GARRIGUES

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TAX

Tax adjustments focused on the definition of permanent establishments for nonresident income tax purposes are becoming increasingly common, especially in cases where the manufacturing or distribution structure in Spain is modified which considerably reduces the income taxable in Spain.

No introduction may be needed to the familiar supreme court judgments on this subject in the Roche and Borax cases, of January 12, 2012 (appeal 1626/2008) and June 18, 2014 (appeal 1933/2011) respectively, and now they have been joined by the recent judgment of June 20, 2016 by the same court (in appeal 2555/2015), known as the Dell case. In this judgment, the court has again departed from the formal theory applied in well-known judgments in other countries (such as the Norwegian Dell case judgment of the French Zimmer case), to adopt a substantive approach.

It examines the case of an Irish company with a complex structure in a number of countries, Spain among them, in which a subsidiary acts as commission agent for itself and on behalf of that subsidiary for the sale of products. The National Appellate Court had concluded that the Irish company had a permanent establishment in Spain from the angle of both a "fixed place of business" and a "dependent agent".

The Supreme Court confirmed the National Appellate Court's conclusion, and affirmed that both items must be viewed flexibly. Meaning that there may be a fixed place of business even if the subsidiary's premises and personnel are made available indirectly (provided it is through the subsidiary who is actually carrying on the parent company's primary activity); and there may be a dependent agent even if the commission agent acts for himself, in other words, even if relationships are not established between the supplier and the end customers, if it may be inferred from the facts that it is the supplier that actually takes the decisions related to the distribution.

The Supreme Court ultimately supported its conclusions on the importance of a fair distribution of tax burdens among countries and, in short, on what it called the basic principles of international taxation.

01 CASE LAW

1.1 Corporate income tax.- There is a sham element in a contribution of inventories followed by a subsequent transfer of the ownership interest and the claiming of deferred taxation for reinvestment (Supreme Court. Judgment of June 22, 2016)

Enterprise A had a plot of land among its inventories. After carrying out a number of urban service and property development activities on the land, it transferred the land to a second enterprise B. In the following year, A transferred its shares in B to a newly created third enterprise C. This second transfer gave rise to a capital gain on which A claimed the deferred payment of tax for reinvestment. The inspectors disallowed that arrangement to be claimed indicating that what enterprise A had intended with the two successive contributions was to convert inventories into financial assets for the only purpose of claiming that arrangement.

The lower court denied that the inspectors could characterize events which occurred in a period other than the periods being audited and that there was any sham element in that they were real and authentic transactions, both characterized by notaries who would not be able to authorize a sham transaction. The Supreme Court nevertheless upheld the appeal lodged by the tax authorities, arguing that:

a) Certification by a notary or registry does not ensure that the public instruments they certify are valid because that status may depend, as occurs in this case, on circumstances outside the contract that is concluded.

b) The tax authorities may characterize certain facts that occurred in a fiscal year other than the one being audited if they are dealing with a complex transaction for a single purpose whose effects take place in the years that are adjusted.

c) In this case, the sham element lies in the fact that some assets which are completely unsuitable for the disputed benefit (inventories) are mutated in the examined transactions into a different type of assets (fixed assets).

The conclusion is further supported by the fact that the property development activity was commenced by enterprise A before enterprises B and C had been created which is final proof that all subsequent activities performed by the new enterprises were fictitious or nonexistent and only served to prompt, enable and achieve the mutation of "inventories" into "fixed assets" after a complex collection of transactions which were legal on the surface but had an effect intrinsically contrary to the law.

1.2 Nonresident income tax.- A distributor subsidiary which is a commission agent acting for itself and on behalf of another may be a permanent establishment (Supreme Court. Judgment of June 20, 2016)

The Irish resident company had a subsidiary in Spain which acted as commission agent for itself and on behalf of that company for the sale of products. The National Appellate Court concluded that in Spain the Irish company had a "fixed place of business" and a "dependent agent" and therefore, a permanent establishment for nonresident income tax purposes.

The Supreme Court confirmed the lower court's conclusion and affirmed that:

a) The Irish company has a fixed place of business in Spain, because it must be construed flexibly: by expanding how the applicable law is construed, the making available of a place of business includes acting on behalf of the company.

b) A dependent agent can be either a commission agent acting for itself and on behalf of another or a commission agent acting for and on behalf of another.

c) The treaties do not allow a dependent agent to exist simply because they act though a broker, a general commission agent or any other independent agent. The differentiating feature does not lie in how the contractual relationship was formally defined, but in the *"existing functional factual relationship, in which the most characteristic feature is the separation in economic and operating terms, a real and identified autonomy, which will have to be determined according to all the circumstances arising in the performance of its activity".*

The court based its conclusions on the importance of a fair distribution of tax burdens among countries, and in short, on the basic principles of international taxation.

1.3 VAT.- Sending the amended invoice to the insolvent debtor is not an essential requirement if the amendment was notified to the authorities within the time limit (National Appellate Court. Judgment of May 25, 2016)

Amended invoices were issued to an insolvent company while the amendment was notified to that debtor company outside the time limit. For that reason, the tax authorities did not allow the taxable person to claim the VAT credit resulting from the amendment. It was concluded in this judgment that:

a) The taxable person has the burden of proving that the amended invoice was effectively sent within the time limit, although the legislation does not require verifiable proof of the sending of the invoice. Sending the invoice by ordinary mail is therefore valid.

b) There is no economic detriment to the authorities, however, if the invoice is sent late, where the taxable person has notified the amendment appropriately to the authorities (in other words, within one month from the publication of the insolvency proceeding in the Official State Gazette), which is the real substantive requirement in connection with this matter.

1.4 Transfer and stamp tax.- Conditions subsequent do not prevent stamp tax becoming chargeable (Supreme Court. Judgment of June 20, 2016)

It was examined whether stamp tax becomes chargeable on the date the taxable document is executed, regardless of whether the deed recording the transaction contains a condition subsequent. The Supreme Court indicated that:

a) Liability for stamp tax arises whenever the subject-matter of the deed is a sum or quantifiable element, containing registrable acts or agreements not subject to inheritance and gift tax. It is therefore irrelevant whether the act or agreement is subject to a condition.

b) The tax becomes chargeable on the date when the taxable transaction is executed, given that the subject-matter of the tax is not the legal transaction but its recording in a specific document.

1.5 Transfer and stamp tax.- The acquisition of ownership of an asset by prescription is not subject to transfer and stamp tax (Andalucía High Court. Judgment of July 10, 2015)

A real estate asset was acquired by prescription and the authorities deemed this acquisition subject to transfer and stamp tax.

Against their view, Andalucía High Court held that, because acquisition by prescription is a form of original acquisition of ownership and therefore does not result from a transfer for consideration, the taxable event for the tax does not occur.

1.6 Inheritance and gift tax.- It is contrary to the free movement of capital for a higher reduction to be applied for residents in gifts of real estate (Court of Justice of the European Union. Judgment of June 8, 2016 in case C-479/14)

German tax law allows the benficiary of a gift between nonresidents of real property in Germany to claim a certain tax-free alowance when the relevant option is exercised. When that option is exercised, the tax is assessed by aggregating all the gifts that the nonresident recipient has received from the same person in the ten years before and after the donation concerned. In gifts involving at least one resident, only the gifts made in the tens years before the gift concerned have to be aggregated.

That difference in the computation period may give rise to a difference in the payable amount of tax, and therefore, the CJEU concluded that German Law is contrary to the free movement of capital.

1.7 Tax on the increase in urban land value.- Analysis of unconstitutionality in sales with losses or where the gain is lower than the tax (Valencia High Court. Judgment of July 20, 2015)

The tax on the increase in urban land value is calculated on an imputed increase in the value of urban land between its acquisition and subsequent transfer for consideration or otherwise. This increase (the tax base) is determined by reference to the value of the land in the cadaster and the length of time the land was owned by the transferor, but fails to take the "market" into account, and so the tax may become chargeable even if the land has not actually increased in value.

In this judgment a number of questions are examined related to the potential unconstitutionality of the tax for the reason described above, which the court answered as follows:

a) Cases in which the transfer of the land or building determines a capital loss: in these cases the taxable event does not occur, because the increase in value (of the land) which forms part of the definition of this taxable event does not exist. Therefore, in these cases, an application for a ruling on the constutionality of the rule on determining the tax base for the tax does not have to be submitted.

b) Cases in which there has been a capital gain on the transfer of the land: in these cases, the rule on determining the tax base for the tax could violate the no-confiscation constitutional principle, because that rule may result in an amount of tax payable which may even be higher than (or equal to or slightly below) the increase in value actually generated. These are the cases in which a request for a ruling on constitutionality may be submitted.

Lastly, the court concluded that the method for determining the tax base is contrary to the legal definition of tax base, in that the increase in the value of the land is determined by reference to the value in the cadaster when the tax becomes chargable (the transfer) and not to the increase that has taken place over the holding period of the asset.

1.8 Real estate tax.- The proportional amount of real estate tax can be charged to the buyer (Supreme Court. Judgment of June 15, 2016)

Real estate becomes chargeable on January 1 of every year. Therefore when a transfer of land or a building is made, the real estate tax for the year of the transfer will have already become chargable on January 1 of the previous year. The question brought before the court was whether it is valid to charge to the buyer the proportional part of real estate tax related to the days of the year following the transfer, where nothing was expressly agreed in this respect.

The Surpreme Court replied affirmatively. It said that:

- The wording of the tax law is clear over the taxable person for the tax, and therefore the payment of the tax relates, in this case, to the sellers who owned the land or building on January 1 of the year of the sale.

- Although, when article 63.2 of the Local Finances Law (LHL) provides that *"The provisions in the preceding subarticle shall apply without limiting the taxable person's power to charge the tax burden it has borne in accordance with the rules of general law"*, it must be construed that the taxable person for the tax, the seller, may charge it without the need for an agreement.

- Obviously, the parties may agree that it cannot be charged, in which case it will not be allowed to be charged.

1.9 Environmental taxes.- The tax on environmental damage caused by the installation of cable transport (ITC) in the autonomous community of Aragon is valid (Supreme Court. Judgment of June 8, 2016)

The taxpayer argued that the cable transport tax is chargeable on the same item as the tax on economic activities and that, as a result, the legal provisions on this tax violate article 6.3 of the Law on Autonomous Community Finances, in its original wording, and is therefore an unconstitutional tax. This unconstitutionality rendered null and void Decree 1/2007, of January 16, 2007, of the government of Aragon which governs it.

The Supreme Court overturned the taxpayer's claim stating that the cable transport tax is charged on a different source of wealth to the tax on economic activities, because it is not a tax for revenue purposes. Supporting this, it underlined that the cable transport tax is charged on the negative impact on the local natural environment and landscape caused by conducting the activities referred to in the law (carrying passengers, goods and property) with the aim to compensate the cost borne by society; whereas the tax on economic activities is charged on the simple fact of engaging in the activity of operating cable modes of transport.

1.10 Tax procedure.- A provincial government cannot make a request for information to an enterprise domiciled in another area (Supreme Court. Judgment of June 29, 2016)

The Vizcaya provincial government made a request for tax information to an enterprise domiciled in the general Spanish territory (excluding Navarra and Basque Country), which did not comply with that request. The request related to persons or enteprises based in Vizcaya.

The issue centered on determining whether a "taxing power" (the Vizcaya provincial government, in this case) may request information directly from a citizen domiciled outside its territory (in other words, in a territory falling under a different "taxing power"). The Supreme Court disallowed this option (regardless of the content of the requested information) to the extent that this power does not apply beyond the territorial area for which it is established.

1.11 Tax procedure.- The right to a refund resulting from the enforcement of a decision cannot be held to have expired (Supreme Court. Judgment of June 7, 2016)

TEAC (Central Economic and Administrative Tribunal) recognized the right to obtan a refund of incorrect payments. After the end of four years from the

notification of TEAC's decision, the authorities tried to claim that the right to obtain the refund had expired.

The Supreme Court overruled the arguments raised by the authorities by indicating that in this case it was not the right to obtain the refund of an incorrect payment that was claimed but the right to enforce, strictly on its terms, the final decisions of the administrative bodies carrying out a review function.

According to the court, it is clearly in the public interest, separately from the taxpayer's own interests, for decisions to be brought into effect purely on their terms and in the required manner. Therefore, the right to that enforcement cannot expire.

1.12 Tax procedure.- Inspection work must start when the Inspection Plan is in force (National Appellate Court. Judgment of May 5, 2016)

The party was the subject of an audit under a specific Inspection Plan which had been in force in a year before the inspection work had started.

Supporting the party's arguments, the National Appellate Court rendered void the administrative decisions in connection with this proceeding, by considering that the inspection work must be commenced within the annual period in which the Inspection Plan giving rise to the specific audit is in force. This is an essential timing requirement and therefore failure to satisfy it renders the inspection proceeding null and void.

1.13 Tax procedure.- The notification date and signature of the public official must appear on the acknowledgement of receipt (National Appellate Court. Judgment of May 5, 2016)

In this judgment the National Appellate Court revisited the requirements that must be met by the notification of any administrative act, and specifically, those that must be met in relation to the acknowledgement of receipt. It affirmed in particular that:

a) The acknowledgement of receipt must contain both the date and the signature of the post office official that made the notification.

b) It is not valid to replace that signature by affixing a post office stamp and subsequently sealing it (as happened in the case under examination), because this stamp does not comply with the necessary guarantees regarding notifications.

1.14 Review procedure.- New documents may be produced in an appeal for consideration (Madrid High Court. Judgment of September 21, 2015

In recent years the authorities and some courts have been making it difficult to produce documents after the inspection work had ended; in the appeal proceeding, in other words. Their argument is that the inspection proceeding is the right place to produce those documents. But they fail to take into account, however, that often the taxpayer realizes that certain documents (not expressly requested by the inspectors) need to be produced when the authorities' adjustment is known (in other words, to counter that adjustment).

Madrid High Court affirmed in this judgment that it is allowed to produce new documents in an appeal for reconsideration or even allowed to assert grounds not submitted in the audit procedure. The court based its ruling on the provisions on the appeal for consideration which do not place any restriction in this respect.

02 DECISIONS AND RULINGS

2.1 Corporate income tax.- On directors' compensation (Central Economic-Administrative Tribunal. Decision of July 5, 2016; and Directorate-General for Taxes. Ruling V1965-16, of May 9, 2016)

This TEAC decision and DGT ruling examine deduction of the expense in respect of directors' compensation:

a) In the first case, TEAC examined an administrative assessment in which that compensation was deemed nondeductible because it was not included in the bylaws. The assessment was overturned by Andalucía Regional Economic-Administrative Tribunal (TEAR), after finding it had been evidenced that the salary received by the director matched the performance of the tasks associated with an executive director who provided services as an employee.

In the subsequent special appeal, TEAC (referring to its Decision of February 6, 2014 and the principle repeatedly adopted by the Supreme Court), set the following principle: where it has been evidenced that the only activities that a director carries on, in addition to those associated with his contract for services, are the tasks associated with an executive director, the contract for services must prevail, and therefore the compensation the director receives for those management or board activities is not deductible, if the bylaws do not provide that directors are compensated for their services.

TEAC clarified howerver that the principle described above only applies to the tax periods prior to the entry into force of Corporate Income Law 27/2014.

b) After the new Corporate Income Taw Law had already come into force, the DGT examined the case of the majority shareholder of a limited liabily company who is also its sole director and bills services to the company even though the bylaws do not mention whether directors are compensated for their services.

The DGT concluded that the expense related to the services provided by the sole director of the company, which are not in respect of the activities associated with his position as director, will be treated as a tax-deductible expense, provided that expense meets the statutory requirements in terms of recogniton for accounting purposes, accrual and supporting documents and provided it is recognized at market value, in accordance with article 18 LIS (a questionable method because according to that article, directors are related parties except in relation to the compensation for the performance of their functions).

In relation to the supporting documents for the expense, this is a factual matter that must be

evidenced using any means of proof permitted by law, for which the interested party must submit the proof and the tax authorities evaluate it.

Lastly, TEAC makes one more notable determinination in its decision discussed above. Since Andalucía TEAR had not followed the principle which had been determined earlier by TEAC, TEAC recalled the three cases in which the General Taxation Law gives its rulings binding force for all central government or autonomous community tax authorities:

a) TEAC's decisions settling special appeals for a ruling on a point of law.

b) TEAC's decisions settling the new procedures for adoption of rulings on a point of law.

c) Repeated rulins adopted by TEAC as part of its task to "rule on points of law". For there to be repeated rulings it will be necessary for there to be two or more decisions adopting the same principle and this will be indicated in the subsequent decision or decisions so that it may be considered by everyone that it is a repeated ruling.

2.2 Corporate income tax.- Reciprocal revenues and expenses cannot be eliminated until a gain occurs on a consolidated basis (Directorate-General for Taxes. Ruling V2751-16, of June 17, de 2016)

Under article 64 of the Corporate Income Tax Law (LIS), the eliminations needed to determine the consolidated tax base must be made under the methods establised in the rules on the preparation of consolidated financial statements. The DGT clarified in this ruling that:

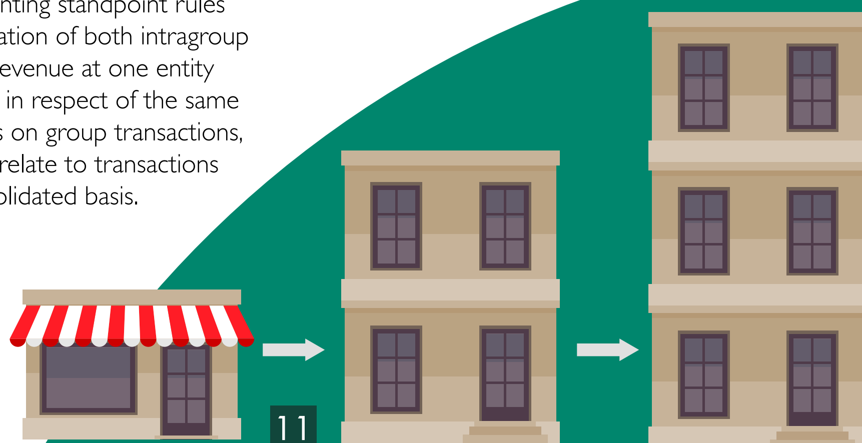
a) Even where from an accounting standpoint rules are provided on the elimination of both intragroup items (those generating a revenue at one entity and an expense at another in respect of the same item) and of gains or losses on group transactions, the eliminations must only relate to transactions generating gains on a consolidated basis.

b) Otherwise a shifting of assets among the enterprises taking part in the transaction would be taking place, which is contrary to the philosophy of the consolidated tax group regime.

The DGT explained the following examples:

a) Leasing of properties among enterprises in the tax group: if the expense and the revenue have matching amounts from a tax standpoint, they will not be eliminated, because it is simply an internal transaction in the tax group which does not give rise to any gain on a consolidated basis.

b) Sales and purchases of goods which were not carried out with third parties outside the tax group: a gain will be generated on group transactions on a consolidated basis which will be eliminated, and it must be incorporated in the tax period in which it is deemed to have occurred with respect to third parties.



2.3 Corporate income tax.- The definition of "economic activity" for the purposes of the special regime for enterprises engaged in property leasing must be interpreted in accordance with the Personal Income Tax Law (Central Economic-Administrative Court. Decision of July 5, 2016)

Within a procedure for adoption of a ruling on a point of law –commenced by Catalonia Regional Economic-Administrative Tribunal (TEAR) due to the disparate rulings by different regional economic-administrative tribunals, it was examined whether the definition of "econonic activity" referred to in the repealed Revised Corporate Income Tax Law (TRLIS) for the purposes of claiming the special regime for enterprises engaged in property leasing must satisfy the requirements contained in article 27.2 of the Personal Income Tax Law in the wording in force at that time (namely, premises used exclusively for carrying out the management of the business and a person employed full time under an employment contract).

TEAC concluded that it must, on the basis of the following reasoning:

a) In the absence of an express definition of "economic activity" in the repealed Revised Corporate Income Tax Law (TRLIS), if a property leasing activity is carried on, the provisions in the Personal Income Tax Law must be applied (systematic interpretation rule).

b) The preamble to the now in force Corporate Income Tax Law 27/2014 allows the expression "economic activity" used in the repealed Revised Corporate Income Tax Law (TRLIS) to be construed with the meaning defined at that time by the Personal Income Tax Law.

c) As a result of the definition of economic activity included in Law 27/2014 not being significantly different from the one currently contained in the Personal Income Tax Law, it may be concluded that, before Law 27/2014, the definition of "economic activity" used in the TRLIS had to be construed as required in the provisions of the Personal Income Tax Law.

2.4 Corporate income tax.- Eligibility for the exemption under article 21 for the holder of a usufruct in respect of the shares (Directorate-General for Taxes. Ruling V2043-16, of May 12, 2016)

The enterprise is the holder of a usufruct right in respect of shares in a Spanish company, representing more than 5% of its capital stock or shareholders' equity. When asked whether it was eligible for the exemption under article 21 of the Corproate Income Tax Law (LIS) on any dividends received as usufruct holder, the DGT underlined that:

a) Even though the shareholder is the legal owner, it is the usufruct holder who has the right to receive any dividends distributed in the term of the usfruct, and therefore it could be attributed "economic shareholder" status.

b) It would not make sense for the dismembering of ownership into an arrangement generating the right to receive a dividend to lead to double taxation (firstly at the enterprise and later by

denying both the legal owner and the usufruct holder the right to correct the double taxation).

c) Therefore, the usufruct holder will be eligible for the exemption for the avoidance of double taxation on the received dividends, subject to satisfaction of the requiremetns under article 21 of the Corporate Income Tax Law (LIS) and double taxation has effectively taken place.

2.5 Corporate income tax.- The limit on the deduction of finance costs will not apply in the year in which the enterprise is terminated or in the liquidation period (Directorate-General for Taxes. Ruling V1989-16, of May 9, 2016)

The sole shareholder of a limited liability company resolved to dissolve the company and the liquidation period was commenced, which will foreseeably last for more than a fiscal year for reasons beyond the company's control; in particular, because there is a tax audit procedure in progress, in relation to tax periods before 2015.

The Corporate Income Tax Law (LIS) provides that the limits on the deduction of finance costs will not apply in the tax period in which the termination of the enterprise takes place, unless it is the consequence of a restructuring transaction. It was asksed whether this rule applies not only in the fiscal year in which the dissolution of the enterprise is resolved but throughout the liquidation period.

The DGT concluded that it does. The fact of the liquidation lasting longer than a business year cannot change this conclusion if it is for reasons beyond the intention to terminate the enterprise.

2.6 Miscellaneous taxes.- Treatment of shareholders' contributions to account 118 in the National Chart of Accounts (Directorate-General for Taxes. Ruling V1978-16, of May 9, 2016)

The shareholders' meeting decided in 2012 to make contributions to account 118 "shareholder or owner contributions" in the National Chart of Accounts for small and medium sized enterprises. The contribution was made in the same proportion as the ownership interests of all the shareholders in the capital stock.

In the contribution resolution it was determined that the sought aim was to restore the balance of equity and that, after that restoration had taken place and when its liquidity position so permitted, the required cash repayment was to be made to the shareholders (in all cases with a prior shareholders' resolution). In 2014, after the enterprise's financial position had improved, the shareholders resolved to repay the contributions.

The DGT examined the following issues:

a) Shareholder contributions:

a) For corporate income tax purposes, the contribution must be treated as nonrefundable, and therefore does not generate a revenue in the income statement, which is part of the tax base.

b) For the purposes of personal income tax in the hands of the shareholders, under the same assumption, the contributed amount should include the cost price of the shares.

c) For the purposes of transfer and stamp tax, given that this is a shareholder contribution which does not imply a capital increase, the transaction will be subject to but exempt from capital duty (transfer tax under the corporte transactions heading).

The DGT also examined whether it could be deemed that the contribution is really a loan. If so, it concluded that we would be facing a transfer for consideration subject to (but exempt from) the tax on transfers for consideration. It concluded that it is irrelevant whether it is convenanted to pay interest on the loan to characterize it as being for consideration, because what matters is not whether there is interest, but whether there is consideration, as opposed to legal transfers for no consideration in which the obligation of one party is not compensated with consideration from the other party.

b) Repayment of shareholder contributions:

a) The repayment to shareholders will result from their abstract right to the distribution of reserves (from income or from other shareholder contributions), due to the fact of being shareholders, in other words, regardless of whether they had contributed funds at the relevant time to the reserves to be distributed. That repayment, therefore, must be given the treatment laid down for the distribution of additional paid-in capital.

b) Under the corporate income tax legislation, the distribution will reduce the tax value of their ownership interest, and any excess will be treated as a revenue.

c) For individuals, the amount obtained will reduce to zero the cost price of the shares concerned and any excess will be taxed as income from movable capital.

It must be recalled, however, that in distributions relating to unlisted shares, where the difference between the value in equity of the shares as of the latest fiscal year-end before the distribution and their cost value is positive, the amount obtained or the market value of the assets or rights received will be deemed income from movable capital to the extent of that positive difference.

For these purposes, because no specific rule is laid down in the law, the distribution of the repayment among the various shares must be done in proportion to the cost value of each with respect to the total cost value for the shares as a whole.

d) For stamp and transfer tax purposes, the repayment of the contributions is not a taxable event.

2.7 2.7 Miscellaneous taxes.- Treatment of voluntary contributions to the Chambers of Commerce (Directorate-General for Taxes. Ruling V1963-16, of May 9, 2016).

The requesting entity is a public law entity with its own legal personality and full capacity to act for the accomplishment of its purposes, which is governed by the provisions in Basic Law 4/2014, of April 1, 2014 on the Official Chambers of Commerce, Industry, Services and Shipping.

Among its revenues are voluntary contributions from enterprises or entities as provided in Law 4/2014 and in the Internal Code of Conduct of the requesting entity. Under this code, enterprises making voluntary contributions will fall in the following categories: members, active members and associates.

The DGT indicated that:

a) Regardless of whether the contributions are voluntary, they will be treated as deductible expenses for corporate income tax purposes in that they do not meet the requirements to qualify as donations or gifts, given that there is no animus donandi (intent to give) on the part of the contributor.

b) The same treatment will apply for personal income tax in the hands of entrepreneur individuals.

c) Lastly, the voluntary contributions made by enterprises will be subject to and not exempt from VAT, at the standard 21% rate.

2.8 Wealth tax.- The requirement for a person cannot be covered by a management and administrative services company (Directorate-General for Taxes. Ruling V1999-16, of May 9, 2016)

The wealth tax exemption requires the property leasing activity to be characterized as an economic activity for which the leasing must be managed using a person hired full time under an employment contract. This requirement is in the personal income tax legislation, to which the wealth tax law refers.

When asked whether that requirement is satisified by using a management and administrative services company, the DGT concluded that:

a) The reference in the wealth tax law is made, for the purposes of the exemption, exclusively to the personal income tax legislation; and this legislation clearly lays down that for property leasing to be an economic activity there must be a full-time employee.

b) The Corporate Income Tax Law (LIS) contains a similar requirement when it defines holding companies but it allows this requirement to be satisfied through another company in the business group. Corporate income tax however is charged on a different expression of economic activity and from a different perspective to wealth tax. Therfore, there is no room for a flexible interpretation over the wealth tax exemption as defined by the Corporate Income Tax Law (LIS).

2.9 Inspection procedure.- Notification attempts interrupt the six month period of inactivity by the inspectors (Central Economic-Administrative Court. Decision of July 7, 2016)

It was asked whether the notification attempts made before the end of the period for filing pleadings against the notice of assessment are relevant for preventing the finding of an unjusitifed standstill in the inspection proceeding for over six months.

TEAC set the principle that an unjustified interruption in the inspection proceeding cannot be found to exist in those cases, in that the attempts themselves evidence that the authorities were not inactive in that period.

According to TEAC's arguments, it would be contradictory to accept that a notification attempt is a sufficient step by the authorities to consider that it has breached its obligation to end the tax proceeding within that period while arguing at the same time that the same attempt at serving notice of the assessment decision that brings an end to the proceeding implies inactivity by the authorities for the purpose of finding whether there has been an unjustified interruption in the proceeding for longer than six months.

03 LEGISLATION

3.1 Directive against the tax avoidance practices commonly employed by large enterprises

The primary aim of Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market published in the Official Journal on July 19, 2016 is to ensure coherent integration within the EU of a number of anti-abuse measures recommended by the OECD (BEPS), and to add others (rules on exit taxation, for example) not specifically covered by the BEPS reports.

The Directive lays down some minimum standards (i.e. the member states may provide stricter rules but not softer ones) regarding limitations to the deductibility of interest, exit taxation, the rules on international fiscal transparency (flow-through entities) and the rules (which have been simplified with respect to the BEPS work) on hybrid instruments and entities. It also contains a general anti-abuse rule similar to the existing rule in the Parent-Subsidiary Directive.

In Spain, the Directive may require the amendment of certain elements of the Corporate Income Tax Law in which rules already exist on these elements.

The Directive will apply to every company resident in the EU, and to permanent establishments in the EU of residents in third countries. Generally, its measures should be brought ino effect on January 1, 2019, although there are transitional provisions for exit taxation (January 1, 2020) or for limitations on the deduction of borrowing costs (any countries, such as Spain, which already have rules in this respect, may defer their adaptation to the Directive until there is consensus over Action 4 of the OECD BEPS Project, within a time limit ending on January 1, 2024).

3.2 Effective annual interest rate for the second calendar quarter of 2016, for the purpose of characterizing certain financial assets for tax purposes

As is customary, on June 29, 2016, the Official State Gazette published the decision of June 28, 2016 by the Office of the General Secretary for Cash and Financial Policy, publishing the annual effective interest rate for the third calendar quarter of 2016, for the purpose of characterizing for tax purposes certain financial assets, which are as follows:

- Financial assets with a term equal to or shorter than four years: 0.110 percent..
- Assets with a term longer than four years, but equal to or shorter than seven: 0.473 percent.
- Assets with a term of ten years: 1.273 percent..
- Assets with a term of fifteen years: 1.638 percent.
- Assets with a term of thirty years: 2.178 percent..

In all other cases, the reference rate relating to the term that is closest to that of the issue that is made will apply..

3.3 Amendment of the VAT rules applicable to vouchers

On July 1 the Official Journal of the European Union published Council Directive (EU) 2016/1065 of 27 June 2016 amending Directive 2006/112/CE as regards the treatment of vouchers, which is the expression of the proposed amendment to the VAT Directive of May 2012 to set out specific provisions on the treatment of vouchers for goods and services.

The new legislation introduced by that Directive were analyzed in our specific VAT and Customs Commentary 2-2016 (Amendment of the VAT rules applicable to vouchers) available at the following address:

http://www.garrigues.com/sites/default/files/documents/comentario-iva-aduanas-2-2016.pdf

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04 OTHERS

4.1 Exchange of Letters interpreting the Spain-Morocco tax treaty

On July 15, 2016 the Official State Gazette published the Exchange of Letters interpreting the Spain-Morocco tax treaty.

These letters clarify the interpretation that must be given to the term "technical or economic studies" in article 12.2.c) of the DTA, on the treatment of royalties, according to which 10% tax may be withheld in the source state.

It clarifies in particular that the term covers any specific analysis or research of a technical or economic nature, in which one of the parties undertakes to use their own know-how, skills and experience to carry out the analysis or the research themselves without transferring that know-how to the other party so that this other party may use that know-how for their own account (financial risk studies, financial studies and studies performed as part of professional activities such as architecture, engineering, legal or accounting advisory services or other consulting services, for example).

It also clarifies that the payments made to a permanent establishment in respect of the services provided by that permanent establishment are not subject to withholdings at source provided they are attributable to that permanent establishment.

Lastly, it indicates that the tax authorities have underlined the importance of issuing residence certificates to allow the tax treaty benefits to be taken.

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