GARRIGUES
Newsletter

Tax

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Over recent years huge advances has been made in the development of legislation on automatic exchange of information systems to step up the battle against the existence of financial assets hidden from the authorities.

The legal foundations for this legislative development process are found in (i) Council Directive 2011/16/EU, of 15 February 2011 on administrative cooperation in the field of taxation, (ii) the OECD Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (2014); or (iii) the FATCA Agreements (in Spain the Agreement with the United States done at Madrid on May 14, 2013 was published in the Official State Gazette (BOE) on July 1, 2014). This legislative process has continued moving forward with the following instruments, discussed in this Newsletter:

(i) Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU to encourage efficient spontaneous exchange of information in respect of advance cross border rulings and advance pricing arrangements.

(ii) Commission Implementing Regulations (EU) 2015/2378 of 15 December 2015 which approves standard forms and computerized formats for the exchange of tax information within the European Union.

(iii) Council Decisions (EU) 2015/2400, 2015/2453 and 2015/2469 (all of 8 December 2015) on the Amending Protocols to the Agreements between the European Community and the Swiss Confederation, the Principality of Liechtenstein and the Republic of San Marino, providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments.

In Spain, a further notable event was the publication of Royal Decree 1021/2015, of December 13, 2015, in which the obligation has now been laid down to identify the tax residence of the people who own or have control over certain financial accounts.

This legal automatic exchange of information system appears to have been put in place under the assumption of the ability of tax authorities to provide quality information (error-free, in other words) a context in which we highlight in this newsletter the recent TEAC (Central Economic Administrative Tribunal) Decision of December 2, 2015 (01789/2015/00).

That Decision looks at the probative value of this information and the Tribunal concludes that this is information with an immediate probative value, and therefore gives greater value to the information from other states.

These terms leave no doubt that the international exchange of information could place the taxpayers concerned in a position of being unable to defend themselves.

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I. Judgments

1. *Corporate income tax.- The reincorporation of the net operating losses of a permanent establishment abroad when it is transferred is not contrary to the freedom of establishment (Court of Justice of the European Union. Judgment of December 17, 2015, case C-388/14)*

German tax law allows:

(i) Deduction of the losses attributable to a permanent establishment (PE) situated abroad in cases where the income of the PE is exempt from German income tax under a double tax treaty;

(ii) And the reincorporation of losses deducted previously when the PE is later transferred (provided those losses had not already been reincorporated).

The CJEU concluded that the law is not contrary to the freedom of establishment on the basis of the following considerations:

(i) At first sight, from the case law of the CJEU it may be concluded that the reincorporation (applicable only in the event of transfer of the PE) is a disadvantageous difference in treatment, or in other words, a restriction on the freedom of establishment.

(ii) Also under that case law, however, such a restriction is permissible if it relates to situations which are not objectively comparable or if it is justified by an overriding reason in the public interest.

(iii) In this case, the difference in treatment is justified by the following overriding reasons in the public interest:

  (a) The need to ensure a balanced allocation of the power to impose taxes between states.

  (b) The benefit of ensuring the coherence of the tax system in the entity's state of residence (Germany, in this case).

  (c) The prevention of tax avoidance, because it reduces the risk of conduct aimed at escaping the tax normally due in the state of residence of the company to which the PE belongs.

(iv) Lastly, the regime described above does not go beyond what is necessary to obtain these objectives. In this context, the CJEU underlined that the losses to be reincorporated are not definitive because the member state in which the PE is situated does not preclude all possibility of losses being carried forward.

2. *Nonresident income tax.- The reduced rate for dividends under the tax treaty with the Netherlands (Protocol) applies if they are not taxed in the Netherlands (Supreme Court. Judgment of November 27, 2015)*

The double taxation agreement between Spain and the Netherlands sets out the following tax rates for dividends:

- A rate of 15%, generally (article 10.2 of the DTA).
- The tax on dividends paid by a company which is a resident of Spain to a company resident in the Netherlands will be 10% if the receiving company owns 50% or more of the capital of the Spanish company or 25% where other companies which are residents of the Netherlands also own 25% or more of the capital of the Spanish company (article 10.3 b).
- A rate of 5%, if the dividends are exempt in the Netherlands (provision VII of the Protocol).

In the case under examination, the authorities argued that to benefit from the 5% reduced rate provided in the Protocol two circumstances were required: (a) the exemption referred to above on the dividends in the Netherlands, and (b) the requirements regarding ownership of capital in article 10.3 of the DTA must be satisfied; the taxable person considered that only the first of the requirements needed to be satisfied, which was accepted by the National Appellate Court.

In ruling to confirm this principle the Supreme Court noted that a literal and systematic interpretation of the law allows it to be argued that the 5% rate is not subject to the requirement to meet a minimum ownership threshold.

3. *Value added tax and procedure for applying taxes.- Information must be requested from other member states where it is useful for determining the place of supply of a transaction for VAT purposes (Court of Justice of the European Union. Judgment of December 17, 2015, case C-419/14)*

The judgment mentioned above analyzes various requests for a preliminary ruling submitted to the CJEU by a Hungarian Court in relation to VAT. Notably one concerning the international exchange of VAT related information.

Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax provides that for the purposes of collecting the tax, member states should cooperate to help ensure that VAT is correctly assessed. They must, therefore, not only monitor the correct application of tax owed in their own territory, but should also provide assistance to other member states for ensuring the correct application of tax relating to activity carried out on their own territory but owed in another member state.

The CJEU held that, having regard to that duty to cooperate, the tax authorities are required to send a request for information to the tax authorities of another member state where such a request is useful or essential for determining whether VAT is chargeable in the first member state.

4. *Value added tax. Chargeability of VAT on unused flight tickets. (Court of Justice of the European Union. Judgment of December 23, 2015, joined cases C-250/14 and C-289/14)*

In relation to the chargeability of VAT on transport tickets (plane tickets) for domestic flights which are not ultimately used by the passenger, the CJEU ruled that VAT is chargeable on the issue of those tickets and a refund cannot be claimed, in that the obligation acquired by the airline is to grant the customer the right to benefit from the supply of the transport service, regardless of whether or not the customer exercises that right. Accordingly, the service is considered to be supplied from when the customer pays the price of the ticket, which is when the tax becomes chargeable.

5. Transfer and stamp tax.- The exemption for transfers between owners and land owners consortia (Juntas de Compensación) does not apply to stamp tax (Supreme Court. Judgment of December 21, 2015)

The Supreme Court examined whether any transfers of land made as a result of the contribution to land owners' consortia by the owners of a unit for development and the awards of plots that are made by the consortia to the owners, in proportion to the land lots included, may benefit from the exemption provided in article 45.I.B).7 of the Revised Transfer and Stamp Tax Law.

The Court held that, even though that exemption is contained in the "*common provisions*" chapter of the law, which might indicate that it applies under all the headings of the tax, it transpires from the actual wording of the law that the tax benefit is provided only for the transfers of those lots, and therefore the exemption cannot apply to the tax chargeable on the notarized document (stamp tax).

6. Transfer and stamp tax.- A mortgage with a condition precedent is subject to stamp tax (Supreme Court. Judgment of November 13, 2015)

Article 2.2 of the Revised Transfer and Stamp Tax Law, included under the Preliminary Title on the nature and content of the tax, provides that in any acts or contracts which are subject to a condition precedent, the tax will not be assessed and paid until that condition is satisfied. Based on that article, the taxable person considered that a mortgage subject to a condition precedent was not subject to stamp tax.

The Supreme Court threw out this conclusion and indicated that stamp tax is a charge on the deed recording the legal act, in other words, the document that formally records the transaction, not the transaction itself, and therefore it is chargeable from when the formal recording of that document takes place even if the transaction is subject to a condition precedent; and it affirmed (arguably) that despite falling under the Preliminary Title, article 2.2 relates only to the postponement of the assessment and payment of the tax on the act or contract subject to the condition precedent, which does not include stamp tax.

7. Real estate tax.- The exemption applies to beneficiaries of patronage even where the real estate is leased to a third party carrying on economic activities in it (Supreme Court. Judgment of December 10, 2015)

A nonprofit organization was not allowed to claim the exemption from real estate tax in respect of certain properties because they were leased to a banking institution.

According to the inspectors, this prevented satisfaction being found of the condition that they had to be properties not used for economic operations not exempt from corporate income tax. In particular, said the inspectors, because real estate tax is a tax on property, that condition must be satisfied by the property not the taxable person, and therefore if a beneficiary of patronage leases a property to a private party carrying on an economic operation, they must pay real estate tax even if the income they obtain is exempt from corporate income tax at that organization.

Against that conclusion, the Supreme Court (with reference to its earlier judgment of April 4, 2014) held that property leasing does not imply the performance of an economic operation, and it is irrelevant whether the lessee conducts an activity in the property.

8. *Tax on large retail establishments.- A preventive stay is necessary due to the commencement of a proceeding against Spain in relation to potential state aid (Supreme Court. Judgment of December 14, 2015)*

The IGEC, a tax on large retail establishments, has been placed under scrutiny in the European Community from two channels. This transpires from:

(i) The Communication by the Directorate-General for Taxation of the European Union, informing of the opening of an EU PILOT scheme (prior phase to the start of an official infringement proceeding) against Spain, as a result of the complaint by ANGED, the Spanish association of large distribution companies.

(ii) The letter sent by the European Commission to Spain, on November 28, 2014, as a result of a complaint filed by ANGED, in which the Spanish IGEC tax is described as a measure that could be state aid incompatible with European law.

Accordingly, although these proceedings are at very early stages, the Supreme Court, under the principle of the "appearance of a good right", has granted a preventive stay on assessments of that tax.

9. *Procedure for applying taxes.- The law cannot be interpreted beyond its terms without initiating an evasion of the law proceeding (National Appellate Court. Judgment of April 18, 2015)*

The institutional shareholders of an enterprise transferred a share to an individual to be able to apply the fiscal transparency regime to them. The inspectors considered that this regime could not be applied because the individual only owned a very small percentage of the capital stock (well below 1%).

The National Appellate Court reached the opposite conclusion, by affirming that:

(i) The article of the law is clear when, on defining the exemption, it refers to the ownership of the whole of the capital stock by legal entities.

(ii) If the authorities considered that there could have been an intention to evade obligations, they should have initiated a proceeding to declare evasion of the law; otherwise, they would be making a *malam partem* analogy by applying the effects of a legal article to scenarios not contemplated in it, which is unacceptable.

II. Decisions and Rulings

1. *Corporate income tax.- Timing of recognition for the capitalization reserve and the leveling reserve (Directorate-General of Taxes. Ruling V4127-15, of December 22, 2015)*

Article 25 of the Corporate Income Tax Law (LIS) allows the tax base to be reduced by 10% of the increase in shareholders' equity existing in the taxable period, subject, among other conditions, to the recognition of a reserve equal to the amount of the reduction, which must appear in the balance sheet as a completely separate item under the appropriate heading and be restricted for 5 years from the end of the taxable period to which the reduction relates.

In reply to a question about when that reserve must be recorded, the DGT underlined that:

(i) Formal satisfaction of the requirement to record the restricted reserve will be considered to have occurred where it is recorded in the statutory period provided in corporate law for the approval of the financial statements for the fiscal year related to the taxable period in which the reduction was claimed.

(ii) Specifically, to claim a reduction in the tax base for the 2015 taxable period, it may be claimed in that period provided the reserve is recorded before the approval of the financial statements for 2015 (in other words, in 2016 and foreseeably not later than June 30). The 5-year period for which the reserve is restricted will start to run from December 31, 2015.

Elsewhere, article 105 of the Corporate Income Tax Law allows small sized enterprises satisfying certain requirements to reduce their taxable income by up to 10% of its amount. The reduced amounts must be added to the tax base in the taxable periods ending in the 5 years immediately following the taxable period in which that reduction is made, provided the taxpayer has a net operating loss and only to the extent of that loss. The remaining amount must be added to the tax base for the taxable period in which that period ends.

One of the requirements established in that article is, again, that a reserve must be recorded equal to the amount of the reduction, which will be restricted until the taxable period in which the reduced amounts are added to the tax base. The reserve, according to the expressly stipulated terms, must be recorded against income in the year in which the reduction is made to the tax base. If this reserve cannot be recorded, the reduction will be conditional on it being recorded against the first income in the following years with respect to which that reserve may be recorded. As a result, the levelling reserve must be recorded at the time determined in the corporate law for income for the year to be used.

2. *Corporate income tax.- Increased rate for the credit for loyalty in donations (Directorate-General of Taxes. Ruling V3543-15, of November 17, 2015)*

The law on tax incentives for patronage increases the tax credit for donations (which will be 40%) where the donations are paid repeatedly to the same entity, subject to certain requirements.

The DGT underlined that to claim this increased percentage the following is necessary:

(i) In the two immediately preceding taxable periods donations or contributions must have been made to a same entity in an amount equal to or higher than the amount in the year in progress.

(ii) In short, in 2015 the amounts donated in 2014 and 2013 must be taken into consideration, but also those made in 2012, insofar as the law requires also that in the two immediately preceding taxable periods donations were made to an entity in an amount equal to or higher than the amount in the preceding taxable period (in this case, with respect to 2013 the donations made in the preceding year, 2012, would have to be looked at).

3. *Corporate income tax.- The dividends distributed after a contribution to offset losses do not give rise to a computable revenue and are not subject to withholding tax either (Directorate-General of Taxes. Ruling V3527-15, of November 17, 2015)*

The requesting entity owned the whole of the capital stock of another entity and made a contribution to offset losses and restore the balance of its equity (by increasing the value of its interest and simultaneously recording an impairment loss equal to the difference between the value of the contributions made and the value of the net equity of the investee). Since then, the subsidiary has been obtaining income and the requesting entity has been reinvesting the recorded impairment loss, which has implied it adding computable revenues to the corporate income tax base. In 2015, the subsidiary considered a distribution of income out of reserves in an amount lower than the contribution made to offset losses. The requesting entity is going to record for accounting purposes a financial revenue in respect of the dividend received and a loss in respect of the impairment of the interest in the subsidiary in the same amount.

The DGT observed that:

(i) Before the dividend distribution, the subsidiary sustained losses which required a contribution by the requesting entity to restore the balance of its equity.

(ii) Therefore, the income out of which the dividends are distributed has not been taxed in respect of corporate income tax (insofar as it will be used to offset net operating losses).

(iii) Given that the income concerned has not determined any effective tax, its distribution does not generate a revenue (which might benefit from the exemption under article 21 of the Corporate Income Tax Law) but rather a refund of earlier contributions. This will imply a reduction to the value for tax purposes of the ownership interest. The impairment in the value of the ownership interest in the subsidiary will not be deductible either.

(iv) Lastly, insofar as these dividends do not qualify as income to be included in the corporate income tax base, they will not be subject to withholding tax.

4. *Corporate income tax.- Participating loans giving rise to nondeductible interest will not be counted in the general rule restricting the deduction of finance costs (Directorate-General of Taxes. Ruling V3503-15, of November 13, 2015)*

According to the Corporate Income Tax Law, the finance costs related to participating loans provided by institutions belonging to the same group of companies as the taxable person are not deductible. It was asked whether those expenses must be taken into account for the purpose of determining the borrowing ratio established in article 16.5 of the Corporate Income Tax Law.

That article adds a limit on the deduction of finance costs related to debts incurred to acquire interests in the capital or equity of any type of entities. The last paragraph provides that this additional limit will not apply in the taxable period in which the interests in the capital or equity of entities are acquired if the acquisition is financed with debt, in up to 70% of the cost price; and that this limit will not apply in later taxable periods provided that the amount of that debt is reduced, from when the acquisition takes place, at least by the proportional part related to each of the following 8 years, until the debt amounts to 30% of the cost price.

The DGT determined that, given that the participating loans provided by group entities give rise to nondeductible finance costs, these are no longer affected by the limit provided in article 16 of the Corporate Income Tax Law. Therefore, a consistent and systematic interpretation of the law allows it to be determined that the participating loans should not be treated as debt for the purposes of the last paragraph of article 16.5 of the Corporate Income Tax Law.

Moreover, in relation to the same article, in an earlier ruling on May 28, 2015 (V1664-15) it was indicated that, *"given the customary practice on the market in transactions of this type, in the case of acquisitions by holding companies, in which an interest in an entity is acquired with borrowing, contributions from shareholders or participation by the former shareholders, the portion of no more than 70 percent will be determined by reference to all of the shares acquired by the entity in the same act"*. In ruling V3503-15 it was clarified that the term "the same act" must mean all the legal transactions performed on the same date for the purpose of achieving the same aim, and therefore where the acquisition of shares in an entity is performed via more than one legal transaction that are performed on the same date they may be considered to be performed in the same act.

5. *Corporate income tax.- Recognition for accounting purposes of impairment in premises plant and equipment (Directorate-General of Taxes. Ruling V3436-15, of November 11, 2015)*

The requesting entity was going to recognize for accounting purposes in 2014 impairment losses on its premises plant and equipment that had arisen both in that year and in earlier years, including statute-barred years. It was asked how any potential reversals of those impairment losses must be attributed for tax purposes in the future (2015 et seq.). It must be remembered that until 2014 (inclusive) there was no tax rule preventing the deduction for tax purposes of this type of impairment losses, which is not the case in the years that began on or after January 1, 2015.

The DGT indicated that:

(i) The impairment loss for 2014, which was deductible, must be fully or partially reversed in the period in which its value is recovered, by being included in the corporate income tax base for that period (its reversal for accounting and tax purposes therefore takes place at the same time).

(ii) Any loss for accounting purposes which is recognized in 2014 and relates to earlier years is a loss that should have been recognized, for both accounting and tax purposes, in those earlier years. Insofar as it is a loss for accounting purposes (an expense) recorded in a taxable period falling after the period in which it was incurred, it may be deducted in the fiscal year in which it is recognized for accounting purposes only if it does not give rise to a lower amount of tax than would have been determined under the accrual principle.

To assess this last circumstance, according to the DGT, the potential effect of the statute of limitations must be taken into account. Therefore, the expenses from a statute-barred year cannot be attributed for tax purposes to the year in which they are recognized in the accounts but rather to the (statute-barred) year in which they were incurred, and therefore they cannot be deducted.

The DGT added, with an arguable view, that when the losses are reversed (because the value is recovered) the amount will be included in the corporate income tax base, even if it was prevented from being deducted by the effect of the statute of limitations.

6. *Corporate income tax.- The performance of a capital restructuring transaction (reducing and simultaneously increasing capital) has no impact on the regime for using net operating losses (Directorate-General of Taxes. Ruling V3403-15, of November 5, 2015)*

The Corporate Income Tax Law (LIS) provides that net operating losses (NOLs) cannot be used to reduce future tax payments where, among other cases, the majority of the capital stock is acquired by related individuals or entities after the end of the taxable period in which the net operating losses were incurred, and the acquiring individuals or entities had held an ownership interest below 25% at that time.

In the specific case underlying the request, the requesting party had unused net operating losses. To restore the balance of its equity, it increased and simultaneously reduced its capital (known as an "accordion transaction"), which for accounting purposes reduced its capital stock to zero, by offsetting the balance of the accounting caption containing prior years' losses, until it was reduced almost to zero, and then performing a capital increase.

When asked whether the capital restructuring could preclude the right to use the net operating losses under the provisions in the Corporate Income Tax Law when a change in shareholder ownership occurs, the DGT indicated the following:

(i) The "accordion transaction" is composed of two simultaneous transactions, a reduction of capital without repayment of contributions and a simultaneous capital increase.

(ii) Neither transaction has an impact on the income for accounting purposes or on the corporate income tax base of the entity nor, therefore, may it have repercussions on the right to use net operating losses.

7. *Transfer and stamp tax.- Stamp tax on the establishment of a multiple-unit development, notification of new construction, horizontal division and award of residential property (Directorate-General of Taxes. Ruling V3632-15, of November 19, 2015)*

The stamp tax on a number of real estate transactions was examined:

(i) Establishment of a multiple-unit development: this is simply a preparatory step for the later construction of structures, without any change being made to the content or the scope of ownership (since the same registered property as before the establishment of the development is retained in the deed) and it only involves establishing management regulations or rules. It is therefore an act without a subject-matter, amount or valuable thing, which is why the appearance of the development in the notarized document does not give rise to stamp tax.

(ii) Notification of new construction and horizontal division: in this case the variable liability does become chargeable on the notarized document; the tax base, in the case of notification of new construction, being the real cost of that construction (cost of performing the construction not its market value, on the terms established in the supreme court judgment of April 22, 2013) and, in the case of the establishment of the horizontal property regime, the real cost of the new construction plus the real value of the land.

(iii) Award of residential property: is also subject to the variable liability in respect of the notarized document on a tax base consisting of the declared value, as of the date of the deed in which the award is formally recorded. In the case of a swap, the declared value

will consist of the covenanted value of the plot delivered as consideration for the residential property on the date on which the swap was made.

8. *Administrative proceeding.- The time periods under article 150.5 of the General Taxation Law (LGT) do not apply where reversion of the procedure is decided to allow the accountable person to benefit from the reduction for payment in cash of the penalties (Central Economic-Administrative Tribunal. Decision of December 17, 2015)*

A taxpayer was held liable for a tax penalty and required to make payment without applying any reductions. After a claim was filed, TEAC ruled to revert the procedure to when the payment was claimed from the accountable person to allow the 25% reduction for payment in cash to apply

In compliance with that decision, the collecting body rendered an enforcement decision which was challenged by the taxpayer due to considering that the right to claim the tax liability had become statute-barred following expiry of the time limits provided in article 150.5 of the LGT.

Let us recall that the article provides that: *"Where a judicial or economic-administrative decision orders the reversion of inspection proceedings, these shall end in the period remaining from the point in time to which the proceedings were reverted until the end of the time period mentioned in point 1 of this article or in six months, if that period is shorter. That time period will be computed from the receipt of the proceeding by the body responsible for enforcing the decision"*.

In this claim, TEAC concluded that the time periods referred to above do not apply insofar as it is not a case of issuing a new assessment by enforcement of a court or administrative decision, but rather only of requesting payment of the penalty contained in the decision for declaration of liability.

9. *Procedure for applying taxes.- The DGT's binding principle gives the taxpayer a subjective right which may be relied on as against the inspectors (Central Economic-Administrative Tribunal (TEAC). Decision of December15, 2015)*

A taxpayer submitted two requests for binding rulings from the DGT, in which the DGT concluded that certain services were exempt from VAT. Despite this, the authorities made an assessment considering them subject and not exempt.

As in other earlier decisions, TEAC stressed the binding nature of the DGT's rulings, stating that in cases in which the principle contained in the rulings is favorable to the taxpayer, the taxpayer acquires a subjective right which may be relied on in a review of the taxable event.

In cases of this type, an assessment such as the one discussed should not even have been issued, and therefore if TEAC (the tribunal itself affirmed) entered into examination of the facts of the case, it would be allowing the bodies in charge of applying taxes to violate the binding nature for them of the replies to ruling requests to the DGT that are favorable to the parties with tax obligations.

TEAC specified, however, that it could enter into an examination of the facts of the case where:

(i) the inspectors had identified differences between the case raised in the ruling requests and the adjusted case;

(ii) there are existing TEAC decisions contradicting the principles in the DGT's rulings, and those decisions prevail; or

(iii) claims were filed with TEAC in which the above principle was questioned and after the point in time when the decisions under examination were rendered, the DGT established a principle favorable to the taxpayer other than that used by the bodies in charge of applying taxes.

That said, it is relevant to mention the judgments of the National Appellate Court rendered on November 13, 2015 (Rec. nº 88/2015 and 515/2015) in which a limit is placed on the binding nature of the rulings by considering that TEAC is bound, first and foremost, by the tax law.

10. Procedure for applying taxes.- The information supplied by other member states in the context of mutual assistance does not have to be confirmed by the Spanish tax authorities with the state that sent it (Central Economic-Administrative Tribunal. Decision of December 2, 2015)

The inspectors issued a personal income tax assessment on a taxpayer in respect of certain income items from foreign bank accounts, basing themselves on information supplied by the tax authorities of another member state in the context of mutual assistance (the information evidenced, in the inspectors' judgment, that the owner of the accounts was that taxpayer).

Article 108 of the General Taxation Law, which governs presumptions in evidence, provides:

(i) that the authorities may consider as the owner of property, rights, enterprises, services, activities operations or functions the person who appears as such on a tax record or other public record (unless there is evidence to the contrary).

(ii) that the information included in declarations or replies to demands in the fulfillment of certain obligations to supply information, as defined in the General Taxation Law itself, which are going to be used in the adjustment of the tax position of a person with tax obligations (other than the person who provides those particulars) are presumed to be true, although they must be confirmed where the person with tax obligations concerned pleads that they are inaccurate or false.

On the basis of this article, the taxable person challenged the assessment, pleading that the authorities had not proven that the information used appeared in a tax record or other public record, nor had they requested its ratification and confirmation from the tax authorities of another state, and obtained a favorable decision from the Canary Islands Regional Economic-Administrative Tribunal (TEAR).

Finding against this, TEAC affirmed that:

(i) article 108 does not apply to the information that is supplied by the tax authorities in the context of mutual assistance because it is an item of direct proof;

(ii) this is because that documentation has the value of an official document whose probative force is very different from that of the particulars included in tax returns or in replies to requests from the authorities, given by other parties with tax obligations. It is therefore information that does not need to be confirmed by the Spanish tax authorities with the tax authorities of the member state sending it.

(iii) Accordingly, if the party with tax obligations to which the supplied information relates wishes to plead that it is false or inaccurate, it is that party that must prove the substance of the facts (in this case, that the accounts were not owned by them). The governing rules for these purposes are the general rules on the means and evaluation of evidence contained in the Civil Code, the Civil Procedure Law and the General Taxation Law and, among others, the principles of evaluation of the evidence taken as a whole and of the ease of providing information or closeness to the means of evidence.

In relation to the case under examination, TEAC added that this evidence could have consisted in a banking certificate indicating the real owner of the accounts.

11. Inspection procedures.- To find delay due to the late production of documents a specific period for producing them must first have been determined (Central Economic-Administrative Tribunal. Decision of December 15, 2015)

In inspection proceedings the authorities found the existence of delays attributable to the taxpayer because they had requested extensions of the time limits for producing certain documents. The inspectors, however, had not determined a specific time period for the production of those documents.

TEAC indicated that:

(i) Where the inspectors require data, reports or other background information to be submitted, they must grant a period of ten days or more for the fulfillment of this obligation.

(ii) The inspectors cannot refer to a "requested extension of the time limit" when no date had been specified by them, because in these cases there is nothing to extend. The inspectors cannot benefit from a vagueness they created themselves.

12. Tax on economic activities.- The management companies do not form a group of companies with the private equity vehicles they manage simply due to the fact of managing and administering them (Directorate-General of Taxes. Ruling V3515-15, of November 16, 2015)

The Local Finances Law provides that a weighting multiplier must be used on the (municipal, provincial or national) base liability figures if the net revenues figure exceeds certain thresholds.

For this ruling it was examined whether, for these purposes, the management companies of closed-ended collective investment schemes that manage private equity vehicles (SGEIC) must include in their net revenues figure the figures relating to the managed private equity vehicles (ECR) and the figures for the vehicles in which they invest. In other words, whether it is considered that they all form a group of companies.

The DGT recalled that:

(i) The net revenues figure (which determines whether or not there is exemption from the tax, whether a weighting multiplier is required and how it is determined) includes the revenues from all the economic activities carried on by the taxable person (including exempt activities) and, where applicable, those relating to all the entities forming part of the group to which the taxable person belongs.

(ii) The requirement to consider the revenues of all the entities in a same group is an antiavoidance provision intended to prevent the taxable person from being able to divide their economic activities among several entities to lower the net revenues figure of each of them for the purpose of qualifying for the exemption from the tax or a lower weighting multiplier.

That said, the DGT underlined that the management companies of closed-ended collective investment schemes are in charge of the management and administration of the private equity vehicles and are responsible for ensuring that they fulfill the provisions in their governing legislation. This management and administration function is imposed by their specific legislation which lays down the obligation for every private equity vehicle to have a management company. This does not imply, however, that the management companies necessarily form a group with the private equity vehicles they manage and administer, simply by reason of the existence of that management and administration.

Only in cases where any of the conditions required in article 42 of the Commercial Code exist between the management companies and the private equity vehicles they manage (because there is control resulting from the possession of the majority of the voting rights or the power to appoint or remove the majority of the members of the managing body), will the net revenues figure of all the entities belonging to that group have to be taken into account.

III. LEGISLATION

1. *Amendments in relation to the single administrative document (SAD)*

The Official State Gazette (BOE) of January 25, 2016 published the Decision of January 14, 2016, of the Customs and Special Taxes Department of the State Tax Agency, amending the Decision of July 11, 2014, providing instructions for the submission of the single administrative document (SAD).

Some of the amendments relate to how the SAD is filed, the procedure for its admission, and the procedure for clearance and release of the goods as a result of the creation by the Public Authority Reform Commission of a one-stop shop for customs matters.

They include in particular the added option to file the SAD before the arrival of the goods, the filing and admission of the declaration before obtaining the certificate from the Border Inspection Services (BIS), the establishment of a new type of automatic clearance ("yellow circuit") for monitoring those certificates, and the option to add reference to those certificates to the SAD after it has been admitted.

Additionally, besides certain enhancements of a technical nature and relating to the update of codes as a result of the new legislation approved since the publication of the Instruction of July 11, 2014, the following adaptations have been made:

(i) The option to send other proof of the customs status of goods at the destination customs other than T2L, as commercial documents, has been broadened.

(ii) The option has been added for an export SAD to include more than one e-DA (electronic administrative document) with the aim to advance in the simplification of customs formalities.

The provisions in this Decision entered into force on January 26, 2016.

2. Amendments in EU legislation

On December 29, 2015 the Official Journal of the European Union (OJ) published the implementing provisions for Regulation (EU) No 952/2013 of the European Parliament and of the Council which sets out the Union Customs Code (UCC), namely:

1) Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 specifying the procedural rules mentioned in the UCC for some of its elements.

2) Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 to complete certain non-essential elements of the Code, in accordance with article 290 TFEU to allow for a clear and proper application of the Code.

The provisions of both regulations must be applied from May 1, 2016 to enable the full application of the new UCC.

In addition to these regulations, work is also in progress on a Delegated Regulation as regards the transitional rules for certain provisions of the UCC until the relevant electronic systems are up and running.

3. Amendments of the taxpayer identification numbers codes for partnerships and entities without a legal personality

Effective January 1, 2016, Corporate Income Tax Law 27/2014 has defined partnerships as corporate income taxpayers, only where they have a legal personality and commercial corporate purpose.

The distinction the Law makes between partnerships which are liable and not liable for corporate income tax (the scope and implications of which were analyzed by the Tax Agency in its Instructions dated December 22, 2015 –discussed under the "Miscellaneous" heading below-) has led to a change to the composition of the taxpayer identification number (NIF).

For this reason, the Official State Gazette (BOE) of January 15, 2015 published Order HAP/5/2016, of January 12, 2016, amending Order EHA/451/2008, of February 20, 2016 on the composition of the taxpayer identification number of legal entities and entities without a legal personality.

In particular, it is specified that the letter "J" will be used for both partnerships with a legal personality, and partnerships without a legal personality, and the letter "E" in the taxpayer identification number (NIF) (which to date related to joint property entities and uncollected estates in inheritance scenarios) will now also include other entities without a legal personality.

4. Form 113 for notification of particulars due to change of residence ("exit tax"). Filing period of form 170

Law 26/2014 introduced a new tax regime for the capital gains derived from the shares of any type of entity owned by the taxpayer, where the taxpayer loses their status as such by changing residence, subject to certain requirements. It does, however, contain a number of special provisions for cases where the change of residence takes place to another EEU or EEA member state with which there is an effective exchange of tax information.

For that reason, the Official State Gazette (BOE) of December 30, 2015 published Order HAP/2835/2015, of December 28, 2015, approving form 113, which may be used to exercise the option to apply those special provisions and provide certain particulars, such as the following:

- Identification of the shares (including the percentage ownership and their market value).
- The capital gain that has arisen.
- The date of the change of residence, the state to which residence is relocated (providing the address) and subsequent changes of address.
- If the shares are transferred inter vivos, the transfer value.

The form must be filed in the period between the relocation date and time limit for filing the personal income tax return for the first taxable period in which the taxpayer loses their status as such as a result of the change of residence. Any subsequent changes of address must be notified within two months from when they take place.

The Order also brings forward to February (from March) the filing period for form 170 for the annual informative return on the transactions performed by traders or professionals signed up for the collections management system via credit or debit cards which must be filed by banking or credit institutions and other institutions providing that service.

The Order entered into force on December 31, 2015 and will apply, with respect to form 170, for the first time, to the filing of the form for the 2015 taxable period.

5. *Procedure for obtaining the certificate for the deduction of expenses related to the production and presentation of live scenic arts shows*

The Official State Gazette (BOE) of December 30, 2015 published Order ECD/2836/2015, of December 18, 2015, on the procedure for obtaining the certificate of the National Scenic Arts and Music Institute provided for in Corporate Income Tax Law 27/2014, of November 27, 2014.

This is a certificate issued by the National Scenic Arts and Music Institute (INEAM) to be able to claim the credit in respect of expenses incurred in the production and presentation of live scenic arts and music shows.

The taxpayer must request the certificate online and evidence that they have incurred expenses on the production or presentation of live music, dance, theater or circus shows, in the taxable period for which the certificate is requested. That evidence may be obtained from one or more of the following sources:

(i) The INAEM's own databases, due to the taxpayer being the applicant and beneficiary of a subsidy granted by the INAEM, or due to the show being included on the PLATEA program of events, organized by the INAEM.

(ii) From associations in the sector, in other words, a certificate from any of the entities representing collective interests which at the time the certificate is issued form part of the State Scenic Arts and Music Council, or have received a subsidy from INAEM in the three taxable periods immediately preceding the date of the application to INAEM.

(iii) The applicant’s own documents on the production, festival or arts venue for which they want to obtain the certificate from INAEM.

In the event of a decision rejecting the application, an appeal may be lodged within a month and if no decision is rendered in three months the appeal will be considered to be upheld due to administrative silence.

IV. MISCELLANEOUS

1. Partnerships as corporate income taxpayers: instructions from the Spanish Tax Agency (AEAT)

Following the amendment made in article 7.1.a) of the Corporate Income Tax Law determining that the following will be taxpayers “*legal entities, not including partnerships without a commercial corporate purpose*”, AEAT published, on December 22, 2015, a set of instructions aimed at clarifying the delineation of this type of company.

Specifically, it affirmed that:

(i) A partnership only has a legal personality where its covenants are not kept secret among its partners (article 1669 of the Civil Code).

Therefore, if the enterprise represents that it is a partnership company to AEAT on applying for a taxpayer identification number (and this is so mentioned in the agreement of intentions) it must be considered that its intention is for its covenants not to be kept secret, which will give it a legal personality and, therefore, make it qualify as a corporate income taxpayer (provided it has a commercial corporate purpose). In this case, it will be given a taxpayer identification number with the letter “J” associated with a partnership.

Conversely, if the enterprise does not represent that it is a partnership to AEAT on applying for a taxpayer identification number, but rather represents that it is any other enterprise without a legal personality under article 35.4 of the General Taxation Law (and this is so mentioned in the agreement of intentions), it must be considered that its intention is for its covenants to be kept secret, which will not give it a legal personality and nor therefore will it be a corporate income taxpayer. In these cases it may be a joint property entity (*comunidad de bienes*), an uncollected estate in an inheritance or any other entity without a legal personality. All of these will be given a taxpayer identification number with the letter “E”.

(ii) Any partnerships established as such will be corporate income taxpayers if they have a commercial corporate purpose. Therefore, companies engaged in agricultural, livestock, forestry, mining or professional activities will not be subject to corporate income tax; although those engaged in any business activity will.

2. *Protocols amending agreements between the EU and Switzerland, Liechtenstein and San Marino for the application of OECD standards on automatic exchange of information*

The EU and the various countries within it have recently signed agreements in relation to the automatic exchange of information on financial accounts. These agreements are a step forward in the battle waged against tax fraud and tax evasion and they update the existing agreements with those states to guarantee the application of measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments.

There have now been published Council Decisions (EU) 2015/2400 and 2015/2453 of 8 December 2015 on the conclusion, on behalf of the European Union, of the Amending Protocols to the Agreements between the European Community and the Swiss Confederation and the Principality of Liechtenstein providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments (OJ of December 19 and 24 2015); and Council Decision (EU) 2015/2469 of 8 December 2015 on the signing, on behalf of the Union, and provisional application of the Amending Protocol to the Agreement between the European Community and the Republic of San Marino on the same subject-matter as those mentioned above (OJ of December 31, 2015).

Under the Agreements, the EU and the states mentioned will automatically exchange information on the financial accounts of their respective residents.

3. *Automatic exchange of information in respect of advance cross-border rulings and advance pricing arrangements*

On December 18, 2015, the publication took place of Council Directive (EU) 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, with the aim to encourage the efficient spontaneous exchange of information between member states in respect of advance cross-border rulings and advance pricing arrangements, and providing a definition of the rulings and arrangements concerned, the scope and the time periods for making the notifications.

It provides in particular that:

(i) The competent authority of a member state, where an advance cross-border ruling or an advance pricing arrangement was issued, amended or renewed after December 31, 2016 must communicate by automatic means information thereon to the competent authorities of all other member states as well as to the European Commission.

They also must communicate information on advance cross-border rulings and advance pricing arrangements issued, amended or renewed within a period beginning five years before January 1, 2017, although if they have been issued, amended or renewed between January 1, 2012 and December 31, 2013 they only have to be communicated if they were still valid on January 1, 2014.

However, member states may exclude from the communication information on advance cross-border rulings and advance pricing arrangements issued, amended or renewed before April 1, 2016 to a particular person or group of persons not conducting mainly financial or investment activities and that have had a group-wide annual net turnover of less than €40,000,000 in the fiscal year preceding the date of issuance, amendment or renewal of the cross-border rulings and advance pricing arrangements.

(ii) Advance pricing arrangements with third countries will be excluded from the scope of automatic exchange of information where the international tax agreement under which the advance pricing arrangement was negotiated does not permit its disclosure to third parties.

The provisions in this Directive entered into force on December 18, 2015.

The member states must adopt and publish, by December 31, 2016, the laws, regulations and administrative provisions necessary to comply with the Directive and must communicate forthwith to the Commission the text of those measures. They must apply those measures from January 1, 2017.

In this context, the standard forms and computerized formats for the exchange of tax information within the EU have been approved. In particular, the publication took place of Commission Implementing Regulation (EU) 2015/2378 of 15 December 2015 laying down detailed rules for implementing certain provisions of Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Implementing Regulation (EU) No 1156/2012 (OJ of December 18, 2015).

These are the standard forms that will have to be used for exchanges on request, spontaneous exchanges, notifications and feedback together with the computerized formats to be used for the automatic exchange of information.

The Regulation entered into force on December 21, 2015 and will apply from January 1, 2016.

4. The Sultanate of Oman ceased to be considered a tax haven on September 19, 2015

The DGT published a report issued on November 3, 2015 in which it is specified that Oman ceased to have tax haven status on September 19, 2015, date of the entry into force of the tax treaty between Spain and Oman and its Protocol, done “ad referendum” in Muscat on April 30, 2014 (Official State Gazette (BOE) of September 8, 2015).

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