalent national situation, however, such gains are not taxed until the disposal of the transferred assets.

The CJEU concluded that the law does not comply with the freedom of establishment because the difference in treatment it creates may deter companies established in Finland from conducting an economic activity in another member state through a PE; therefore this law is a restriction on freedom of establishment.

The Court acknowledged that the restriction might be justified because it deprives Finland of any link with that PE. But however, since it does not offer the choice between immediate payment of tax and deferred payment of tax, it is considered that the legislation goes beyond what is necessary to attain the objective of preserving the allocation of powers of taxation between the member states.

2 PERSONAL INCOME TAX.- SPENDING LONGER THAN 183 DAYS OUTSIDE SPAIN BY REASON OF A FELLOWSHIP IS NOT ALLOWED TO BE TREATED AS SPORADIC ABSENCE (SUPREME COURT. THREE JUDGMENTS OF NOVEMBER 28, 2017)

The taxable person had spent longer than 183 days outside Spain in the calendar year, by reason of carrying on the activities for which a fellowship had been granted. The tax authorities held that that time spent outside the country should be treated as a sporadic absence for the purpose of retaining the taxpayer's habitual residence in Spain. Because the time spent outside Spain resulted from a fellowship, it was clearly the taxpayer's intention to return to Spain after the end of the fellowship.

Finding against the tax authorities' interpretation, the Supreme Court concluded that the meaning of "sporadic absence" must be determined exclusively by reference to the objective characteristic of the length or intensity of the time spent outside Spain. It is therefore separate from whether or not the taxable person intends to reside outside Spain temporarily or permanently.

3 INHERITANCE AND GIFT TAX.- PERSONAL ITEMS DO NOT HAVE TO BE REPORTED IF THERE IS NO PERMANENT RESIDENCE (VALENCIA HIGH COURT. JUDGMENT OF JUNE 28, 2017)

It is presumed under the inheritance and gift tax legislation that the deceased's estate always includes personal items, the value of which must be calculated at 3% of the amount of the estate (unless a different value is evidenced). In this case, the deceased had sold his permanent residence a few years before his death, and moved to a residence. Therefore personal items were not reported for the purposes of the tax. The tax authorities considered that the move to a residence was not evidence of the absence of personal items.

After acknowledging that there are judgments upholding the opposite view, Valencia High Court confirmed the taxable person's interpretation, by concluding that the absence of personal items had been sufficiently evidenced with the proof of the sale of the deceased's permanent residence years before his death.

4 VAT.- RIGHT TO REDUCE TAXABLE AMOUNT FOR VAT PURPOSES IN THE EVENT OF NONPAYMENT DUE TO INSOLVENCY ORDER (COURT OF JUSTICE OF THE EUROPEAN UNION. JUDGMENT OF NOVEMBER 23, 2017 IN CASE C-246/16)

The tax authorities failed to approve the right to reduce the taxable amount in a case where the customer had entered into insolvency proceedings, because until after the completion and failure of the insolvency proceedings there cannot be any certainty that the debt will not be paid. The existence of a judgment declaring insolvency is not therefore enough.

In reply to the questions submitted by the Provincial Tax Court in Syracuse, Italy, the CJEU concluded that making the reduction to the tax base conditional on the completion of insolvency proceedings is against the principles of proportionality and effectiveness of EU law and neutrality of VAT. The Italian tax court pointed out that the average length of insolvency proceedings in Italy is not uncommonly longer than ten years.

5 VAT.- EXEMPTION MAY BE DENIED IF THERE ARE ABUSIVE PRACTICES, EVEN IF THE LAW DOES NOT EXPRESSLY GIVE THE POWER TO DO SO (COURT OF JUSTICE OF THE EUROPEAN UNION. JUDGMENT OF NOVEMBER 22, 2017 IN CASE C-251/16)

Under the principle that abusive practices are prohibited, the tax authorities held that the VAT exemption for third and later supplies of dwellings does not apply where it was held that the first supply had been artificially created to avoid the subsequent sales being liable to VAT.

In relation to which, the CJEU concluded that:

a) The principle that abusive practices are prohibited may be relied on as against taxable persons for VAT purposes by a member state to refuse an exemption even if there are no provisions in the national law that authorize this.

   This is a general principle of European Law that is based on reiterated case law and not on a given directive or legislative provision that could be applied as a result of a direct effect.

b) To determine whether the objective of a given transaction is fraudulent, only the specific transaction must be examined not that of the supplies which, as a result of that exact transaction, formally satisfy the conditions for obtaining a tax advantage. Accordingly, it is for the national court to determine, in accordance with the rules of national law whether the transaction must be held abusive or fraudulent.

6 VAT.- NO EXEMPTION FOR SUPPLY OF BUILDING IF "FIRST OCCUPATION" HAS NOT TAKEN PLACE (COURT OF JUSTICE OF THE EUROPEAN UNION. JUDGMENT OF NOVEMBER 16, 2017, IN CASE C-308/16)

A residential building was acquired which was later reformed. The cost of the reform work was equal to approximately 55% of the initial value of the building. After the reform work was completed, it was used as a show home until it was sold. The tax authorities held that the exemption for second and later supplies of buildings did not apply in that the sale had occurred during the first occupation of the building.

The CJEU concluded as follows:

a) The sale of buildings is not allowed to be exempt from VAT if it takes place, in the wording of the directive, before first occupation of the building, a concept which though not defined in EU law must be applied in a uniform manner across the EU.

b) The "first occupation" is the first use of the property by its owner or tenant. On that basis, if that first occupation has not taken place, the sale cannot be exempt.

c) The concept of "conversion" as contained but not defined in the directive suggests at the very least that the building concerned must have undergone substantial modifications intended to modify the use or alter considerably the conditions of its occupation, and it is interpreted that it covers a situation where completed or sufficiently advanced works have been carried out and on completion of those works the building concerned is intended to be used for other purposes.

7 VAT.- DETAILED RULES ON INDICATION OF ADDRESS OF ISSUER OF INVOICE CANNOT BE DETERMINING CONDITION FOR DEDUCTION OF VAT (COURT OF JUSTICE OF THE EUROPEAN UNION. JUDGMENT OF NOVEMBER 15, 2017 IN CASES C-374/16 AND C-375/16)

It was examined whether the condition that the address of the issuer must be indicated on the invoice to be able to exercise the right to the deduction refers to the address where the issuer carries out its economic activity. The court concluded that:

a) The identification of the issuer of the invoice allows the tax authorities to check whether the amount of VAT giving rise to the deduction has been declared and paid and also allows the taxable person to check whether the issuer of the invoice is a taxable person for the purposes of the VAT rules. Therefore, it should not be considered necessary to indicate on the invoice the address where the issuer of the invoice carries out its economic activity.

b) The deduction of input VAT must be allowed if the substantive requirements are satisfied even if the taxable persons have failed to comply with certain formal conditions. It follows from this that the detailed rules regarding the indication of the address of the issuer of the invoice cannot be a decisive condition for the purposes of the deduction of VAT.

8 VAT.- TAXABLE AMOUNT MUST TAKE INTO ACCOUNT ESTIMATE OF CONTINGENT PRICE (SUPREME COURT. JUDGMENT OF OCTOBER 31, 2017)

A property was sold for €25 million, of which 24 million had to be paid in cash, according to a payment schedule determined by the parties on the basis of the development plans for the properties. The remaining price would be paid by supplying the developed plots which were worth the remaining million euros. Later, in view of the unlikely approval of the development plans on the transferred plots, the agreed price was changed, and set at €8.1 million plus a third of the value that would be obtained on the sale of each of the plots. As a result, the company issued the relevant correcting invoices, changing the taxable amount to leave it at €8.1 million.

The tax authorities, however, considered that the change to the taxable amount made by the appealing company was not consistent with the contents of the deed of amendment of contractual terms, in that no value had been allowed in respect of the amount that would be received in the future in respect of the sale of the plots. On this point, the VAT Law provides that a provisional taxable amount may be determined if the price is not known when the tax becomes chargeable. Both the National Appellate Court at first instance and the Supreme Court confirmed that the reduction made by the appellant should not have included only the amount in cash but rather the variable portion of the price should have been estimated.

9 TAX PROCEDURE.- GENUINE RESPECT FOR RIGHT OF DEFENSE MEANS REAL POSSIBILITY TO ACCESS ADMINISTRATIVE CASE FILE (COURT OF JUSTICE OF THE EUROPEAN UNION. JUDGMENT OF NOVEMBER 9, 2017, CASE C-298/16)

The Rumanian tax authorities assessed an additional amount of VAT without giving the taxable person the opportunity to access the information and the documents on which the assessment was based.

At the heart of the issue was determining whether the general principle of respect for the right of

defense underlying EU law must be interpreted as a requirement that in national procedures of inspection, a private party must have access to all the information and to all the documents in the administrative case file and considered by the public authority when it adopted its decision. The CJEU concluded as follows:

(i) It recalled first that the right of defense is a general principle of EU law which is to be applied when the authorities are minded to adopt a measure that will adversely affect an individual.

(ii) In accordance with that principle, if the right of defense is genuinely to be respected, there must be a real possibility of access to the administrative case file, unless access restrictions are justified by public interest reasons.

10 AUDIT PROCEDURE.- ABSENCE OF REASONING IN DECISION TO EXTEND TIME FOR AN AUDIT MAY BE PLEADED AT ANY POINT IN THE PROCEDURE (SUPREME COURT. JUDGMENT OF OCTOBER 5, 2017)

The taxpayer challenged the administrative assessment on the basis of the absence of reasoning for the decision to extend the time for the audit procedures. This pleading was not made, however, in the time period granted with the notification of the proposed decision but rather after it had ended. Both the tax authorities and the lower chamber held that by not having submitted this argument within the stipulated period for doing so, the taxpayer forfeited his right to use it later.

The Supreme Court disallowed this position by stating that the absence of pleadings by the taxpayer early on does not remedy the defects in the extension decision, or prevent the taxpayer from pleading when it sees fit on the correctness of that extension.

A similar view had already been upheld by the Supreme Court in a judgment rendered on June 23, 2016 in which it stated that the need to hold that the statute of limitations period had ended must take precedence over the fact of not having made specific pleadings against the extension decision.

11 REVIEW PROCEDURE.- EVIDENCE IS ALLOWED TO BE PRODUCED IN THE JUDICIAL REVIEW JURISDICTION (MADRID HIGH COURT. JUDGMENT OF SEPTEMBER 14, 2017)

The parent/subsidiary exemption on dividends paid to parent companies resident in the European Union is subject to a requirement that the investment in the subsidiary must have been held for at least a year. This requirement may be satisfied after payment of the dividends concerned. In this case, the payer will make the required withholding and the nonresident parent company or the withholding agent are allowed, after the end of a year, to apply for the relevant refund.

This is what happened in the case examined in this judgment. After a year had elapsed, an application was made for a refund. The tax authorities disallowed the refund, however, on the basis that the taxpayer had not satisfied the other requirements laid down for the exemption.

The company produced documents evidencing compliance with all of the statutory requirements for claiming the exemption in the judicial review jurisdiction. The procedural representative for the tax authorities pleaded that evidence could not be produced for the first time in a judicial proceeding. Against this argument, Madrid High Court mentioned in this judgment that it is not allowed to disallow the production of new evidence in a court proceeding, because otherwise it would be preventing taxpayers from having a court render a decision on their disputes with the tax authorities.

2 Judgements, decisions and rulings

1 CORPORATE INCOME TAX. LATE-PAYMENT INTEREST ARISING FROM AUDITS ARE NOT TREATED A TAX DEDUCTIBLE EXPENSE IN THE YEARS THE REVISED CORPORATE INCOME TAX LAW WAS IN FORCE (CENTRAL ECONOMIC-ADMINISTRATIVE TRIBUNAL. DECISION OF DECEMBER 4, 2017)

At issue was determining whether the late-payment interest arising from audits is treated as a tax deductible expense for corporate income tax purposes pursuant to article 10.3 and article 14 of the Revised Corporate Income Tax Law. TEAC concluded that interest of this type is not a tax deductible expense by making the following observations:

a) Late-payment interest arising from audit procedures cannot be compared with either the interest arising on a loan or with the interest arising on the grant of deferred or split payment.

b) According to the interpretation adopted by the Supreme Court in a judgment rendered on February 25, 2010, it is contrary to the principle of justice for the perpetrator of an unlawful act to obtain a benefit or advantage from that act; and allowing the deduction for tax purpose of that interest would give rise to inequality among taxpayers.

c) While it is not a penalty, neither are surcharges, which the law expressly states are not deductible, and it would therefore be inconsistent for late-payment interest to be so.

d) Lastly, the fact that the Spanish Accounting and Audit Institute (ICAC) has concluded that it must be recognized as a finance cost, does not automatically make it deductible, since making tax characterizations does not fall within the ICAC's powers.

2 CORPORATE INCOME TAX. THE ABSORBED COMPANY HAVING UNUSED NET OPERATING LOSSES DOES NOT PREVENT THE NEUTRAL REGIME FROM APPLYING (DIRECTORATE GENERAL FOR TAXES. RULINGS V2435-17, OF OCTOBER 2, 2017; V2568-17, OF OCTOBER 10, 2017; V2618-17, OF OCTOBER 13, 2017; V2635-17, OF OCTOBER 16, 2017; V-2710-17, OF OCTOBER 24, 2017)

In relation to a number of mergers by absorption, a request was submitted as to whether the fact that the absorbed companies had net operating losses (NOLs) before the restructuring may invalidate the existence of valid economic reasons for the purposes of applying the neutrality tax regime.

In various rulings, the DGT indicated that this circumstance does not in itself invalidate the right to apply the special tax regime if with respect to the various mergers:

a) They have a positive effect on the activity of the operating companies participating in the merger.

b) Their primary aim is not to claim the unused net operating losses generated at the absorbed companies.

c) The absorbed company or companies may offset the NOLs generated before the merger themselves.

3 CORPORATE INCOME TAX. THE MERGER OF TWO US COMPANIES FORMING PART OF A GROUP AND HOLDING INVESTMENTS IN SPANISH COMPANIES DOES NOT GIVE RISE TO A CAPITAL GAIN IN SPAIN (DIRECTORATE GENERAL FOR TAXES. RULING V2674-17, OF OCTOBER 20, 2017).

A and B are two US Limited Liability Companies. Company A is owned by C, which is also US resident and has the legal form of an Incorporation. Company B, for its part, is wholly owned by company D (a Holding Corporation), the group's controlling company. In Spain, the group has companies E and F.

After the purchase of B by C, a request was submitted as to whether the merger of A and B (B absorbing A) which own Spanish companies E and F, gives rise to a capital gain taxable in Spain. the DGT indicated that:

a) The Spain-US tax treaty applies to companies A and B, insofar as both companies belong to an Incorporation resident for tax purposes in the US (company C).

b) According to the Protocol, an alienation does not include a transfer of shares between members of a group of companies that file a consolidated tax return to the extent that the consideration received by the transferor consists of participations or other rights in the capital of the transferee or of another company resident in the same state that owns directly or indirectly 80 percent or more of the voting rights and value of the transferee, if:

- The transferor and transferee are companies resident in the same contracting state.

- The transferor or transferee owns, directly or indirectly, 80 percent or more of the voting rights and value of the other, or a company resident in the same contracting state owns directly or indirectly (through companies resident in the same contracting state) 80 percent or more of the voting rights and value of each of them.

c) In the case examined in the ruling, the price received by the investors in the transferor (company A) are shares in the absorbing company (company B). Both companies are owned by one company (company C), which has more than 80 percent of the shares or rights of both.

According to this, the gain derived from the merger between A and B is not deemed an alienation within the meaning of article 13.4 of the treaty, and therefore may only be taxed in the United States.

4 CORPORATE INCOME TAX. CAPITAL INCREASE IS NOT NECESSARY IN MERGER BETWEEN COMPANIES WHOSE SHAREHOLDERS ARE INDIVIDUALS (DIRECTORATE GENERAL FOR TAXES. RULING V2444-17, OF OCTOBER 2, 2017).

Company A and Company B are owned by two individuals, each owning 50% of both companies. They had plans for company A to absorb company B, and asked whether the merger by absorption could be carried out without company A having to perform a capital increase and whether the special tax neutrality regime would apply to it.

The DGT concluded that, if the transaction is in compliance with corporate law and with the requirements laid down in the law on the tax for the neutrality regime to apply, this regime may be applied, without company A having to increase capital.

5 CORPORATE INCOME TAX. REQUIREMENTS FOR THE LEASING OF REAL PROPERTY TO BE DEEMED A LINE OF BUSINESS FOR THE PURPOSES OF NEUTRALITY TAX REGIME (DIRECTORATE GENERAL FOR TAXES. RULING V2441-17, OF OCTOBER 2, 2017; RULING V2445-17, OF OCTOBER 2, 2017; RULING V2636-17, OF OCTOBER 16, 2017).

The requests concerned spinoffs in which it was intended to spin off a business related to leasing real estate, and in particular, what requirements have to be met for it to amount to a line of business.

The DGT first recalled that for the neutral regime to be elected for a spinoff::

a) The spun-off assets must be a line of business at the company performing the spinoff, in other words, an organization of separate material and human resources. If more than one block of assets is spun off, there must be a separate organization of operations at the spun-off entity to carry out the management of each of them, such that a set of assets and liabilities used in, or assigned to, each line of business may be identified.

b) Additionally, the spun-off assets and liabilities must enable by their own means the performance of a business operation at the transferee company.

c) Lastly, assets and liabilities that also amount to one or more lines of business must remain under the ownership of the company performing the spinoff.

In relation to the leasing of real estate, it is necessary, in all cases, to have a full-time employee working for that business. Nevertheless, says the DGT, the existence of a number of members of staff hired to follow up on different properties does not determine in itself the existence of separate management in that, if the number of assets so requires, there must be as many individuals and premises as are needed to carry on the business as efficiently as possible.

6 CORPORATE INCOME TAX. THE COST OF CONTAINERS AND PACKAGING IS NOT INCLUDED IN CALCULATION OF TAX CREDIT FOR PUBLICITY AND ADVERTISING EXPENSES RELATED TO SUPPORT PROGRAMS FOR EVENTS OF EXCEPTIONAL PUBLIC INTEREST (CENTRAL ECONOMIC-ADMINISTRATIVE TRIBUNAL. DECISION OF NOVEMBER 2, 2017)

The request concerned whether the base for calculating the corporate income tax credit for advertising and publicity expenses related to support programs for events of exceptional public interest may include the aggregate cost of the containers and packaging bearing the logo of the event.

According to the interpretation established by the Supreme Court in its judgment of July 13, 2017, TEAC, after confirming the tax authorities' power to check the suitability of the expenses included in the base for the tax credit, concluded that the base may only include the cost of the containers and packaging that strictly fulfill an advertising purpose.

That judgment by the Supreme Court rendered on July 13 was discussed in our September 2017 Tax Newsletter. Additionally, in our Tax Newsletter of November 2017 we looked at the national appellate court judgment of October 18, 2017, in which that court changed its interpretation held until that date to adopt also that delivered by the Supreme Court.

7 CORPORATE INCOME TAX / VALUE ADDED TAX– TAXATION OF ASSIGNMENT FOR NO CONSIDERATION OF INTANGIBLE ASSET BETWEEN ENTERPRISES BELONGING TO SAME CONSOLIDATED TAX GROUP (DIRECTORATE GENERAL FOR TAXES. RULING V2439-17, OF OCTOBER 2, 2017)

The enterprise, a member of a tax group for VAT and corporate income tax purposes was considering assigning an intangible asset for no consideration to a subsidiary. This assignment would give rise to a reduction to the tax base as provided in the Corporate Income Tax Law for the assignment of intangible assets (article 23 of the Corporate Income Tax Law). Both enterprises are fully entitled to deduct input VAT on their transactions.

The tax implications of this assignment, according to the DGT, would be the following:

a) For VAT purposes:

- The VAT law sets out a special rule for controlled transactions, according to which the taxable amount is the market value of the performed transaction. This special rule is only applicable where the difference between the agreed consideration and the market value of the transaction does not result in a loss to public finance (e.g. the customer in the transaction is not entitled to deduct the whole amount of tax). In this case, given that both enterprises are fully entitled to the deduction, that special rule would not apply.

- Because the assignment is for no consideration, the provisions envisaged for self-supplies of services would apply. Specifically, the tax base will be the cost of the supply of the services, including, if applicable, the amortization of the assigned property.

- In short, the assignment of an intangible asset for no consideration by a company to

a subsidiary, if both have the right to deduct VAT, must be priced at the time of the assignment at the cost of that supply. The quantification of that cost must include any expenses that were necessary to obtain that intangible asset.

b) For corporate income tax purposes

- Because it is a controlled transaction, it must be priced at arm's length regardless of the agreed price. Additionally, that transaction will be subject to the documenting obligations regardless of whether both entities are part of a tax group, in that it gives entitlement to apply the reduction under article 23 of the Corporate Income Tax Law.

- In any event, an application may be made to the tax authorities, prior to the assignment, to adopt an advance pricing agreement to determine the income for which the incentive under article 23 of the Corporate Income Tax Law may be elected.

8 PERSONAL INCOME TAX.- THE EXEMPTION FOR REINVESTMENT OF LIFELONG ANNUITIES MAY NOT BE CLAIMED ON A CAPITAL GAIN OBTAINED AS A RESULT OF DEFERRED COLLECTION OF THE PRICE AFTER THE END OF 6 MONTHS FROM THE TRANSFER (DIRECTORATE GENERAL FOR TAXES. RULING V2712-17, OF OCTOBER 24, 2017)

The requesting party transferred two properties, and it was stipulated in the contract of sale that part of the price of one of them would be paid after the end of a year from the transfer. The request concerned whether, when the deferred price was collected, the exemption for reinvestment in lifelong annuities under article 38.3 of the Personal Income Tax Law could be claimed for the relevant portion of the capital gain.

The DGT explained that to be able to claim the exemption for the capital gain arising on the transfer, the applicable law stipulates that the lifelong annuity must be established within six months from the transfer date, and the law does not contain any special provisions in the event of deferred collections. Since in the case concerned the reinvestment of the deferred amount in a lifelong annuity would be made after the end of six months since the transfer was made, the exemption could not be claimed.

9 PERSONAL INCOME TAX.- THE 30% REDUCTION CANNOT BE APPLIED TO A HIRING BONUS PAID TO WORKER JOINING A COMPANY ON CONDITION HE STAYS FOR 24 MONTHS (DIRECTORATE GENERAL FOR TAXES. RULING V2661-17, OF OCTOBER 18, 2017)

The requesting party signed an employment contract with an enterprise under which the employer undertook to pay the worker a hiring bonus at the start of the employment relationship, on condition that the worker provides his services for at least 24 months; if he leaves the company within that period he will be required to refund the bonus, in proportion to the time he has stayed. The request concerned whether the 30% reduction under article 18.2 of the Personal Income tax Law could be claimed.

The DGT discarded the existence of any generation period in this case. It also considered that this case did not fall either within any of the cases of multiyear income defined in the law. It therefore concluded by refusing to allow the reduction to be claimed.

10 IRPF.- THE EXPENSES ARISING FROM THE ACQUISITION OF A LOTTERY TICKET FOR CLIENTS ARE DEDUCTIBLE SUBJECT TO A LIMIT AMOUNTING TO 1% OF NET REVENUES (DIRECTORATE GENERAL FOR TAXES. RULING V2490-17, OF OCTOBER 4, 2017)

The request concerned the deduction for tax purposes of the expenses paid by a business owner subject to the direct assessment method, arising from the acquisition of lottery tickets which will be delivered to clients as gifts.

The DGT recalled that the performance of an economic activity by an individual subject to the direct assessment method determines that the corporate income tax legislation applies to determine the tax base. Therefore, those expenses will be tax deductible, subject to a limit amounting

to 1% of net revenues in the tax period (rule set out in article 15.e) of the Corporate Income Tax Law for gifts to clients).

11 WEALTH TAX.- SHARES OF NONRESIDENT ENTERPRISE OWNED BY NONRESIDENT AND HELD AT SPANISH BANK ARE SUBJECT TO WEALTH TAX (DIRECTORATE GENERAL FOR TAXES. RULING V2380-17, OF SEPTEMBER 19, 2017)

The Wealth Tax Law provides that nonresidents must be taxed as nonresident taxpayers on the property and rights they own which are located, may be exercised or must be fulfilled in Spain.

In this context the request concerned whether an individual owning shares in a German enterprise listed on the Frankfurt stock exchange but held at a Spanish bank must report those shares for the purposes of the tax. The DGT replied that the individual should report them by reasoning that the fact that the shares have been placed with a Spanish bank brings them within the scope of application of the tax.

12 VAT.- THE TAXABLE VALUE OF VEHICLES FOR PERSONAL INCOME TAX PURPOSES MAY BE USED TO DETERMINE THE TAX TO BE CHARGED AND PAID FOR VAT PURPOSES (CENTRAL ECONOMIC-ADMINISTRATIVE TRIBUNAL. TWO DECISIONS RENDERED ON NOVEMBER 22, 2017)

The auditors found that to determine the VAT to charge and pay over on vehicles provided for private use by employees, it is not the taxable value of effective private use that has to be calculated but of the time they were available for private use, in the same way as their taxable value was calculated for personal income tax purposes to determine the income in kind. In particular, the auditors calculated the taxable value of their availability for private use by reference to the time they were available outside of working hours under the collective labor agreement.

TEAC confirmed the auditors' interpretation on the basis of DGT rulings (i.e. V0891-12), of the CJEU's case law (i.e. Judgment of September 26, 1996, Enkler, C-230/94) and of national appellate court judgments (i.e. judgment number 2202/2009, rendered on June 30, 2010); and concluded in favor of using the same interpretation for both taxes, and validated that their availability for private use could be calculated by reference to working hours as described (without making a distinction based on professional categories).

13 REAL ESTATE TAX.- THE PROCEDURE FOR RECALCULATING CADASTRAL VALUE TOLLS STATUTE OF LIMITATIONS PERIOD FOR THE RIGHT TO DETERMINE THE TAX DEBT (DIRECTORATE GENERAL FOR TAXES. RULINGS V0035-17, OF OCTOBER 10, 2017; V0036-17, OF OCTOBER 10, 2017 AND V2722-17, OF OCTOBER 24, 2017)

It was examined whether the procedures for recalculating the cadastral value, which increase the cadastral value of real estate with retroactive effects, toll the statute of limitations period for the right of local councils to calculate real estate tax on the increase.

The DGT concluded in these rulings that:

a) Cadaster management activities may not be treated as if they were independent from tax management.

b) Therefore any recalculation decisions by the cadaster (which are of a tax nature) rendered with the formal knowledge of the taxable person toll the calculation of the statute of limitations period for the right of the tax authorities to determine the real estate tax debt in the relevant assessment.

14 TAX ON INCREASE IN URBAN LAND VALUE.- TAXATION OF THE VESTING OF OWNERSHIP AS A RESULT OF DEATH OF THE USUFRUCT RIGHT HOLDER (DIRECTORATE GENERAL FOR TAXES. RULING V2431-17, OF SEPTEMBER 28, 2017)

The father of the requesting party died, and his widow acquired bare ownership and a lifelong

usufruct right. Later the wife passed away, and ownership vested in the son. According to the DGT, these facts give rise to the following transfers for the purposes of the tax on increase in urban land value:

a) On the date of the father's death, the usufruct right in the property is transferred to the widow, and bare ownership, to the son. Both transfers are taxable, and the taxable persons are the spouse and the son, respectively.

b) On the mother's death, her usufruct right is extinguished and absolute ownership vests in the bare owner (the son), on which the tax applies again.

This interpretation is supported in the supreme court judgments of April 25, 1984 and November 14, 1996, and in the Catalonia high court judgments rendered on March 24 , 1999 and September 29, 2000; and in the Andalucía high court judgments rendered on December 29, 1997 and October 9, 1998.

They do not take into account, however, the more recent interpretation by the Supreme Court in its judgment rendered on January 16, 1999 or in the Catalonia high court's judgment of January 30, 2002, which conclude otherwise. In these judgments they say the simple fact of extinguishing the usufruct right does not cause a transfer of ownership of the property to the bare owners for the purposes of this tax.

15 ADMINISTRATIVE PROCEDURE.- THE EXPIRY OF THE PREVIOUS PROCEDURE AND THE COMMENCEMENT OF ANOTHER NEW PROCEDURE MAY BE NOTIFIED IN THE SAME ADMINISTRATIVE NOTICE, WHICH MUST SPECIFY HOW TO CHALLENGE EACH DECISION (CENTRAL ECONOMIC-ADMINISTRATIVE TRIBUNAL. DECISION OF NOVEMBER 16, 2017)

Some taxpayers filed a return reporting inherited goods for the relevant assessment of their inheritance and gift tax liability to be made. More than six months after they filed that return, the Spanish tax agency (AEAT) notified in a single notice expiry of the procedure commenced with the filing of the return and the start of another procedure to audit values. At issue was determining whether the expiry of a procedure and the commencement of a new procedure could be notified in a single notice.

TEAC recalled that in these cases notification is given to the party with tax obligations in one document of two different decisions which are subject to different rules of appeal, one is appealable, which implies that the statute of limitations period has not been tolled in favor of the tax authorities (the declaration of expiry) and another which is not appealable and again interrupts the statute of limitations period for assessment action (the commencement of the procedure).

Having determined this, TEAC concluded that, according to the precedent set in earlier decisions (which have been strengthened by the Supreme Court's conclusions in its judgment of July 18, 2017), it is allowed to notify in a single notice a declaration of expiry of a procedure and the commencement of a new procedure, but only if this single notice expressly and clearly sets out the different challenging rules for one and the other, and expresses with clarity and separately the requirements for being able to appeal against one and the other.

In the particular case described, since those matters were not identified, TEAC upheld the economic-administrative claim and overturned the challenged assessment.

16 ADMINISTRATIVE PROCEDURE.- THE ADMINISTRATIVE ASSESSMENT DOES NOT TOLL THE STATUTE OF LIMITATIONS PERIOD FOR THE RIGHT TO APPLY FOR A REFUND OF INCORRECT REVENUES (CENTRAL ECONOMIC-ADMINISTRATIVE TRIBUNAL. DECISION OF NOVEMBER 2, 2017)

A taxpayer applied for correction of a self-assessment and the resulting refund of incorrect revenues in relation to facts which had been the subject of a provisional assessment by the tax authorities. This assessment was first appealed in the economic-administrative jurisdiction and later in an application for judicial review, after which that assessment was confirmed. When the application was made for a refund more than four years had elapsed since the original self-assessment.

TEAC recalled that, for the purposes of the time limit and the calculation of the statute of limitations period, a distinction must be made between the tax authorities' right to assess the tax debt and the taxpayer's right to apply for a refund of incorrect revenues. Because they are separate powers, TEAC concluded that neither the provisional assessment nor the appeals brought against it tolled the statute of limitations period for the taxpayer's right to apply for correction of its self-assessment and the resulting refund of incorrect revenues. As a result, TEAC held that in this case the taxpayer's right to apply for that refund had become statute-barred.

17 ADMINISTRATIVE PROCEDURE.- GENERAL REQUESTS FOR INFORMATION MUST BE REASONED AND ADOPTED USING PROCEDURES DETERMINED IN THE LAW (CENTRAL ECONOMIC-ADMINISTRATIVE TRIBUNAL. DECISION OF NOVEMBER 2, 2017)

At issue was determining the lawfulness of the request for information made by the National Anti-Fraud Office (ONIF) to a financial institution to identify the owners of rental agreements for safety deposit boxes over a specific period of time.

TEAC made a distinction according to whether the request is made by a collection body or audit body. It concluded that:

a) Collection bodies are not allowed to make general requests for information, in that their powers are limited to the people appearing as debtors to the public finance authority.

b) Auditing powers include any taxable person, and therefore in this area the general requests for information are lawful, if they are sufficiently reasoned and adopted using the procedures specified in the law.

In all cases, these requests must be made individually in relation to the taxable person to whom they are directed, not in relation to the requested items of information, for which the only requirement is that they must be specified and known by the taxable person that is the subject of the request as a result of the conduct of its activity.

18 TAX PROCEDURE.- REGISTRATION ON THE ENABLED ELECTRONIC ADDRESS SYSTEM IS HELD UNTIL THE COMPANY IS EXTINGUISHED (CENTRAL ECONOMIC-ADMINISTRATIVE TRIBUNAL. DECISION OF NOVEMBER 2, 2017)

AEAT served on a taxpayer a notification of mandatory inclusion on the enabled electronic address system (NEO). Being in disagreement with that administrative notice, the taxpayer availed itself of the available appeal remedies, until the TEAC decision mentioned above was ultimately rendered. The taxpayer's pleadings focused on arguing that it was a dormant enterprise without any funds, and that it had not been wound up as a result of not having the necessary resources to do so.

TEAC dismissed the filed economic-administrative claim on the basis of the following observations:

(i) Because the appellant is a limited liability company registered on the census of traders and professionals kept by AEAT, it is included among the individuals and entities required to receive their notifications electronically.

(ii) The fact of not having any activity is not relevant. It will continue to have the obligation to remain registered on the enabled electronic address system until the extinguishment deed is registered at the commercial registry and the relevant registry entries are removed.

19 COLLECTION PROCEDURES.- ENFORCED COLLECTION INTERLOCUTORY ORDERS MAY BE RENDERED FOR DEBTS NOT PAID IN THE VOLUNTARY PERIOD OF A DEBTOR IN AN INSOLVENCY PROCEEDING, WITHOUT FIRST BEING CLASSIFIED AS POST-INSOLVENCY ORDER CLAIMS (CENTRAL ECONOMIC-ADMINISTRATIVE TRIBUNAL. TWO DECISIONS RENDERED ON NOVEMBER 30, 2017)

TEAC has rendered two decisions regarding applications for a ruling on a point of law in which it was asked whether for AEAT to be able to render enforced collection interlocutory orders for tax

debts not paid in the voluntary period of a debtor that is the subject of an insolvency order, it is necessary for the judge hearing the insolvency to classify them first as post-insolvency order claims.

TEAC corrected the conclusions reached in the challenged decisions by the regional economic-administrative tribunals (TEAR) of Madrid and of Castilla y León and concluded that it may do so without it first being necessary for them to be classified as such by the judge hearing the insolvency.

TEAC adopted that interpretation after concluding that it is not necessary to use, in all cases, the ancillary proceeding to decide on the classification and payment of the claims, as a prior requirement for them to be enforceable. Only where there has been a dispute over the classification or payment of the post-insolvency order claims will it be necessary to use an ancillary insolvency proceeding.

20 REVIEW PROCEDURE.- IT IS ALLOWED TO PRODUCE TO REGIONAL ECONOMIC-ADMINISTRATIVE TRIBUNALS DOCUMENTS AND ITEMS OF EVIDENCE THAT HAD NOT BEEN PRODUCED EARLIER, IF NO AUDIT AND INVESTIGATION ACTIVITIES BY THE TRIBUNAL ARE NECESSARY (CENTRAL ECONOMIC-ADMINISTRATIVE TRIBUNAL. DECISION OF NOVEMBER 2, 2017)

AEAT made a provisional assessment, in which it rejected the application of a stipulated exemption because compliance with the statutory requirements for that exemption had not been evidenced. In an ordinary appeal to TEAC, documents were produced that had not been produced in the audit to evidence satisfaction of those requirements.

Before assessing the sufficiency of the produced items of proof, TEAC considered whether the taxpayer was allowed to produce new evidence and documents that had not been produced when the audit took place and concluded that, on the basis of the conclusions reached by the Supreme Court in its judgment of April 20, 2017, the taxpayer may produce to a regional economic-administrative tribunal documents and items of proof that were not produced in the audit, if (i) they are documents or items of proof that substantively evidence the taxable person's claims, and (ii) it is not necessary for the tribunal to carry of any auditing or enquiring activities to verify that point, because any such type of activity is prohibited for it.

3 Legislation

1 ARRANGEMENT ON THE EXCHANGE OF COUNTRY-BY-COUNTRY REPORTS BETWEEN THE UNITED STATES AND SPAIN

On December 26, 2017 the Official State Gazette published the administrative arrangement between the competent authority of the Kingdom of Spain and the competent authority of the United States of America on the exchange of country-by-country reports, done in San Marino and Madrid on December 13 and December 19 2017.

According to this Arrangement, the competent authorities of each state intend to exchange annually and automatically the country-by-country (CbC) report sent by each reporting enterprise that is resident for tax purposes in their country or territory, if, based on the reported information, one or more enterprises in the multinational enterprise group are resident for tax purposes in the United States or Spain or are subject to tax with respect to the business carried out through a permanent establishment.

A CbC report is intended to be first exchanged with respect to fiscal years commencing on or after January 1, 2016. That CbC report is intended to be exchanged as soon as possible and no later than 18 months after the last day of the fiscal year of the multinational enterprise group to which the report relates.

CbC reports with respect to fiscal year commencing on or after January 1, 2017 are intended to be exchanged as soon as possible and no later than

15 months after the last day of the fiscal year of the multinational enterprise group.

The arrangement has effects from December 19, 2017.

2 AMENDMENTS TO FORMS 210 AND 296

The Official State Gazette of December 23, 2017 published Order HFP/1271/2017, of December 21, amending (i) Order EHA/3316/2010, of December 17, 2010 approving personal income tax self-assessment forms 210, 211 and 213, and (ii) Order EHA/3290/2008, of November 6, 2008 approving form 216 (Nonresident income tax. Income obtained other than through a permanent establishment. Withholdings. Return-payment document) and form 296 (Nonresident income tax. Nonresidents without a permanent establishment. Annual withholdings return).

The most important amendments relate to form 210:

- A new income code is created (35), intended to identify cases of returns related to leased properties containing combined income including payments from more than one payer. This new code will apply to forms 210 for tax arising on or after January 1, 2018.

- A new income code (36) is created to identify self-assessment made under a special reporting procedure intended to simplify the reporting of exempt capital gains arising on the transfer of rights of subscription from securities.

  That special procedure, applicable to liability arising on or after January 1, 2017, must be subject to the following rules:

  - The same form 210 can be used to combine exempt gains obtained by more than one taxpayer resident in the same country, on securities issued by the same issuer.

  - The person making the self-assessment return may be either a representative for all the taxpayers or the custodian or management institution for the securities that has been engaged to hold them in custody or manage them.

  - The exempt gains relating to each of the taxpayers in the calendar year must be below €500 per issuer.

In relation to form 296 a new income sub-code is introduced for recipients who have evidenced to the payer of salary income that they have used the procedure stipulated for notification to AEAT of their assignment abroad for the purposes of having the withholdings made on account of nonresident income tax. This amendment will be used for the first time in the information return for fiscal year 2017.

This Order came into force on December 24, 2017.

3 AVERAGE SELLING PRICES FOR 2018 OF CERTAIN MODES OF TRANSPORT FOR THE PURPOSE OF AUDITING VALUES

The Official State Gazette of December 22, 2017 published Order HFP/1258/2017, of December 5, 2017, approving the average selling prices applicable in the management of transfer and stamp tax, inheritance and gift tax and the special tax on certain modes of transport.

4 AMENDMENTS TO VAT FORM 309 AND TO CENSUS NOTIFICATION FORM 030

The Official State Gazette of December 21, 2017 published Order HFP/1247/2017, of December 20, 2017, approving (i) form 309 for non-periodical self-assessment VAT returns and (ii) census notification form 030 for change of address and/or change of personal data that individuals may use. In both cases, basic technical changes are added.

Technical and collection management amendments are also added to Order EHA/2027/2007, of June 28, 2007 partially implementing the General Collection Regulations in relation to credit institutions providing the approved collection entity service for AEAT.

The Order will come into force on January 1, 2018, and therefore the new form 309 will be used to file the self-assessment returns for fiscal year 2018 and thereafter. Despite this:

- The amendments approved for form 030 will be available from April 5, 2018.

- The amendments made regarding collection matters will come into force when the first fortnight begins of those defined in article 29 of the General Collection Regulations, approved by Royal Decree 939/2005, of July 29, 2005 for the month of February 2018.

5 NON-WORKING DAY CALENDAR FOR 2018 WITHIN THE SCOPE OF THE CENTRAL GOVERNMENT

The Official State Gazette (BOE) of December 18, 2017 published the Decision of December 1, 2017, of the Secretary of State for the Civil Service, providing for the purposes of calculating time periods, the non-working day calendar within the scope of the central government for 2018.

6 TAX TREATY WITH QATAR

The Official State Gazette of December 15, 2017 published the Qatar-Spain Income Tax Treaty concluded in Madrid on September 10, 2015.

The following elements of the tax treaty are notable::

- Dividends are generally taxable at 5%. Tax will not be withheld at source, however, if: (i) the beneficial owner is a company that holds at least 10% of the company paying the dividends; (ii) the beneficiary is the other contracting state, a political subdivision, a local authority or a statutory body thereof or an entity wholly owned by that state or authority (including Qatar Investment Authority and Qatar Holding) provided that such state authority or entity holds directly at least 5% of the company paying the dividends; and (iii) where the shares of the company paying the dividends are substantially and regularly traded on a stock exchange of a contracting state and the beneficial owner of the dividends is a resident of the other contracting state that holds directly at least 1% of the capital of the company paying the dividends.

- Interest and royalties will generally be taxable only in the state of residence of the entity receiving them.

- A tax at source clause is introduced for gains derived from shares or other rights, deriving more than 50% of their value directly or indirectly from immovable property. In determining the 50 per cent share, immovable property used as offices or for the purposes of industrial activities will not be taken into account. Gains will also be taxable at source where the shares or other rights directly entitle the owner of such shares or rights to the enjoyment of immovable property (namely, timeshare and similar agreements).

The tax treaty also includes a mutual agreement dispute resolution procedure and an exchange of information regime.

The tax treaty is scheduled to enter into force on February 6, 2018 and its provisions will take effect:

- Regarding taxes periodically assessed, in respect of taxes on income relating to any taxable year beginning on or after the date on which the Agreement enters into force;

- Regarding all other cases, the date on which the Agreement enters into force.

7 OBJECTIVE ASSESSMENT METHOD FOR PERSONAL INCOME TAX PURPOSES AND SIMPLIFIED VAT RULES FOR 2018

The Official State Gazette (BOE) of November 30, 2017 published Order HFP/1159/2017, of November 28, 2018, implementing for 2018 the objective assessment method for personal income tax purposes and the simplified special VAT rules.

Generally, the structure and contents of Order HFP/1823/2016, of November 25, 2016, applicable in 2017 have stayed the same. A new change for personal income tax purposes is a reduction to the net revenue index applicable to the agricultural activity of obtaining rice, to adapt it to the actual circumstances of this industry. The new index will also apply in the 2017 tax period.

The Order came into force on December 1, 2017, and is effective for 2018.

8 AMENDMENT TO BENCHMARK HYDROCARBON PRICES FOR FUEL PRODUCED IN MINING CONCESSIONS FOR FUEL DEPOSITS SUBJECT TO THE TAX ON THE EXTRACTION VALUE OF GAS, OIL AND CONDENSATES

The Official Gazette of November 30, 2017 published Order ETU/1160/2017, of November 21, amending Order ETU/78/2017, of January 31, 2017, on certain aspects of tax on the extraction value of gas, oil and condensates and with the benchmark values for determining payments to the owners of land overlying mining concessions for hydrocarbon deposits.

The Order replaces the index laid down in the now non-existent original wording for crude oil, with another index deemed to be valid on a more stable basis over time. This index chosen as a replacement is used heavily in the liquid hydrocarbons industry as a benchmark for selling prices in commercial contracts.

This Order came into force on December 1, 2017 and is applicable in and after the tax period for 2018.

4 Miscellaneous

1 LIST OF NON-COOPERATIVE TAX JURISDICTIONS

On December 5, 2017 the Council of the European Union published a conclusions document in relation to the list of non-cooperative jurisdictions in tax matters.

According to the analysis performed by the Council, the following are deemed non-cooperative jurisdictions: American Samoa, Bahrain, Barbados, South Korea, United Arab Emirates, Grenada, Guam, Marshall Islands, Macao, Mongolia, Namibia, Palau (Micronesia), Panama, Saint Lucia, Samoa, Trinidad and Tobago and Tunisia.

Of the jurisdictions listed above, Spain has signed international tax treaties with exchange of information clauses with Barbados, South Korea, United Arab Emirates, Panama, Trinidad and Tobago, and Tunisia.

2 FAVORABLE REPORT BY THE COUNCIL OF STATE ON THE RENDERING NULL AND VOID AB INITIO OF AN ASSESSMENT AND A PENALTY FOR ADVERSELY AFFECTING RIGHTS AND FREEDOMS PROTECTED BY THE CONSTITUTION

In the context of a review procedure of decisions that are null and void ab initio as provided in article 217 of the General Taxation Law, the Council of State has issued a favorable report on the application filed by the taxpayer to have rendered null and void ab initio a provisional corporate income tax assessment and the related penalty.

In this particular case, the local council had changed the numbering of the street on which the taxable person's address for tax purposes was located, and several unsuccessful attempts had been made to serve notifications in the proceeding at the former number for that address. After those unsuccessful

attempts by reason of an "incorrect address", the notifications were served by appearance with the relevant notices published in the Official State Gazette (BOE), which prevented the taxable person from appealing within the time limit.

The taxable person applied for the assessment and penalty to be rendered null and void on the basis of (i) the adverse effect on rights and freedoms protected by the Constitution, (ii) the fact that the legally stipulated procedure for rendering the administrative decisions had been dispensed with completely. The taxable person pleaded in relation to this that the way in which the notifications had been made had prevented it from knowing about the administrative steps and it did not have an obligation to notify of a change of numbering that had been approved by the local council.

The Council of State concluded that a change to the street numbering does not give rise to an obligation for the taxable person to notify of a change of address, because it is not a physical change made in response to its wishes. Therefore, the absence of the right to defense caused by not having been able to appeal (due to not receiving the notifications adequately) means the assessment and the penalty must be rendered null and void ab initio.

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