2021
July

GARRIGUES

MAGAZINE
SPORTS &
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News • Judgments • Resolutions • Decisions • Legislation

New Draft Sport Bill: an opportunity to update the sector's taxation

Performer in public shows hired uninterruptedly under successive contracts is permanent employee

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ÍNDICE

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New Draft Sport Bill: an opportunity to update the sector's taxation

José María Cobos Gómez

The public information and comment period for the Draft Sport Bill commenced on June 30, 2021. The starting point for the bill is the consolidation of sport's status as a necessary activity for the Spanish population and as requiring the attention and protection of public authorities under article 43.3 of the Constitution and under the powers held by the Government. The length of time it has now been since the entry into force of Law 10/1990, of October 15, 1990, has compelled lawmakers to approve a new Sport Law aimed at covering the whole spectrum of fields related to sport: sports activities themselves and their various expressions, plus the economic, employment, tourism, communications, educational, health-related, social and international elements related to sport.

From this all-inclusive angle, the need to adjust tax rules to the sport environment has also been timidly reflected in various articles of the draft bill, notably in two general principles and three specific measures.

One aim of these two general principles is to encourage investment by the private sector in sport, and a second aim relates to recognizing professional athletes' rights to receive specific tax treatment adapted to the particular characteristics of their career. Those elements are implemented in the following provisions:

- The putting in place of tax treatment that will motivate and encourage the private sector to invest in physical activity and sport has been included among the aims to be achieved by the public policies that the Government will craft, within the scope of its powers, in keeping with the goals and targets of sustainable development that have been set internationally. No further implementation of this general principle is contemplated, although it would be commendable if it were translated into an enhancement of the tax regime for patronage.

- Among the rights of professional athletes it expressly includes the receipt of specific tax treatment adapted to the lengths of their careers and the income generated in those periods. This is a historical demand which had yet to be met with an adequate response in the personal income tax legislation. For that reason, it is recommendable for this principle to be implemented using correcting mechanisms to prevent the accumulation of income over a short space of time, which is usually how long the careers of professional athletes last, potentially being able to violate the ability-to-pay principle. It must therefore be asked, for example, whether the income of professional athletes should be characterized as multiyear income to moderate its taxation.

Additionally, as mentioned above, three specific measures are set out, essentially geared towards the personal income tax of top class athletes, with the following scope:

- An increase from €60,100 to €75,000 is made to the exemption for aid with an economic content for top class athletes, adjusted to the training programs put in place by the National Sports Council with Spanish sports associations or with the Spanish Olympic and Paralympic Committees.

- A reduction from 15% to 7% is made to withholding tax on prizes obtained by athletes in sports competitions which are characterized as income from professional activities. A warning is needed here that, unless the way in which athletes are taxed is adjusted to the particular characteristics of their careers, this measure would have limited effect.

- A technical amendment is made to the rules on the personal requirements for making contributions to employee benefit mutual insurance companies, to adapt them to the definitions of professional and top class athletes contained in the draft bill.

Lastly, although not free from debate, it would be advisable to adopt measures that would add to the attractiveness of Spain as a country where athletes can establish their tax residence, and also to provide a solution for rights of publicity in line with the guiding principles of the special regime introduced by Law 13/1996.

In short, this is great opportunity to update and modernize taxation in sport, which without any doubt will have the effect of encouraging physical activity and sport and promoting the essential values associated with sport in society, relating to equality, inclusion, participation, ethics and fair play, reasonable and organized competition, enhancement of physical and mental health and the pursuit or personal excellence.

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Performer in public shows hired uninterruptedly under successive contracts is permanent employee

Supreme Court sticks with its principle that performers in public shows should be treated as permanent workers where they sign back-to-back definite term contracts over lengths of time exceeding the legal periods under article 15.5 of the Workers' Statute

Supreme court judgment of October 20, 2020

Ángel Olmedo Jiménez

1. Issue under debate

The Supreme Court, in a cassation appeal brought to unify a point of law, examined whether the ordinary employment legislation (in particular, the limits on the length of time in which individuals can be hired under definite-term contracts) is applicable to performers in public shows.

2. Facts of interest

The worker provided services as a dancer in the dance team attached to the Spanish National Performing Arts and Music Institute (INAEM). His contract contained an exclusivity clause, and because his performances before audiences accounted for less than 20% of his ordinary working hours, he also carried out other activities forming part of the structural activities of the INAEM (such as, productions rehearsals of works that were not predetermined, classes, participation in maintaining and preserving the traditional dance repertoire, among others).

He had been hired on September 4, 2003 and carried out his functions, uninterruptedly, between that date and August 31, 2016, after signing twelve definite-term contracts in all.

When the last temporary contract reached the end of its term, the employee received notice of termination of his employment relationship and brought a claim against it, arguing that it was unjustified dismissal, because the employment relationship had to be classed as permanent.

Both the Labor Court and the regional high court upheld the claim, ruling that the employment relationship was permanent.

3. Judicial interpretation

On examining the facts of the case in a cassation appeal proceeding, the Supreme Court relied on the principle set out in earlier judgments, rendered on December 10, 2019, and January 15, May 7 and September 22 in 2020.

Concerning this principle, the court recalled that, despite the contents of Royal Decree 1435/1985, on performers in public shows (which allows temporary contracts to be signed for one or more performances, for a specified period, for a season or for the length of time that a show runs), to be able to enter into definite term contracts there must be a reason for the temporary nature of the contract justifying the use of this type of contract.

On this point, the Supreme Court noted also that, for performers in public shows, the same limit applies as for other workers, which comes from Directive 1999/79/EC, transposed into Spanish law through article 15.5 of the Workers' Statute (treating as permanent any temporary workers who have provided services for longer than twenty-four months in any 30 month period).

Applying that theory to the facts of the case, the judgment reasoned that the various contracts signed with the dancer had not been tied to a circumstantial activity, instead the dancer's services were obtained for functions belonging to the ordinary structure of INAEM's activities.

The ruling held to be inapplicable the provisions in Royal Decree-Law 2/2018 (which relate the lengths of contracts of performers at the INAEM, where they are linked to an artistic project, to that set out in the Master Plan), because they came into force after the end of the dancer's employment relationship.

The judgment therefore dismissed the appeal and by doing so confirmed the decision holding termination of the dancer's employment relationship to be unjustified, making INAEM choose between reinstating the dancer (and pay the required amount of back pay), or paying the statutory amount of severance for unjustified dismissal.

NEWS

Garrigues Sports & Entertainment gives tax and labor law lectures on Sport Business Administration course organized by Centro de Estudios Garrigues

Some of the tax law and labor law lectures on the Sport Business Administration program took place at Centro de Estudios Garrigues in May and June. The lectures were given by Félix Plaza and Diego Rodríguez, partners in the tax department and co-directors of Garrigues Sports & Entertainment, along with José Manuel Mateo, partner in the labor and employment department, among other industry professionals.

Tax law lectures on the Master in Sports Law program at UEM

On May 26 José María Cobos Gómez, partner in the tax department, gave a tax lecture at Universidad Europea de Madrid as part of its Master in Sports Law program, dealing, among other topics, with the tax regime for nonresident athletes, the tax regime for rights of publicity and the taxation of sport patronage and sponsorship.

Félix Plaza, appointed arbitrator at 'Tribunal Arbitral du Sport' (TAS)

Félix Plaza, partner in the tax department and co-director of Garrigues Sports & Entertainment, was included on May 10 on the list of arbitrators at the Court of Arbitration for Sport (CAS). This appointment carried recognition of his career and highlights the importance of the matters he has dealt with over the years and his detailed knowledge of the sector.

In 1981, shortly after his election as president of the International Olympic Committee, Juan Antonio Samaranch had the idea of creating an arbitral institution exclusively for resolving matters related directly or indirectly to sport. One of the decisive reasons was the need to create an authority capable of resolving international disputes and providing a swift, flexible and uncostly proceeding. Over the years TAS has become the most well-known arbitral institution for sport.

Judgments

1 Football club's sporting directors have ordinary employment relationships

Madrid high court judgment on December 23, 2020

Following notification by the new sporting director hired by a football club of his wish to terminate his contract with 15 days' notice, the club informed him that termination of his contract without an attributable ground entitled the club to indemnity, due to arguing that he had a special employment relationship for professional athletes.
The defendant, for his part, affirmed that none of the signed contracts stated that his was a special relationship, and therefore that the regime concerned could not be applied to him.
The court dismissed the club's appeal after finding that this was an ordinary employment contract which does not require the payment of severance for termination by decision of the worker.

2 Limits on right to freedom of expression determined by association bodies' duty of neutrality

Constitutional court judgment on January 25, 2021

In 2017, and three months before the elections for the president of the Spanish football association, presidents of 16 local associations signed a "Letter of support for ..." document which they signed as presidents.

The Spanish Disciplinary Committee for Sports asked them to withdraw their signatures and not to perform any acts that could induce electors to vote one way or another or condition their vote, for which it relied on the applicable legislation which imposes a duty of neutrality on all sports association bodies.

That decision was appealed by the signing parties, who considered that their rights to freedom of expression and to information and the principle of equality had been violated, because they said that this is the first time that these types of initiatives had been condemned despite it being common practice for freedom of expression to apply in election processes to directly held positions at other sports associations.

The Constitutional Court held that, although the issue falls within the domain of freedom of expression, this right is subject to certain limits. In this specific case, it needs to be underlined that the presidents of the sports associations did not act as private citizens, but as members of a sports association body. For that reason they cannot rely on the right to exercise fundamental rights reserved for private citizens. It therefore dismissed the appeal.

3 Supreme Court to hear case on characterization of contracts with advertising effects for VAT purposes

Supreme court decision on January 28, 2021

The debate at first instance centered on studying whether certain contracts with advertising effects were subject to VAT and, in particular, how those contracts should be characterized. It was therefore examined whether they could be characterized as "advertising sponsorship contracts" or as "business collaboration agreements", the difference being that the first type are subject to VAT and not exempt and the second are not subject.

The wider cassational interest for the formation of case law consisted of determining the interpretation regarding the VAT taxable event in relation to advertising payments. Therefore, the cassation appeal was admitted to determine whether legal transactions referred to as "advertising sponsorship" may be included in the VAT taxable event, by specifically studying "supplies of services made for consideration", and whether those transactions may give rise to a VAT taxable event.

4 Sports federations are subject to the legislation on public contracts

Judgment by the Court of Justice of the European Union (CJEU) on February 3, 2021

An Italian company challenged in a national court the way in which the public procurement process had been carried out in the negotiated procedure to award services for transporting the equipment needed to follow the away matches of the Italian football teams and for the warehouse of the Italian Football Federation in Rome. The appeal was upheld, overturning the award of that contract, in response to which both the awardee and the Italian Football Federation each filed appeals.
In that appeal proceeding a reference for a preliminary ruling was submitted to the CJEU, which analyzed whether the Italian Football Federation may be characterized as a "body governed by public law", together with whether the management of a national sports federation has to be considered subject to the supervision of a public authority.

It concluded that it may be considered to be an association governed by private law to which public functions have been conferred, even if it was not created with the form of a public body. Additionally, if sports federations have management autonomy, that management may be supervised by a public authority, and it is allowed for that authority to influence the federation's decisions regarding public contracts.

5 Bullfighter's skill cannot be registered at Intellectual Property Registry

Supreme court judgment on February 16, 2021

The Supreme Court dismissed an appeal filed by a bullfighter who had not been allowed to register at the Intellectual Property Registry his work on the skill earning the bull's two ears and a request for its tail ("Faena de dos orejas con petición de rabo de toro"). The court of first instance had already dismissed that bullfighter's claim, by finding that a bullfighter's skill does not quality as an artistic work that can be protected as a copyright work. The National Appellate Court also dismissed the appeal, because it found that registration would make it impossible for any bullfighter to use a skill of the type that had been registered.
In the filed cassation appeal, the appellant pleaded that the applicable legislation provides a non-finite list (numerus apertus) of works that may be registered, which means that there is room for a bullfighter's skill. However, the Supreme Court dismissed the appeal due to finding that a bullfighter's skill is not a clearly identifiable work.

6 "El Clasico" not distinctive enough to be registered as a trademark

Judgment by the Court of Justice of the European Union (CJEU) on February 24, 2021

The court examined whether the "El Clasico" mark could be registered at the World Intellectual Property Office ("WIPO"), after an application for registration had been refused by EUIPO.

The main ground for EUIPO's refusal was the descriptive character and lack of distinctive character of the mark. The General Court took the view that the decision depends on the perception of the sign by the relevant public and the products and services to be designated.
According to the court the relevant public consists of the general public and a specialist public, although the presence of a specialist public cannot influence the assessment of its descriptive character. Additionally, the standard typeface used does not make any impression, and is perceived by the relevant public as an innate characteristic of the services.
Lastly, the General Court affirmed that this expression is used to designate other types of confrontations outside the area of football.

7 Court of Justice orders four Spanish clubs to refund received public aid

Judgment by the Court of Justice of the European Union (CJEU) on March 4, 2021

As a result of the Spanish legislation that allowed an exemption from the obligation to take the legal form of Spanish sports companies ("sociedades anónimas deportivas") for sports clubs that had recorded positive earnings in the years before the approval of that law, four Spanish clubs chose to keep the legal form for not-for-profit entities, and so be eligible for a specific tax rate and obtain, in the European Commission's opinion, a tax advantage for corporate income tax purposes. The European Commission took the view that the legislation described above contained rules allowing unlawful and incompatible state aid, and ordered Spain to bring an end to those rules and recover the individual aid granted. One of the four clubs concerned, however, appealed against the decision to the General Court, which ruled in its favor.

The appealed judgment held that the Commission had made errors in its assessment of the facts and had not shown with legal arguments that the measure at issue actually provided a tax advantage for its beneficiaries. The Commission filed an appeal with the CJEU, which ruled in favor of the Commission, overturning the General Court's judgment. It determined that Law 10/1990 introduced a difference in the area of professional sport by disallowing professional football clubs generally to operate as not-for-profit entities while reserving that option, along with the tax regime associated with it, for the four football clubs which were able to elect this exemption.

8 Company's income attributed for personal income tax purposes to individual due to not carrying on the economic activities

Madrid high court judgment on March 18, 2021

Madrid High Court confirmed the decision by the regional economic-administrative tribunal (TEAR) holding that a singer had created a web of companies to achieve lower tax, by avoiding personal income tax (and being taxed for corporate income tax purposes on the income obtained through them).

The singer, director acting severally and shareholder owning 5% directly, and 95%, indirectly through another company,

received large sums for providing professional services. The court noted that, although structures of this type are not per se illegal, in this case, it had been evidenced that the singer carried on the artistic activity concerned without adding value to the activity of the claimant entity and that the entity had no material or human resources for carrying on its activity.

9 Ex footballer acquitted after contract transferring rights of publicity found not to be a sham

Madrid provincial appellate court judgment on April 8, 2021

Madrid Provincial Appellate Court acquitted anew an ex footballer accused of several tax offenses stemming from a fictitious transfer of his rights of publicity to a Portuguese company, in a judgment rendered to enforce a decision previously adopted by Madrid High Court, which overturned the first acquittal decision and ordered a new decision to be adopted with new legal grounds, after appeals by the public prosecution service and by government lawyers were partially upheld.

The appellate court found against the existence of a sham transaction and affirmed without any doubt that the entity was a company with an activity, was not fictitious and was not created to defraud the public finance authority, so the accusations by the public prosecution service and government lawyers could not be allowed to succeed, because they were founded solely and exclusively on the sham transaction, which the Chamber had ruled out on a reasoned basis.

Lastly, on the subject of characterization of the income, the appellate court noted that it is not evident that the income obtained by the company from commercial use of the ex footballer's rights of publicity, generated outside his employment relationship with the club, patently and clearly fall outside Article 92 of the Personal Income Tax Law (85/15 rule), and it therefore ruled out willful misconduct from the intentional element for the penalty, relying on a reasonable interpretation of the law.

In June 2021, Madrid High Court dismissed the appeals against this judgment, lodged by the public prosecution service and the government lawyers.

10 Right to reputation of business publishing company prevails after published information found truthful and of public interest

Supreme court judgment on April 16, 2021

A footballer sued the publishing company of a business newspaper, together with its manager and the journalists signing the article, because he believed the published article to be an "unlawful invasion" of his reputation.

Although the first instance judgment found in favor of the unlawful invasion and held that the defendants had not acted with the required standard of care, the provincial appellate court ruled in favor of the defendants at second instance, finding that only two particular elements of the article could be held an unlawful invasion, whereas the rest of the article was built around data obtained from a public registry.

After applying the weighting factors used in the applicable case law, namely the public interest component of the facts (which were specifically of interest to that publishing company because the article spoke about the fulfillment of tax obligations of a well-known footballer and the publishing house specialized in business information) and the truthfulness of the news, the Supreme Court concluded that the right to information should prevail over the right to the footballer's reputation, and dismissed the appeal.

11 Invasion of right to reputation may be held lawful if constitutionally lawful aim sought

Constitutional court judgment on May 10, 2021

A few hours after a bullfighter's death, a local councilor posted a message on social media reproducing the news published by a media organization, together with a photo of the bullfighter, and in the message she used terms such as murderer or oppressor.

The Constitutional Court is aware of the importance of social media in exercising the fundamental rights at issue, but it accepted that it cannot allow the basis for its judgment to be affected by the fact of the opinions being issued on social media.

So, the court affirmed, even if an invasion of the right to reputation occurs, it may be held not to be unlawful if it is considered necessary to achieve a constitutionally lawful aim. In this case, however, the context in which the message was posted shows an intention to hurt which has nothing to do with the councilor exercising her right to freedom of expression. Moreover, there is no justification for using those types of terms in a democratic society in which freedom of expression is defended.

Resolutions

1 Expenses incurred to hire actors and technical staff may be included in the tax credit base for foreign productions of feature films

DGT resolution V2291-20 of July 6, 2020

It was analyzed whether personnel expenses related to hiring a set of actors who were hired by a Spanish company although their scenes were filmed entirely in Mexico, together with the expenses related to technical staff, may be included in the base for the tax credit allowed for the production of feature films or audiovisual works which enable the creation of a physical medium prior to their serialized industrial production.

According to the DGT, the expenses relating to hiring the actors may be included in the tax credit, if those actors are tax resident in Spain or in a member state of the European Economic Area. However, to be eligible for the tax credit, the actors' work must be performed in Spain and the expenses in respect of those services must be borne by the requesting entity.

The expenses related to technical staff are also allowed to be included in the base for the tax credit described if they are borne by the requesting party and the services are provided in Spain. In this case, a portion of production was indeed carried out in Spain, so the same portion of the expense may be included in the base.

2 Exemption from corporate income tax and VAT for not-for-profit entities

DGT resolutions V3654-20, V3656-20 and V3658-20 of December 29, 2020

It was studied whether a private not-for-profit association having as its purpose the promotion and provision of sports activities and competitions, along with the participation of its members in them, is exempt from corporate income tax and VAT.

Because it is a not-for-profit entity which is not characterized as a public benefit association, it may be regarded as partially exempt from corporate income tax if the income it obtains is from the pursuit of its corporate purpose and does not derive from the performance of an economic activity.
For the VAT exemption to apply, the entity has to carry on operations that qualify as supplies of services directly related

to sport activities or physical education and those services have to be supplied by public law entities or private sports social enterprises or establishments.

To be characterized as a social enterprise or establishment, the requesting entity must have a non-profit making purpose and use its income to carry out exempt activities of the same type; the president, trustees or legal representatives must not be paid for their services; and the members and joint owners or investors in the entities or establishments as well as their spouses or first- or second-degree relatives cannot be the primary recipients of the exempt transactions.

3 Nonresident income tax due on income obtained in poker tournament by German participant

DGT resolution V0222-21 of February 10, 2021

The issue concerned the tax treatment of the winnings obtained in a poker tournament in Spain if the requesting party, an individual participating personally, regularly and directly in those games, moves to Germany.

The DGT first recalled the existence of a Germany-Spain tax treaty, which determines shared taxing power between the two states in cases involving the personal activities of an artiste or sportsman as such. Although the treaty does not define was "artiste" or "sportsman" means, participation in poker tournaments may be regarded as covered by these terms.

Lastly, the DGT concluded that income subject to nonresident income tax in Spain, obtained without a permanent establishment, is taxed as capital gains if taxed in Spain. Moreover, if double taxation arises, it has to be eliminated by Germany.

4 Individuals providing teaching services can claim VAT exemption

DGT resolution V0227-21 of February 10, 2021

It was examined whether the activities carried on by an individual owning a dance school are eligible for the VAT exemption for educational activities.

A number of requirements have to be fulfilled to be entitled to the exemption, which vary depending on whether the requesting individual is a trader or professional.

If the individual is a trader, these activities are exempt if they are carried on by public law entities or authorized private entities and consist of regulated teaching activities, meaning they are on subjects included in the curricula in the Spanish education system.

If, to the contrary, that individual is a professional, a number of requirements have to be fulfilled: (i) the service must be provided by an individual, (ii) the subject must be included in any of the curricula in the Spanish education system, and (iii) if the exemption under article 82.1.c) of the Revised Local Finance Law is not applicable, it will not be necessary either to register for a Business Activity Classification.

5 Football match tickets subject to reduced 10% VAT rate

DGT resolution V0284-21 of February 18, 2021

It was analyzed which VAT rate applied to the tickets sold by a football club playing in Segunda División B.

The DGT concluded that if the club organizes a set of personal and material resources, independently and under its responsibility, to carry on a trading or professional activity by means of the continued making of supplies of goods or services, bearing any risk that may arise in conducting the activity, and they are supplied for consideration, the club has to be treated as a trader or professional for VAT purposes and will therefore be subject to VAT.

Moreover, a reduced 10 percent rate is determined for amateur sports events, applicable only to the sale of tickets, not to other activities or services provided by the club.

6 DGT determines how to calculate taxable poker earnings

DGT resolution V0320-21 of February 23, 2021

It was analyzed how the taxable capital gains for personal income tax purposes that might be obtained in official poker tournaments are determined, bearing in mind that to enter a game players have to pay for a buy-in, then they receive chips equal to the amount they have paid. Additionally, if players run out of chips, they can make re-buys.

The aggregate gains are determined by calculating the difference between the prize money and the amounts paid to take part in the poker tournament, including buy-ins and re-buys. If no prize is won, due to being amounts wagered in gambling, the sums paid to play are required to be trea-

ted as computable losses for the purposes of calculating the capital gains and losses obtained in the game, a calculation that is made to obtain the aggregate level, in terms of the capital gains or losses obtained by the taxpayer over the whole of the taxable period and strictly in relation to the amounts won or lost on bets or in games.

7 Lease of property as hunting reserve subject to VAT and personal income tax

DGT resolution 0670-21 of March 23, 2021

The issue concerned the VAT and personal income tax treatment for the owner of a rural property that this individual is going to rent out as a hunting reserve.

The DGT concluded that, because the requesting party fulfills the requirements in the VAT legislation, the transaction is subject to that tax. However, the exemption allowed for properties used for farming operations and with existing grazing land is not applicable. In short, the lease is subject to, but not exempt from VAT.

In relation to personal income tax, the income obtained in respect of that lease is characterized as income from movable capital, and there is no withholding obligation.

8 Online private classes may be VAT exempt

DGT resolution V0935-21 of April 15, 2021

It was analyzed whether private flamenco classes delivered online by an individual are exempt from VAT.

After clarifying that this case involves a trader or professional, the DGT recalled that supplying a service electronically is not the same as supplying an education service using an electronic network.

The described service will be exempt if it falls within the second category, in addition to fulfilling a number of requirements: (i) the classes must be delivered by individuals, (ii) the subjects must be on a curriculum in the Spanish education system, and (iii) if the exemption under article 82.1c) of the Revised Local Finances Law is not applicable, it will not be necessary either to register for a Business Activity Classification for the tax on economic activities.

9 Supplies of services made by patronage beneficiaries not subject to VAT

DGT resolution V1092-21 of April 26, 2021

An issue was submitted relating to the VAT and corporate income tax treatment of the activities carried on by a private not-for-profit association engaged in the promotion or provision of one or more types of sports activities, in particular beach handball and participation in sports competitions linked to national sports associations, on a not-for-profit basis.

The income obtained by the association is exempt from corporate income tax if it comes from activities in its purpose and does not arise from an economic activity.

Moreover, if its operations qualify as supplies of services, these services are directly related to sports activities or physical education and are supplied by public law entities or sports social enterprises or establishments, they are exempt from VAT. The sums received from sponsors, however, are subject and not exempt.

If the requesting entity qualifies as a beneficiary of patronage under the law on the tax regime of not-for-profit entities and on tax incentives for patronage, any supplies of services it makes are not subject to VAT.

10 VAT on activities carried on by association engaged in promoting and providing water sports activities

DGT resolution V1287-21 of May 6, 2021

The examined issue concerned whether the activities carried on by a not-for-profit association having as its purpose the promotion and provision of sea sports activities were subject to VAT, and if so, what the applicable rate would be.

The association's activities fulfill the requirements for a taxable event and are therefore subject. However, if the transactions qualify as supplies of services and are directly related to sports or physical education activities by an individual, in addition to which the services are supplied by public law persons or entities or private sports social enterprises or establishments, they may be exempt.

In particular, the DGT noted a set of services which are exempt, excluding dry-dock launching services and ber-

thing services for boats, cleaning services for boats or hull painting services, the renting out of premises in which to carry out those restoration activities and the fees for courses to obtain water sport qualifications.

Lastly, the sums received by sponsors if the requesting party makes supplies of advertising services for them, will be subject and not exempt.

11 COE aid to top class athletes exempt from personal income tax and not subject to VAT

DGT resolution V1384-21 of May 13, 2021

The issue concerned the VAT and personal income tax on aid received by a top class athlete from the Spanish Olympic Committee (COE), the Spanish Triathlon Association and the Olympic Sports Association Program for Olympic level athletes (Programa ADO), all in relation to training for the Olympics in Tokyo.

Determining whether sports grants to achieve public interest purposes are subject to VAT must be done by reference to the CJEU's case law, finding that the award of grants or aid by a public entity as part of its public interest purposes and without any connection with any specific supply by the requesting party would not qualify as a transaction subject to VAT.

In relation to personal income tax, income obtained by top class athletes in the performance of their activity is classified as income from professional activities. This income includes any public aid obtained for their activities as athletes, although up to €60,100 may be exempt if it is aid granted to top class athletes which is included in the ordinary or extraordinary budgets approved by the National Sports Council, or funded directly or indirectly by the Spanish Olympic Sports Association, by the Spanish Olympic Committee or by the Spanish Paralympic Committee.

12 Participating in horse riding competitions may be treated as a professional activity

DGT resolution V1643-21 of May 31, 2021

The DGT analyzed the tax on economic activities, VAT and personal income tax for a legal professional who also engages on a personal and regular basis in the sport of horse riding, and has won a number of prizes.

Regarding the tax on economic activities, the DGT found that the requesting party is subject but exempt, due to being an individual. From a VAT standpoint, the frequency or regularity with which an individual supplies services is irrelevant for the purposes of treating that person as a trader or professional for VAT purposes, if there is an organization of means of production which implies the intention of supplying to the market, even if only on an occasional basis, as was concluded in relation to the described case.

Lastly, for personal income tax purposes, prizes obtained for participating in horse riding competitions may be characterized as capital gains, unless it may be considered that an economic activity is conducted - a professional activity as a horse rider -, in which case it will be characterized as income from economic activities, from which expenses associated with the activity may be deducted, if the requirements to do so are fulfilled.

Decisions

1 Income obtained by referee treated as salary income

Catalan regional economic-administrative tribunal decision of July 14, 2020

It was examined whether for personal income tax purposes a set of expenses may be deducted, which related to the income from the claimant's economic activity as a professional basketball referee at the highest level.

The tribunal held that, for an expense to be deductible, there must be a direct relationship between expenses and revenues, such that if no revenues are obtained no expenses related to them may be deducted. In other words, the matching principle is a condition for deducting an expense.

The claimant referee's activity did not present any of the characteristics of income from economic activities, which are the organization for the claimant's own account of the means of production and human resources for the conduct of its activity. Therefore, the income obtained by the referee is treated as salary income and as a result only deductible per diems fulfilling certain requirements may be deducted.

2 Golf club's activity subject to and not exempt from VAT

Catalan regional economic-administrative tribunal decision of January 29, 2021

It was examined whether golf classes invoiced by an individual to a social enterprise are VAT exempt.

In the court's judgment, for the exemption relating to certain supplies of services directly related to a sport activity or to physical education to apply, they must be made by private sports social enterprises or establishments or must consist of a supply of services made by a not-for-profit organization. For that reason, the Catalan TEAR held that the activities conducted by the golf club are subject to, but not exempt from VAT.

In relation to the imposed penalties, the tribunal said that when determining whether the taxpayer's conduct warrants a penalty the fault principle needs to be considered. According to the tribunal, the infringing party's conduct should not be justifiable under a reasonable interpretation of the law. In other words, the intentional element or decision to defraud the public purse must be analyzed. This requirement is based on constitutional principles of legal certainty and legality.

3 Income obtained from transfer of rights of publicity characterized as income from economic activities

Catalan regional economic-administrative tribunal decision of March 11, 2021

The characterization of income obtained from transferring rights of publicity was analyzed, together with whether the collections and payments method applied in relation to timing, as well as the potential existence of a sham transaction regarding the fees of a footballer's agent.

The tribunal held that the income concerned must be characterized as income from economic activities, because there is no organization for their own account of the means of production.
Taxpayers conducting economic activities may elect the collections and payments method for the timing of recognition of the revenues and expenses relating to those economic activities. The auditors did not allow the taxpayer to choose, however.

Additionally, they concluded that the entity did not receive representation and management services from the player's agent, and therefore considered that a sham transaction had existed. It was concluded in fact that there was a considerable element of concealment and therefore the intentional element was fulfilled.

Legislation

Specific tax regime for the final of the UEFA Women's Champions League 2020

Additional provision six of Law 10/2021, of July 9, 2021, on remote working, sets out the tax regime applicable to the final of the UEFA Women's Champions League 2020, bearing in mind that the fact of the cities of Bilbao and San Sebastián being chosen to host the final of the UEFA Women's Champions League 2020 requires regulations on a specific tax regime.
The provisions in Law 10/2021 match the provisions published in Royal Decree-Law 27/2020, which we discussed in our alert.


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