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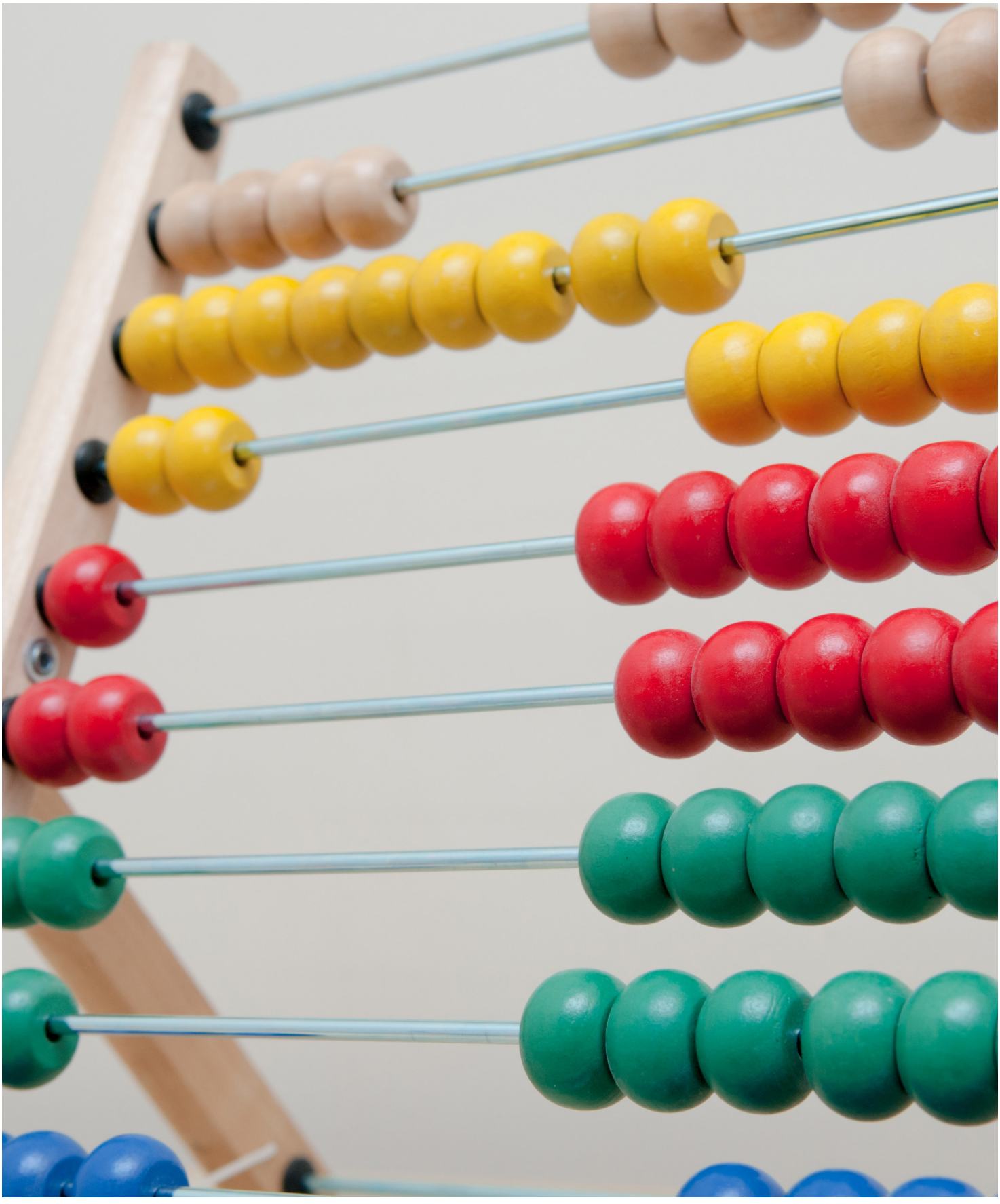
TAX

NOVEMBER 2016



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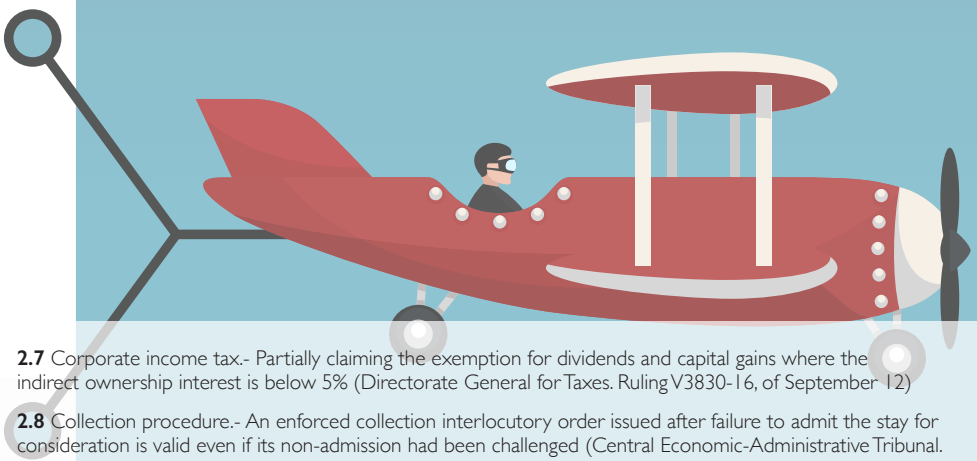

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TAX NEWSLETTER

Whether or not late-payment interest is a tax-deductible expense for corporate income tax purposes has become a topic of debate among tax professionals, especially since TEAC (Central Economic-Administrative Tribunal) revived the subject in its decision on May 7, 2015. TEAC said in that decision that it was basing its view on the Supreme Court's case law to deny the deduction in a case falling under the revised Corporate Income Tax Law (approved by Legislative Royal Decree 4/2004).

In the wake of this decision, Spanish tax auditors in their audits have been issuing notices of assessment in this respect, many signed on a contested basis by taxpayers, and little by little they will come to be examined by the courts and tribunals. One of these, probably the first following the new line of reasoning adopted by the auditors, is that contemplated in Aragon High Court's judgment (of July 20, 2016), which found in the taxpayer's favor.

From an analysis of the various legal instruments that have regulated corporate income tax in recent years and of the evolution in administrative and judicial reasoning over this issue, the judgment draws the following conclusion:

1. In the history of corporate income tax legislation the main instruments have been: Law 61/1978, the later Law 43/1995 (and the following revised law -Legislative Royal Decree 4/2004-) and the current Law 27/2014.

2. In relation to whether late-payment interest is a deductible expense, however, only two different points need to be distinguished: before and after Law 61/1978. This is because:

   a. Article 13 of Law 61/1978 required, for an expense to be regarded as tax-deductible, that it had to be necessary to obtain income.

   b. On the entry into force of Law 43/1995, the requirement for the necessity of the expense disappeared. Furthermore, article 14 detailed the non-deductible expenses and failed to include late-payment interest among them. Nothing changed with the appearance of the revised Corporate Income Tax Law.

   c. Law 27/2014 maintained the status quo; it neither returned to the requirement for necessity, nor added late-payment interest to the non-deductible expenses in article 15.

3. It is reasonable, therefore, that the Supreme Court, in its judgments of October 24, 1998 and February 25, 2010, should find that late-payment interest was not a deductible expense, given that they were rendered in relation to Law 61/1978 which contained the requirement for the necessity of the expense.

4. The comments made in those judgments, however, cannot now be extrapolated without the appropriate reasoning, as TEAC did, to years in which different legislation applies, under which that necessity is no longer required, and which, according to the provisions in the revised Corporate Income Tax Law, allows the late-payment interest resulting from notices of assessment in audits to be treated as a tax deductible-expense.

01 CASE LAW

1.1 Corporate income tax.- Late-payment interest is deductible under the current LIS also (Aragon High Court. Judgment of July 20, 2016)

As mentioned above, Aragon High Court concluded in this judgment that late-payment interest has been deductible since Law 43/1995 came into force (including under the current law) because since then it has not needed to be a necessary expense to be deducted when determining taxable income for corporate income tax purposes (which used to be a requirement under the previous legislation –Law 61/1978-).

Aragon High Court said that:

a) When the Supreme Court denied this deduction in its judgments of October 24, 1998 and February 25, 2000 it did so because these judgments referred to laws in which the necessity requirement had to be met for an expense to be deductible. The exact laws examined in those judgments were Law 61/1978 and Provincial Law 11/1984 (on the tax in the territory of Vizcaya).

b) It cannot be concluded from these judgments, therefore, that the Supreme Court considers that late-payment interest is not deductible now that subsequent laws are in force.

c) Accordingly, the change in TEAC's reasoning is not correct (in its Decision of May 7, 2015, among others) concerning the ability to deduct these expenses on the basis of Law 43/1995; and it is even less acceptable to found that change on an alleged alteration to the Supreme Court's reasoning, because no such alteration exists.

d) Nor is it valid to conclude, as the DGT (Directorate General for Taxes) did in its Ruling of April 4, 2016, that these expenses have only been deductible since the entry into force of Law 27/2014 on the basis that this Law has made substantial amendments to the rules on non-deductible expenses. Because this Law has not made any major changes in this connection and most certainly does not expressly mention anything on the subject of whether late-payment interest is deductible.

All in all, late-payment interest has been deductible since the entry into force of Law 43/1995.

1.2 Corporate income tax.- Federative rights may be transferred and assigned to individuals and legal entities other than sport entities (National Appellate Court. Judgment of July 12, 2016)

The federative rights of a given football club were owned by a business company to which the football club had assigned the rights in exchange for covering given expenses. The tax authorities held that federative rights could not be transferred to a private company which is not a club or a SAD (Sociedad Anónima Deportiva, a Spanish publicly held sports company). They therefore concluded that any revenues and expenses associated with management of the federative rights should be attributed to the transferring football club.

The National Appellate Court departed from the tax authorities' reasoning to make a distinction between different types of federative rights:

- Federative rights in the strict sense: which include the right to register a player at the club and the license to play only for the club at which they are registered. These rights can only be owned by a club or a SAD and can only be transferred between these types of entities.

- Federative economic rights: which encompasses the income obtained from transfers or loans. In the National Appellate Court's view, these rights may be assigned and may belong to individuals and legal entities other than sport entities, in addition to which they are divisible, so they can be owned by more than one party in different percentages.

1.3 Personal Income Tax. Maternity benefit paid by the social security authorities is exempt (Madrid High Court. Judgment of July 6, 2016)

Madrid High Court has ruled (in a decision going against the tax authorities' official stance) that maternity benefit

paid by the National Social Security Institute is exempt from personal income tax.

Accordingly, it held to be correct the rectification of a personal income tax self-assessment return made by the taxpayer, ordering the refund to her of the amounts incorrectly paid over in this respect plus the relevant amount of late-payment interest.

1.4 VAT.- The right to a deduction of VAT cannot be disallowed simply because the invoice has formal defects (Court of Justice of the European Union. Judgment of September 15, 2016 on Barlis 06 case C-516/14)

The CJEU ruled on this occasion in relation to the formal requirements concerning the contents of invoices and the powers of member states to refuse the right to deduct VAT because the invoices do not satisfy certain formal requirements:

a) It examined first whether the requirements laid down in the VAT Directive (points 6 and 7 of article 226) are met if the description of the transactions on invoices mention only "legal services rendered from [a date] until the present date" or "legal services rendered until the present date". The Court considered that those invoices do not *a priori* comply with the requirements in that article, although that is for the referring tribunal to ascertain.

b) Having said that, in relation to exercising the right to deduct the VAT on the invoices described, the Court held, as it had done in earlier judgments, that the fundamental principle of the neutrality of VAT requires the deduction of input VAT to be allowed if the substantive requirements are satisfied, even if the taxable persons have failed to comply with some formal conditions.

Consequently, where the tax authorities have the information necessary to establish that the substantive requirements have been satisfied in relation to the right of the taxable person to deduct VAT, they cannot impose additional conditions which may have the effect of rendering that right ineffective.

In this respect, it is for the competent court or tribunal to ascertain whether the substantive requirements laid down for the taxable person to be able to exercise their right to deduct VAT have been met, for which it must take into account all the information provided on both the invoices and on any additional documents produced to this end.

c) Lastly, and in spite of the above conclusions, the Court stated that the member states have the power to lay down penalties for failure to comply with the formal conditions to exercise the right to deduct the VAT, because they can adopt measures to ensure the correct collection of VAT and to prevent evasion. They must nevertheless ensure that those measures do not go further than is necessary to attain those objectives and do not undermine the neutrality of VAT.

1.5 Inheritance and Gift Tax.- Unregistered *de facto* partners can enjoy the benefits provided in the Inheritance and Gift Tax law for married partners (Madrid High Court. Judgment of May 12, 2012)

The issue discussed in this case concerned whether an unregistered de facto partner could benefit from the reductions allowed in the inheritance and gift tax legislation to the partner's inheritance.
After admitting that there had been a heterogeneous array of decisions on this matter, Madrid High Court allowed these reductions on the basis that entry on the register does not create a right. It therefore considers that a *de facto* couple exists where the factual elements associated with that relationship exist, and entry on the register is a formality which is simply for evidentiary purposes.

1.6 Audit procedure.- The correction to tax must be complete even if it benefits the taxable person (National Appellate Court. Judgment of June 16, 2016)

In this judgment, the National Appellate Court has reconfirmed the principle of complete correction, by affirming that::

a) A correction made to tax in an audit must be complete concerning the taxable person.

b) The correction does not necessarily have to be harmful to the taxable person but can also be beneficial.

c) Specifically, and turning to the case examined in the judgment, if the auditors review years that have become statute-barred to correct their effects on years that have not become statute-barred (as the courts have been allowing and is now expressly allowed in tax law after its reform in 2015), this must be done to the full extent, even if it results in effects in the taxable person's favor.

1.7 Penalty procedure.- The grounds for the penalty cannot be based on the personal circumstances of the infringing person (Supreme Court. Judgment of October 26, 2016)

The Supreme Court recalled in this judgment the importance of providing sufficient reasoning for tax penalties.

In this case, the court examined whether the penalty imposed by the Madrid autonomous community government by reason of a capital increase was allowable. The company filed a self-assessment return for corporate duty (one of the transfer and stamp tax headings), in which it reported the transaction as exempt because it considered that article 45.1.A).a) of the revised law on the tax applied in relation to the exemption for the central government and the regional and institutional public authorities. The tax authorities issued an assessment disallowing the exemption, which was accepted by the company, and it paid the assessed debt.

The tax authorities imposed a penalty which was subsequently confirmed by Madrid High Court and became the subject of debate before the Supreme Court.

The Court underlined that:

a) To be able to impose a penalty there must be fault on the part of the infringing party.

b) This fault cannot be made to depend on the personal circumstances of the party concerned (such as its economic capacity or because of the type of company it was it probably received the appropriate tax advice).

c) Therefore, the fact of the entity being a government company cannot serve alone to discard that it might have committed an error in the interpretation of the law (especially since, according to the Court, the law is not clear).

d) The burden of proving fault lies with the tax authorities, which also must provide sufficient reasoning.

e) In this respect, the burden of proof cannot be reversed without infringing the right to the presumption of innocence. The lower court's reasoning is therefore not valid when it held that the penalty was valid because the infringing party had not evidenced the mistake of law that had occurred.

f) Nor is it valid to base the penalty on the fact that the entity accepted the assessment of the tax without appealing, and paid the debt claimed by the tax authorities. Acceptance of the mistake for these purposes does not exclude its existence.

1.8 Review procedure.- Judgments cannot be produced in a court proceeding after the conclusions stage (Supreme Court. Judgment of October 24, 2016)

In a judicial review proceeding, the conclusions had already been given and a date had already been set for a vote and ruling. Despite this, the appellant submitted to the National Appellate Court two judgments determining new principles for the interpretation and implementation of delays attributable to the taxpayer, which in its view should determine that the authorities' right to assess the tax debt was statute-barred.

The National Appellate Court returned the submission producing those judgments to the appellant and made no reference to them in its judgment.

The Supreme Court found against the claimant's contention by affirming that:

a) Procedural rules have the nature of peremptory norms (*ius cogens*), and therefore the parties are not allowed to attempt at their discretion or convenience to take steps that may bring advantages to them over the other side. Finding otherwise would disturb the equality of arms, a basic principle in adversarial proceedings.

b) Court or administrative decisions or judgments can only be produced if they have a decisive or conditioning effect for resolving an exceptional issue which must be interpreted as meaning that they have the potential to change the direction of the ruling.

c) And, aside from any other considerations, the appellants cannot assert this procedural exception to add new matters unrelated to those that formed the debate between the parties.

In relation to the examined case, the Court affirmed that, although a right becoming statute-barred is a matter to be determined by the authorities:

a) To assess whether this actually occurred it is necessary (i) to take into account facts which have not been disputed in this proceeding or (ii) to apply rules, legal concepts or institutions which have not been questioned over their correct implementation, and therefore the other side has not been given the opportunity to defend itself.

b) Otherwise, that party would have been allowed to add a new matter unrelated to the debate, which is not allowable.

02 JUDGMENTS AND RULINGS

2.1 Corporate income tax.- Change of the fiscal year in a consolidated tax group (Directorate General for Taxes. Ruling V3917-16, of September 15, 2016)

The companies in a tax group changed their fiscal year in 2016. Their original fiscal year was the same as the calendar year and, after this change, it will begin April 1 and end March 31 of the following year. Accordingly, there will be two tax periods in 2016: (i) a first period between January 1, 2016 and March 31, 2016 and (ii) a second tax period matching the new fiscal year (April 1, 2016 through March 31, 2017).

In 2016 it is likely that the parent company of another consolidated tax group will acquire an ownership interest higher than 75% in the parent company of the tax group mentioned above. The fiscal year of the companies in this second tax group is the same as the calendar year.

As a result of the requirement for the entities in the first tax group to be added to the second tax group, two scenarios were proposed in relation to adapting the fiscal year of the companies in the first group to that of the second group: (i) the companies in the first group adopt the necessary resolutions to change their fiscal year to be the same as the calendar year, before January 1, 2017; or, alternatively, (ii) those resolutions are adopted between January 1, 2017 and March 31, 2017.

The DGT ruled that in both scenarios the conclusion must be the same:

a) The parent company of the first group will forefeit its parent company status, effective in the tax period that began on January 1, 2017. Therefore, the companies in the first group will become part of the second group in that 2017 tax period (provided they meet the requirements under article 58 of the Corporate Income Tax Law –LIS-).

b) Consequently, the first group will be disbanded, effective in the 2017 tax period, although subject to the particular provisions in article 74.3 LIS in the event all the companies in the first group become part of the second.

c) In short, the fact of a subsidiary having a different fiscal year to the parent company of the tax group to which it will belong does not prevent it from forming part of that group, regardless of the fact that all the companies in the first group (which will have to become part of the second group from 2017) have an obligation to change their fiscal years, to adapt them to that of the parent company of the transferee group.

The conclusion is that the first group would have the following tax periods: (i) a first tax period between January 1, 2016 and March 31, 2016; (ii) a second tax period between April 1, 2016 and December 31, 2016; (iii) lastly, all the companies would become part of the second tax group, effective on January 1, 2017.

2.2 Corporate income tax.- A provision for bonuses is deductible when their payment occurs (Directorate General for Taxes. Ruling V3908-16, September 15, 2016)

The request concerned whether the expense recorded in respect of a provision to cover the potential obligation to pay bonuses to executives is deductible.

The DGT recalled that:

a) Article 14 of the Corporate Income Tax Law (LIS) disallows the deduction of provisions for (i) long term compensation of personnel under defined-contribution or defined-benefit systems (article 14.2 LIS), (ii) implicit or tacit obligations (article 14.3.a) LIS); and (iii) restructurings, unless they relate to legal or contractual obligations which are not simply tacit (article 14.3.c) LIS).

b) Accordingly, the provision concerned will not be deductible when it is recorded but rather when the bonus is paid.

2.3 Corporate income tax.- Tax on an indemnity clause in connection with a business combination (Directorate General for Taxes. Ruling V3872-16, of September 13, 2016)

As a result of an acquisition process concerning several companies resident in Spain in 2011, the transferee and transferring companies included in the sale and purchase agreement an indemnity clause in relation to a penalty proceeding initiated by the Spanish Markets and Antitrust Commission (CNMC) against one of the acquired companies. Under that clause, the transferring company undertook to pay the transferee company the potential amount of any penalty.

Following the acquisition process, in 2015, the acquired company on which the penalty proceeding had been initiated was absorbed by the transferee company. After the absorption had taken place, the penalty on the absorbed company was confirmed in a nonappealable court judgment. In compliance with the indemnity clause, the transferring company indemnified the transferee company with a sum equal to the confirmed penalty.

To clarify the tax treatment applicable to the received indemnification and to the imposed penalty, the DGT requested a report from the Spanish Accounting and Audit Institute (ICAC). ICAC's reply was as follows:

a) Under points 2.5.1 and 2.3 of Recognition and Measurement Standard (NRV) 19 in the Spanish Chart of Accounts (PGC), an indemnification clause must receive the accounting treatment provided for contingent prices in a business combination and therefore must be treated as an asset that is separate from the cost of the investment.

b) Therefore, a distinction must be made between the following time periods:

a. The period until a year has elapsed from the acquisition:

i. The transferee company must make the best estimate of the value of the identifiable assets and of the assumed liabilities.

ii. If a contingent price is found in connection with an obligation held by the acquired company for which the seller will provide indemnification, the received amount cannot be recognized as revenue, but as recovery of the delivered contingent price.

iii. Therefore, the acquired company must recognize on the acquisition date an expense and the related provision.

iv. And the partner (the transferee company) must record a reduction to the initial value of the investment to recognize the contingent price, under point 2.3 of Recognition and Measurement Standard 19, as an asset or an adjustment to the initial value of that price, with a charge or credit, as applicable, to the account reflecting the investment under equity instruments.

b. After a one-year period has elapsed, any difference arisen between the estimate and the amount actually received must be recorded in the income statement. Therefore:

i. The acquired company must recognize the change to the estimate as an expense or a revenue in the provision.

ii. The partner (the transferee company) must record in the contingent price an expense or revenue resulting from the change to the estimate.

c) If the acquired company had mistakenly failed to record any obligations that might arise from the proceedings in progress or that might arise in the future as a result of events before the acquisition date, that error must be corrected in the year in which it is observed, under Recognition and Measurement Standard 22 in the Spanish Chart of Accounts. Therefore:

a. The acquired company must recognize an expense, and reduce its reserves.

b. The transferee company must recognize the related adjustment to the value of the investment at the best estimate of the contingent price, under point 2.3 of Recognition and Measurement Standard 19 in the Spanish Chart of Accounts.

d) Lastly, if a merger occurs between the two companies, or the transferee company prepares consolidated financial statements, and to the extent that the purpose of the indemnity clause is to transfer to the former owner any loss that may occur at the transferred company, the confirmation in court of the penalty will imply the recognition at the transferred entity of a liability and an asset for the same amount, without any impact on the income statement.

The DGT concluded by affirming that this accounting treatment is fully transferable to tax, and that in this case the provisions in article 11.3 LIS would be applicable (accounting recognition rules).

2.4 Corporate income tax.- A silent investment agreement (*contrato de cuentas en participación*) is not a corporate income tax payer (Directorate General for Taxes. Ruling V3861-16, of September 13, 2016)

Article 7 LIS defines corporate income taxpayers as legal entities which have their residence in Spain, other than partnerships without a business purpose.

When asked whether a silent investment agreement must be treated as a partnership with a business purpose, the DGT concluded as follows:

a) Firstly, it affirmed that for such an analysis corporate law needs to be consulted to determine whether agreements of this type imply the existence of a separate legal personality.

b) According to the Commercial Code, the silent investment agreement is an agreement for a joint business venture between two parties, whereby one party, the silent investor ("*cuenta-partícipe*"), contributes its own property, cash or rights to the other, the manager ("*gestor*"), and the manager undertakes to use that contribution for a given transaction or transactions or for a given business or professional activity (which it will carry on independently and on its own behalf) and to inform, render accounts and give a share to the silent investor in the resulting gains and losses.

c) It is an accepted view among legal commenters that the contributions made by the investor in a silent investment agreement become part of the manager's capital and the manager acquires ownership of them.

d) In line with this reasoning, Recognition and Measurement Standard 19 in the Spanish Chart of Accounts characterizes the contributions made by the silent investor to the business as a collection right ("accounts receivable") and the amounts received from the silent investors under the silent investment agreement, as a debit ("accounts payable").

Consequently, the DGT concluded that the silent investment agreement does not imply the establishment of an entity with its own legal personality, or the formation of a fund or jointly owned capital separate from the private capital of the owner (manager) and of the interested parties (silent investors). Therefore the silent investment agreement cannot be treated as a partnership and will not be deemed a corporate income taxpayer.

2.5 Corporate income tax.- A selective distribution is not allowable under the tax neutrality regime (Directorate General for Taxes. Ruling V3843-16, of September 12, 2016)

Company A acquired a number of rights in some land lots located abroad with the intention to develop them. That company had financed its operations from loans granted by its shareholder and by other companies in the same group.

It intended to carry out a spinoff in which those rights would be transferred. The idea was to carry out a selective distribution of the liabilities which would prevent two of the beneficiaries of the spinoff from incurring negative equity.

The request concerned whether the option of a selective distribution of the liabilities would imply forfeiture of the tax neutrality regime.

The DGT concluded that:

a) Selective distribution of the liabilities is not a valid method: the loans must be distributed to the line of business that has been spun off, in proportion to the financed assets attributed to it.

b) The leftover balance which cannot be attributed under that rule, must be attributed to each block of elements transferred in proportion to the value of the assets assigned to each of those blocks.

2.6 Corporate income tax, personal income tax and nonresident income tax.- Taxation and withholdings in connection with a capital reduction through redemption of shares (Directorate General for Taxes. Ruling V3840-16, of September 12, 2016)

In this ruling, the DGT examined the taxation of a capital reduction through redemption of shares aimed at the repayment of contributions to the shareholders, which included corporate income tax, personal income tax and nonresident taxpayers. It also examined the withholding obligation arising from transactions of this type.

The DGT made a distinction between the following transactions:

a) Shareholder taxable for corporate income tax purposes: the company reducing capital is not required to make a withholding, insofar as the income does not fall under article 60 of the Corporate Income Tax Regulations.

b) Shareholder taxable for personal income tax purposes: a distinction is needed among the following cases:

i. Case 1: the repaid contributions are not from undistributed earnings.

In this case:

(i) The received amount will be subtracted from the cost price of the securities concerned until it is reduced to zero.

(ii) The excess will be taxed as income from movable capital, under the method provided for the distribution of additional paid-in capital. No withholding is required from this amount by the requesting company.

(iii) In the case of unlisted shares, however, if there is a positive difference between the equity which proportionally relates to the shares concerned and their cost price, the amount of the repayment that has not come from undistributed earnings must be treated as income from movable capital to the extent of that positive difference, under the method provided for the distribution of additional paid-in capital. No withholding is required from this amount.

Any amount by which the repayment of contributions that has not come from undistributed earnings exceeds that positive difference must be subtracted from the cost price of the shares concerned, and if that excess is higher than the cost price of the shares, the difference will also be treated as income from movable capital, under the method provided for the distribution of additional paid-in capital. No withholding is required from this amount.

It must be specified that any reserves, earnings or other items recorded in equity which have not come from shareholders' contributions and were taken into account to determine the amount to which

the following letter relates must not be included for the purpose of calculating the equity proportionally relating to the shares.

ii. Case 2: the repayment of contributions comes from undistributed earnings.

In this case, the received amount will be taxed in full as income from movable capital, and a withholding is required.

Lastly, the company reducing capital will be required to file, on the terms described in article 69.5 of the Personal Income Tax Regulations, an information return on the capital reduction transaction, unless any of taxable persons required to file the information return under article 42 of Royal Decree 1065/2207 have participated in the transaction.

c) Shareholder taxable for nonresident income tax: no withholding will be required from the income obtained by the nonresident shareholders as a result of the capital reduction, unless it has come from undistributed earnings (assuming that the requesting company is not an open end investment company formed under the Law on Collective Investment Undertakings).

2.7 Corporate income tax.- Partially claiming the exemption for dividends and capital gains where the indirect ownership interest is below 5% (Directorate General for Taxes. Ruling V3830-16, of September 12)

The request concerned whether the exemption under article 21 LIS applied in the case of a distribution of dividends with the following characteristics:

a) The dividend was distributed to institutional shareholders holding ownership interests higher than 5% in the company distributing the dividend in each case.

b) The income out of which the dividends were distributed consisted in a proportion higher than 70% of dividends in other companies, in which the indirect ownership interest was below 5% (the other income had come from activities relating to the leasing and operation business of rural properties).

According to the DGT:

a) Because the indirect interest mentioned was below 5%, the shareholders could only claim the exemption on the portion of the received dividends relating to earnings from the performance of a business activity (in this case, from the leasing and operation of rural properties).

b) The exempt amount must be calculated by multiplying the dividend total by the percentage that the income obtained from the performance of those activities bears to the total income obtained for the year.

c) Lastly, because the distributed dividends will only be partially exempt, the paying company will be required to make a withholding from the portion of the dividends that is not exempt.

2.8 Collection procedure.- An enforced collection interlocutory order issued after failure to admit the stay for consideration is valid even if its non-admission had been challenged (Central Economic-Administrative Tribunal. Decision of October 27, 2016)

The taxpayer had applied for a stay with dispensation from the obligation to post a bond, an application which the regional economic-administrative tribunal (TEAR) failed to admit for consideration. After this decision by the TEAR, an enforced collection interlocutory order was rendered in relation to the debt. The taxpayer had, however, filed an application for judicial review against that decision not to admit the application for a stay, requesting that that the TEAR's decision be stayed, and the stay was admitted for consideration by the Canary Island High Court.

At issue before TEAC was whether the enforced collection interlocutory order was correct.

TEAC reasoned as follows:

a) Firstly, it assumed (based on recent case law from the Supreme Court) that the ability to enforce administrative decisions must be brought into consonance with the right to an effective remedy before a court, and therefore the enforcement of the decision at issue could not continue while a stay of that act was being decided as an injunctive remedy in a court proceeding

b) Secondly, it referred to the supreme court judgment of January 26, 2016 and to the ability it acknowledged to stay decisions with negative content, with regard to the positive effects they entail such as the payment of a tax debt after deferral of the debt had been denied, when that denial was challenged.

c) TEAC nevertheless concluded that these principles cannot prevail over the ability to enforce the administrative decision before the application for it to be stayed.

Therefore, if the application for a stay has not been admitted, then it is as if no application has been made, which in turn means that the debt had already irremediably entered the enforcement period and that the enforced collection interlocutory order could be rendered if the stay of that decision not to admit the application for consideration had not yet been requested. Therefore, for TEAC, the enforced collection interlocutory order was correct.

2.9 Collection procedure.- Attachment procedures on payments into the debtor's account from the use of POS terminals or data phones are lawful (Central Economic-Administrative Tribunal. Decision of October 27, 2016)

The issue concerned the lawfulness of an attachment of sums received from payments into the tax debtor's account which were being made at the financial institution where the debtor had opened the account as a result of the use of POS terminals or dataphones on which the debtor's customers paid for the goods and services they purchased.

It must be recalled here that, although the tax legislation prevents the attachment of future goods which have not yet been created and their future existence is uncertain, it does provide that the following may be attached (i) earned income if its payment period has not yet ended; or (ii) income involving successive payments, insofar as the income results from transactions in which payment was stipulated in installments or in which there is a continued or ongoing relationship.

In relation to the above, TEAC concluded as follows:

a) The legal relationship binding the financial institution to the party with tax obligations as a result of the use of dataphones or POS terminals is a complex relationship, under which a periodical right to receive payment is generated.

b) Although the legal relationship does not strictly speaking determine an ongoing obligation, its regime is equatable to that for obligations of that type, in that although when the obligation is created it is indeterminate, the establishment cannot refuse to accept the card payments of its customers and the funds become available almost immediately.

c) Consequently, the attachment procedure does not relate only to the balance in the account of the party with tax obligations at the time it is received, but also relates to the payments that the financial institution must make as a result of the transactions performed on dataphones or POS terminals without the need to order a separate attachment procedure for each balance which is paid into that account at the agreed intervals.

2.10 Review procedure.- A judgment rendering an assessment void renders invalid any penalty imposed, even if it has become nonappealable (Central Economic-Administrative Tribunal. Decision of October 20, 2016)

The tax authorities issued a VAT assessment and imposed a penalty. The party with tax obligations lodged appeals for reconsideration against both decisions and both appeals were partially upheld.
As a result, the tax authorities issued a new assessment and rendered another penalty decision. All available remedies were used to appeal against the assessment. The new penalty decision became nonappealable, however. The appeals lodged against the new assessment ultimately obtained a judgment finding in the taxable person's favor by Andalucía High Court, which overturned it.
In this context, the taxpayer lodged a special appeal for judicial review of final decisions against the penalty decision (which had become nonappealable) because it considered that Andalucía High Court's decision was a document with essential value which should have made it invalid.
TEAC upheld that special appeal and set aside the penalty decision by considering that Andalucía High Court's decision was a subsequent document having essential value in that it rendered invalid the assessment that had served as a basis for imposing the penalty.

2.11 Penalty procedure.- The facts and legal grounds on which the existence of fault is founded must be recorded in the penalty proceeding and penalty decision (Central Economic-Administrative Tribunal. Decision of September 8, 2016)

At issue in this economic-administrative claim were the legal consequences arising from not including in the penalty proceeding the documents and evidence supporting the penalty decision and, in particular, the existence of fault, as required in article 210.2 of the General Taxation Law (LGT).

TEAC concluded that:

a) The underlying aim of that article is to ensure the separate examination of penalty proceedings, and while not requiring repetition, in the penalty proceeding, of the whole examination performed to complete the assessment, that separation does at least mean that the elements needed to support the penalty must be extracted from the assessment proceeding and included in the penalty proceeding.

Accordingly, since both processes are independent, the absence of proof in the penalty proceeding is a material defect, and it is not sufficient for the documents to be in the assessment proceeding.

b) The inclusion in the proceeding of the documents must cannot simply be formal but must be real, for which it is not enough only to refer to the location of the proof and information in the proceeding related to the assessment.

c) The procedural rules requiring economic-administrative claims lodged separately against the assessments and the penalties to be joined cannot reduce the effects of, correct or remedy the absence of documents and proof in the penalty proceedings examined.

d) The proceeding cannot be completed by using the power of the court to apply for that proceeding to be completed in the jurisdiction for the review of administrative decisions.

03 LEGISLATION

3.1 Form 289, annual information return on financial accounts in the field of mutual assistance

The legislation on the automatic exchange of information agreed at OECD level (Multilateral Agreement) and at EU level (Directive 2014/107/EU) has been transposed into Spanish law by Royal Decree 1021/2015, of November 13, 2015, which sets out (i) the list of entities required to report information, (ii) the due diligence obligations owed by those entities to identify the nationality of the holders of the "financial accounts" included within the scope of this automatic exchange of information and (iii) all of the relevant definitions in this connection.

Accordingly, Order HAP/1695/2016, of October 25, 2016, approving form 289, annual information return on financial accounts in the field of mutual assistance, and amending other tax provisions, was published in the Official State Gazette on October 27, 2016.

Form 289 will be filed for the first time in 2017 with respect to 2016 and the filing period runs from January 1 to May 31.

Although the order repeals form 299 (annual return on certain gains and/or income obtained by individuals resident in other EU member states and in other countries and territories with which an exchange of information has been established), since it is replaced by form 289 (much broader in scope), form 299 will be filed for the last time with respect to 2016 in relation to residents of Aruba and Saint Martin.

Lastly:

a) The order also amends the legislation governing form 290 (reporting and due diligence obligations laid down in the agreement between the Kingdom of Spain and the United States of America to improve international tax compliance and to implement the foreign account tax compliance act – "FATCA") in order to standardize the period for filing information returns derived from mutual assistance (the current form 290 and the new form 289) which, as noted, runs from January 1 to May 31.

b) In addition, with respect to form 291 (income from nonresident accounts), the logical designs are amended to include two new fields relating to the total volume of inflows and outflows of funds from the financial account, so that the balances of the account as of December 31 or in the last quarter do not differ substantially from those existing in the rest of the period.

The provisions of the order entered into force on October 28, 2016 and apply for the first time to the filing of annual information return forms 289, 290 and 291 with respect to 2016.

3.2 Minimum prepayment for taxpayers that apply the RIC, the special regime for producers of tangible goods, the ZEC and the tax reduction for income obtained in Ceuta or Melilla

Organic Law 1/2016, of October 31, 2016, reforming Organic Law 2/2012, of April 27, 2012, on Budgetary Stability and Financial Sustainability which (among other matters) amends additional provision five of Corporate Income Tax Law 27/2014, of November 27, 2014 ("Impact of the Canary Islands Tax and Economic Regime and of the tax reduction for income obtained in Ceuta or Melilla on the calculation of prepayments") was published on November 1, 2016 and entered into force the same day.

Specifically, Organic Law 1/2016 incorporates the following clarifications regarding the method for determining income per books for the purposes of applying the 23% minimum prepayment rule approved by Royal Decree-Law 2/2016, of September 30, 2016, introducing tax measures aimed at reducing the public deficit:

- Taxpayers using the Reserve for investments in the Canary Islands (RIC) may reduce income per the income statement by the amount of the RIC that is intended to be recorded, prorated in each period of the first 3, 9 or 11 months of the tax period and subject to a cap of 90 percent of the tax base for each one.

- Taxpayers applying the special regime for producers of tangible goods may reduce income per the income statement by 50% of the income that qualifies for the tax reduction envisaged for this special regime.

- Taxpayers that apply the tax regime for the Spanish Canary Islands Zone (ZEC) will not include as income per books for the purposes of applying the minimum prepayment the minimum amount envisaged in the rules for determining the tax base to which the special tax rate for the ZEC applies.

- Taxpayers that claim the tax reduction for income obtained in Ceuta or Melilla may reduce income per the income statement by 50% of the portion of the income that relates to income and/or gains that qualify for the application of the tax reduction.

According to the amended wording of additional provision five of Law 27/2014, the clarifications incorporated apply to prepayments the filing period for which starts on or after the entry into force of RDL 2/2016, that is, to prepayments the filing period for which starts on or after September 30, 2016. Consequently, the clarifications have retroactive effect to the date of entry into force of RDL 2/2016.

04 MISCELLANEOUS

4.1 Subscription to the notification alert service

Article 41 of Public Authorities' Common Administrative Procedure Law 39/2015, of October 1, 2015, introduced, with respect to electronic notices, the option for taxpayers to identify electronic devices and/or e-mail addresses for receiving alerts of notices issued by the Tax Agency.

The Tax Agency has launched the service whereby taxpayers can subscribe to these alerts and has expressly indicated that under no circumstances will the alerts received be deemed to be notices, so, if an alert cannot be sent for technical reasons, it will not prevent the notice from being deemed fully valid.

Both individuals and legal entities as well as entities without separate legal personality can subscribe to the service, with the following special features:

a) Individuals:

To have access to this voluntary service, the individual must have a Cl@ve PIN, an electronic certificate or electronic I.D. card, or a reference number (obtained through the RENØ Service).

Individuals may access the notice on the Tax Agency's website with a Cl@ve PIN or electronic certificate (but not with just the reference number of the specific notice). Notwithstanding this, the notice will be sent by ordinary mail.

b) Legal entities and entities without separate legal personality:

To access this voluntary service, the entity will need a representative's electronic certificate.

The notice may be accessed on the Tax Agency's website, through an enabled e-mail address via the central government's general access point (notificaciones.060.es) or via the citizen's folder (sede.administracion.gob.es/carpeta/clave.htm).

If, in addition to registering with this service, the entity configures the profile of its enabled e-mail address to include other e-mail addresses for receiving alerts of notices received, alerts will be received at those e-mail addresses as well.

Lastly, attention should be drawn to the entry into force of Law 39/2015 on October 2, 2016. As noted in our previous newsletter, with the entry into force of this law, Saturdays become a non-business day for the purposes of computing administrative time limits. However, it should be noted that this provision will not apply to proceedings commenced before October 2, 2016, but rather only to subsequent ones.

In short, in proceedings commenced before October 2, 2016, time limits for steps to be performed after that date will be computed according to the rules previously in force, pursuant to which Saturdays are business days for administrative purposes.

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