# GARRIGUES

**TAX**

MARCH 2016

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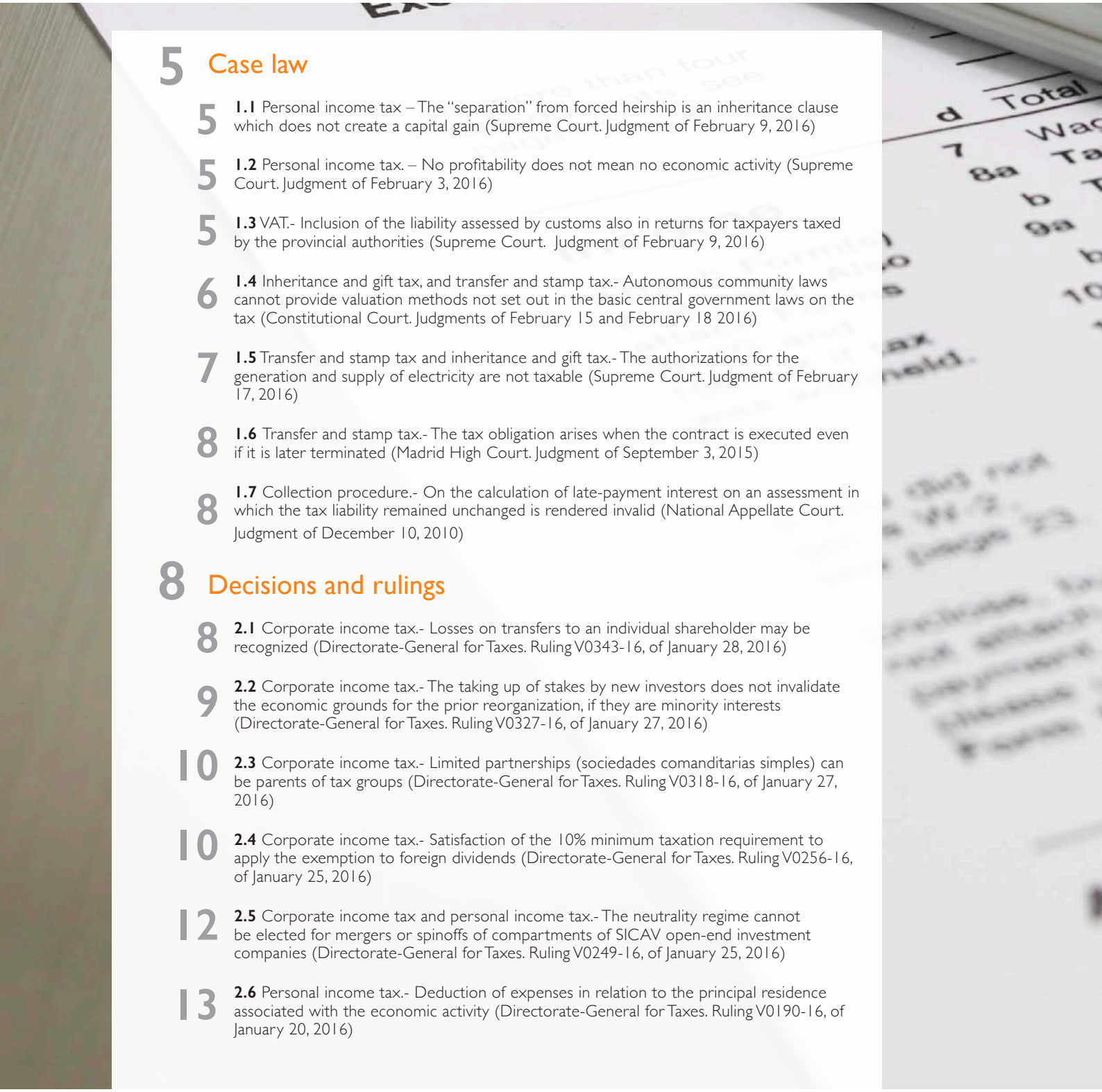
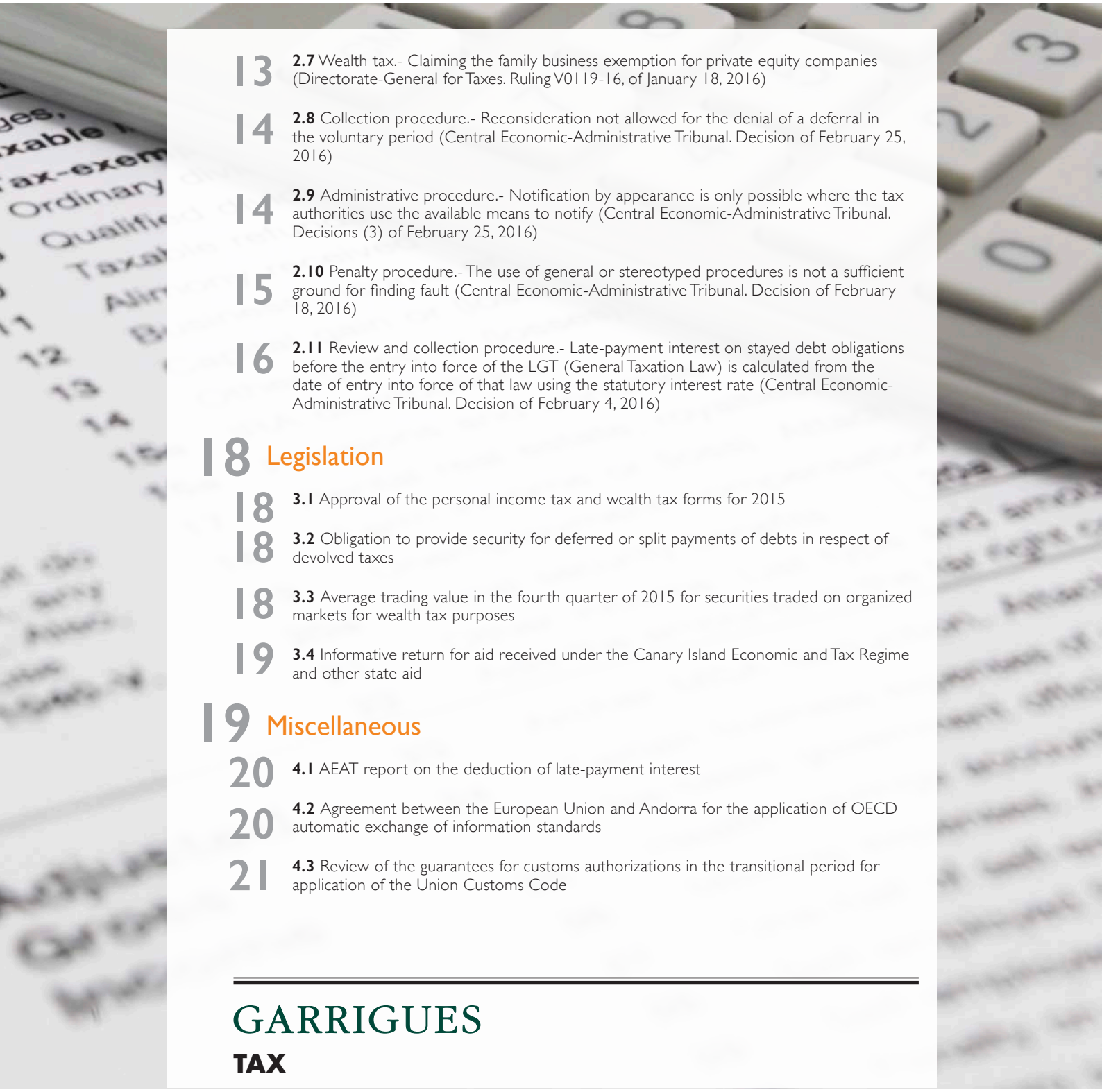






GARRIGUES

**TAX**

# DEDUCTION OF **LATE-PAYMENT INTEREST** ON INSPECTION ASSESSMENTS

In our previous newsletter, we reported that in its ruling of December 21, 2015 (V4080-15), the DGT (Directorate-General for Taxes) seemed to have dispelled any doubts, at least for the periods in which the current Corporate Income Tax Law (Law 27/2014) is in force, by concluding that, due to late-payment interest being a finance cost for accounting purposes and not being able to be characterized as either a gratuity or an expense associated with activities contrary to the law, it must be deductible.

This conclusion was contrary to that drawn by TEAC (Central Economic-Administrative Tribunal) in its decision of May 7, 2015, in which, under the legislation prior to the current Law 27/2014, it considered that this expense was not deductible because it resulted from breach of a law (a view it had already taken in a decision earlier than 2010).

AEAT (State Tax Agency) has now issued an internal report, dated March 7, 2016, in which it has supported that the late-payment interest is not deductible, even though it is reiterating the view in the DGT's ruling mentioned above (which, it is common knowledge, binds the tax authorities under the General Taxation Law - LGT). In this report:

**a)** It begins by acknowledging that the DGT has treated this as a deductible expense between the entry into force of Law 43/1995 and the current Law 27/2014.

**b)** It underlines, however, that although TEAC has in the past leaned towards the deduction of this interest, it has taken the opposite view in two decisions (of November 23, 2010 and May 7, 2015). In this more recent decision, TEAC said it had based its conclusion in the Supreme Court's opinion in its judgment of February 25, 2010 in which it disallowed the deduction of the late-payment interest because, in its judgment, it makes no sense for the law to allow an expense to be deducted if it comes from a practice that is contrary to the law.

**c)** AEAT goes on to ask which principle it must adopt when faced with two types of decisions, both binding on AEAT (by the DGT and by TEAC) and leaned towards adopting TEAC's findings. It based this decision on the TEAC decision of September 10, 2015 under which the DGT's rulings are not binding on the economic-administrative tribunals, whereas the principles that are binding on all the tax authorities (under the central or the autonomous governments) are both the principles reiterated by TEAC and its rulings rendered in decisions on special appeals for a ruling on a point of law. It is odd that AEAT should say that when TEAC rendered its decisions on late-payment interest, it was aware of the DGT's view, when this cannot be true in relation to it applying under Law 27/2014, because Ruling V4080-15 discussed above (the only one referring to the new Law 27/2014) was rendered after TEAC's latest decision.

Additionally, in that same report, AEAT considers that the interest on stayed debt obligations (i.e., the interest charged when a decision or judgment confirms the assessment originally made which had been stayed) is deductible, because this type of expense does not originate from the breach of a law but from the staying of its enforcement, and it likens it to a deferral of payment granted by the tax authorities.

# 01 CASE LAW

## 1.1 Personal income tax – The "separation" from forced heirship is an inheritance clause which does not create a capital gain (Supreme Court. Judgment of February 9, 2016)

It was discussed whether a capital gain arose for personal income tax purposes from what is known as the "Galician separation", an inheritance clause in which the taxpayer acquires, while the decedent is alive, certain items of property in exchange for disclaiming their forced heirship rights in the future estate.

At issue was whether inheritance clauses are *inter vivos* acts (as the tax authorities claimed) because death had not taken place, or *mortis causa* (as the taxpayer argued) because they imply a disclaimer by the beneficiary and separation from their forced-heirship right in the future estate. Because if this is an *inter vivos* act a capital gain arises which is taxable for personal income tax purposes, whereas if it is a *mortis causa* act there is no taxable capital gain arising on death.

The Supreme Court held that:

**a)** Private law must be applied, especially as to whether the rules on inheritance clauses generally and on the Galician separation clause in particular take us to one solution or another.

**b)** It must be concluded from the definition of inheritance clauses in private law that this is a *mortis causa* act, and its legal nature cannot change according to whether the capital gain takes place before the death of the decedent that determined the separation.

**c)** Therefore, the transfer derived from a separation cannot give rise to a capital gain taxable for personal income tax purposes.

## 1.2 Personal income tax. – No profitability does not mean no economic activity (Supreme Court. Judgment of February 3, 2016)

In the examined case, the taxpayer had reported the losses on their horse-riding and forestry business as earnings from economic activities on their personal income tax return, together with the income from their professional activities, and could therefore offset the losses from one against the income from the other. The tax authorities considered that the horse-riding and forestry activities were not economic activities for personal income tax purposes because they only gave rise to losses, and therefore they disallowed the offset. The authorities argued that engaging in a loss-making economic activity for so many years (seven) was not reasonable, and it was a hobby rather than an economic activity.

The Supreme Court supported the principle applied by the taxpayer, stating that:

**a)** Continuously sustaining losses on an activity cannot be allowed to rule out per se that the taxpayer effectively carried on an economic activity.

**b)** Activities that are carried on for "amusement" can also be characterized as economic activities. Indeed, the tax authorities have themselves accepted this for hobbies that generate income.

**c)** If they want to disallow the deduction of an expense, the authorities must carry out specific analytical activities that are sufficiently probative.

## 1.3 VAT.- Inclusion of the liability assessed by customs also in returns for taxpayers taxed by the provincial authorities (Supreme Court. Judgment of February 9, 2016)

Article 74 of the VAT Regulations provides that importers, traders or professionals acting as such may elect to include the liability assessed by the customs authorities in the self-assessment return for the period in which they receive the document setting out that assessment (instead of through the payment to the customs authorities). This election is only available, however, to taxpayers taxed by the central government authority. This restriction was introduced by Royal Decree 1073/2014, of December 19, 2014.

The Bilbao Chamber of Commerce challenged that royal decree because the restriction means that any companies taxed entirely by the provincial tax authority, due to not

being required to file a self-assessment return with the central government, are excluded from the right to elect the system described. It was argued in the appeal that the article mentioned above was null and void as a matter of law because it violated article 14 and article 9.3 of the Constitution, and because it contravened article 108.3 of the Treaty on the Functioning of the European Union, by considering that by applying this article they are granting State aid.

The Supreme Court rendered the challenged article null and void in relation to the expression "[...] and insofar as they are taxed by the central government authority […]" because it held that there is no justification or legal protection for discrimination against those not taxed by the central government for benefiting from the potential financial advantage offered by the deferral regime.

### 1.4 Inheritance and gift tax, and transfer and stamp tax.- Autonomous community laws cannot provide valuation methods not set out in the basic central government laws on the tax (Constitutional Court. Judgments of February 15 and February 18 2016)

The Constitutional Court heard action for unconstitutionality and a request for a ruling on unconstitutionality concerning the valuation methods approved by two pieces of autonomous community legislation.

The unconstitutionality action (which ended with the judgment of February 18, 2016) was lodged against two articles of Galicia Law 12/2014, of December 22, 2014, on tax and administrative measures. On strictly tax-related grounds, the action challenged article 27.5 of that Law because it allowed as a method of auditing values for inheritance and gift tax and transfer and stamp tax purposes (taxes devolved to the autonomous communities) the method involving the capitalization of earnings at the late-payment interest rate.

The Constitutional Court found that:

**a)** Article 57 LGT (General Taxation Law) provides that the value of the elements determining the tax obligation may be audited by the tax authorities, among other methods, through the capitalization of earnings at the percentage that "*the law on each tax specifies*".

**b)** The central government laws on inheritance and gift tax and on transfer and stamp tax do not contain any specific rules on this calculation method.

**c)** Basing itself on the reasoning in its Judgment 161/2012, it concluded that:

**a.** Because the Constitutional Court itself has already interpreted that the expression "*rules on each tax*" refers only to central government rules, the –more restrictive- expression "*the law on each tax*" cannot be considered to mean something else, and therefore the examined Galician legislation is null and void.

**b.** Allowing the autonomous communities to adopt valuation methods other than those contained in the central government laws, for devolved taxes would give rise to material differences between these laws which would contradict the ultimate aim of the LGT to ensure a minimum amount of uniformity in the basic elements of the tax regime which ensure common treatment for taxpayers.

The request for a ruling on constitutionality (which has ended with the judgment of February 15, 2016) related to article 6.One.1.c) of Murcia Regional Assembly Law 15/2002, of December 23, 2002, on tax measures regarding

devolved taxes and regional charges between January 1, 2003 and November 30, 2006.

This article introduced a method for auditing values for transfer and stamp tax and for gift tax purposes which was the value assigned for the auction of the mortgaged properties in compliance with the provisions in the mortgage legislation. In that period between January 1, 2003 and November 30, 2006, however, that method was not provided in the LGT.

Taking its cue again from judgment 161/2012, the Court concluded that the autonomous community law overstepped its authority by introducing ex novo a method not set out in the LGT, falling outside the scope of the powers of the autonomous communities in relation to devolved taxes.

**1.5 Transfer and stamp tax and inheritance and gift tax.- The authorizations for the generation and supply of electricity are not taxable (Supreme Court. Judgment of February 17, 2016)**

It was examined whether the administrative authorizations granted to electricity generation plants may be treated as if they were administrative concessions for the purposes of being subject to transfer and stamp tax (as transfers for consideration).

And the reply was negative: the grant of those authorizations is not subject to transfer and stamp tax. The Supreme Court arrived at this conclusion from the following reasoning:

**a)** Firstly, it considered that the essential requirement is to determine (i) whether by reason of the administrative authorization powers to manage a public service are granted and (ii) whether the grant itself of the authorization (and, therefore, the provision of the service) entail a transfer of property to the providing entity (comparable to the transfer that takes place in the case of concessions) as this is required by the law for transfer tax to arise.

**b)** The Court advanced that although every authorization is a form of supervision by the authorities via consent for the conduct of an activity (which cannot be carried out without that consent), this does not make them, from a tax standpoint, into public services or necessarily imply that a transfer of property takes place (a transfer of public powers, in other words).

**c)** On the examined case, the Court concluded that the requirements mentioned were not satisfied because: (i) there is no allocation or use of public property, (ii) there is no grant of powers to manage a public service (the generation of electricity is no longer a public service owned by the government) and (iii) given that the government is not the owner, the grant does not give rise to a transfer of property to the authorized entity.

Beyond the interest the judgment arouses by finding in the specific case of wind farms that they were not subject to the tax, the reasoning used to reach this conclusion has considerable importance by connecting the current understanding of concession with the definitions contained in the legislation on public sector contracts (currently the Revised Law approved by RDL 3/2011, of November 14, 2011).

This law ties concessions strictly to the management of public services and they only arise where the authorities elect to manage a public service under any of the types of contracts provided in that law. There will only therefore be a concession in that case, not where there are authorizations or acts of administrative control that relate to activities or sectors where the authorities do not have powers of management of a public service.

**1.6 Transfer and stamp tax.- The tax obligation arises when the contract is executed even if it is later terminated (Madrid High Court. Judgment of September 3, 2015)**

The taxpayer entered into a concession agreement with the government but did not self-assess transfer and stamp tax. The tax authorities issued an assessment on the basis that a self-assessment of the tax should have been done in relation to when the concession agreement was signed, which is when the tax falls due.

The assessment was challenged by the taxpayer, who argued that, when it was issued, the concession had already been terminated on a ground attributable to the government, and therefore, according to the law on the tax, this created entitlement to a refund of the tax that hypothetically should have been paid over when the tax fell due.

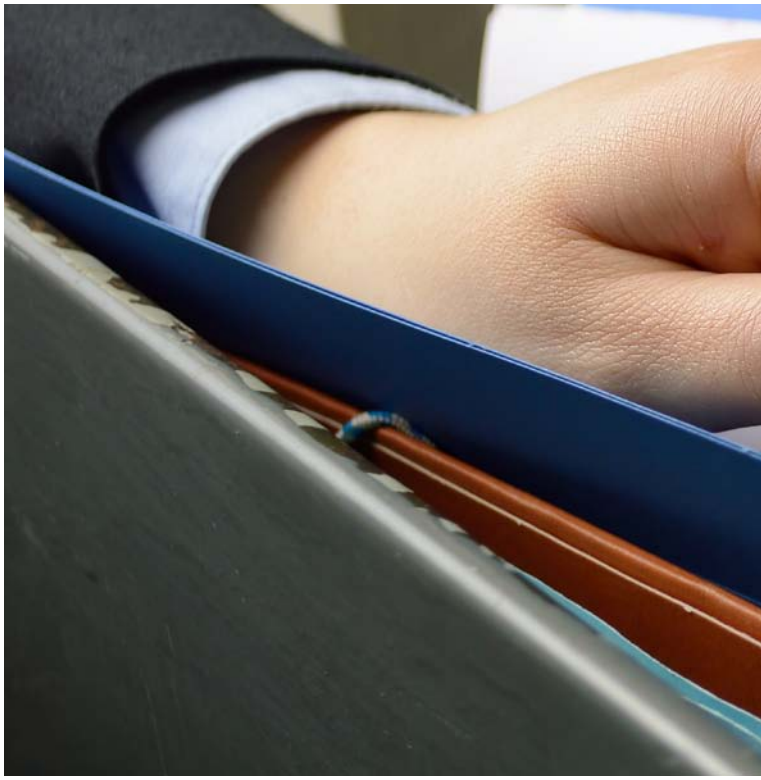
Madrid High Court concluded, however, that the tax falling due is separate from the right to a refund that may arise later due to the termination of the agreement, and therefore, confirmed the tax authorities' assessment.

**1.7 Collection procedure.- On the calculation of late-payment interest on an assessment in which the tax liability remained unchanged is rendered invalid (National Appellate Court. Judgment of December 10, 2010)**

In this judgment, the appellate court looked at what the final date for the calculation of late-payment interest on a stayed debt obligation must be in cases where, after a tax assessment has been appealed, the tax liability is confirmed in the economic-administrative jurisdiction and the assessment is only rendered invalid in relation to late-payment interest.

You are reminded that article 26.5 LGT (General Taxation Law) specifies that in cases where assessments are rendered invalid by an administrative or judicial decision, late-payment interest will accrue until the new assessment has been issued, and the end of the computation period cannot be later than the time limit for implementing that decision.

In the examined case, the National Appellate Court confirmed TEAC's principle according to which, in cases such



as the one described, in which the liability remains unchanged, because it is confirmed in the economic administrative jurisdiction, that article 26.5 LGT (General Taxation Law) is not applicable, and therefore late-payment interest must be charged from the date following the end of the voluntary payment period until the debt is effectively paid over.

## 02 RESOLUCIONES Y CONSULTAS

**2.1 Corporate income tax.- Losses on transfers to an individual shareholder may be recognized (Directorate-General for Taxes. Ruling V0343-16, of January 28, 2016)**

A company had a debt with three shareholders who were individuals. To pay off part of that debt, it was proposed to transfer a subsidiary's shares to those shareholders, in a


transaction that would give rise to a loss at the company. It was asked whether the transferring company would be able to recognize that loss for tax purposes in the taxable period in which the transfer is made.

The DGT concluded that, because the transferees are individuals, they cannot apply the special timing of recognition rules in article 11.10 LIS (Corporate Income Tax Law), which defers recognition of the losses on transfers of shares where the transferee is a company in the same group of companies as defined in article 42 of the Commercial Code.

### 2.2 Corporate income tax.- The taking up of stakes by new investors does not invalidate the economic grounds for the prior reorganization, if they are minority interests (Directorate-General for Taxes. Ruling V0327-16, of January 27, 2016)

This was a group with more than seventy companies and engaged in various lines of business which was considering a reorganization, by merging or spinning off companies and/or businesses, in the way it considered necessary to improve the management of the group.

The group was also considering whether to allow new investors to take up a stake in a company that would hold the real estate business. To achieve this, certain preliminary steps would be performed: (i) creation of two series of shares, (ii) modification of the financial structure of the company to partly finance the assets out of third-party funds, and (iii) distribution of a dividend out of the merger reserve before any new investors took up a stake. After this, a third shareholder would take up a stake, which would be a minority interest in any event, through the sale of the shares in the common series.

Among other questions, and assuming the neutral regime may be applied to these merger and spinoff transactions, it was asked, in relation to the taking up of a stake by investors in the real estate line of business, (i) whether the transfer of the shares held by the company owning the real estate would give

entitlement to the double taxation exemption (article 21 LIS), and (ii) whether that transfer does not change the valid economic grounds for the prior restructuring.

The reply was affirmative in both cases. The DGT thus considers that:

**a)** Merger and spinoff transactions involving different blocks of assets rights and liabilities will not invalidate application of the tax neutrality regime and, in particular, the existence of valid economic grounds, where they are followed by the transfer of shares in one of the companies resulting from those transactions, insofar as it is the transfer of a minority interest (never higher than 50% of the capital).

**b)** Additionally, the exemption under article 21 LIS will apply with respect to the income obtained as a result of the transfer to the third investor, if there are no real estate assets which had been contributed earlier in a transaction for which the tax neutrality regime had been elected (the portion of the income relating to the income deferred at the time as a result of the nonmonetary contribution must be included in the tax base).

### 2.3 Corporate income tax.- Limited partnerships (*sociedades comanditarias simples*) can be parents of tax groups (Directorate-General for Taxes. Ruling V0318-16, of January 27, 2016

A limited partnership, with a legal personality, which is subject to and not exempt from corporate income tax had been the parent of a tax group until 2014. It was asked whether from 2015 it could continue being the parent of the tax group.

The doubt stemmed from article 58.1 LIS which provides that Spanish-resident enterprises can be part of a tax group if they have the legal form of a Spanish corporation (sociedad anónima), limited liability company (responsabilidad limitada) or partnership limited by shares (*comanditaria por acciones*), as well as certain types of banking foundations; but article 58.2.a) provides that "parent" will mean an enterprise having a legal personality and being subject to and not exempt from corporate income tax or a tax identical or similar to Spanish corporate income tax, provided it is not resident in a country or territory classed as a tax haven.

Taking both articles into account, the DGT considered that the rule contained in letter a) of article 58.2 LIS, which requires the parent to have a legal personality, prevails over the rule in article 58.1 LIS, that the legal form of enterprises in the tax group must be a Spanish corporation (*sociedad anónima*), limited liability company (*responsabilidad limitada*) or partnership limited by shares (*comanditaria por acciones*). Therefore:

**a)** The rule in article 58.1 LIS must be restricted to subsidiaries, which may only adopt the legal form of a Spanish corporation (*sociedad anónima*), limited liability company (*responsabilidad limitada*) or partnership limited by shares (*comanditaria por acciones*).

**b)** Having the legal form of a limited partnership (*comanditaria simple*) does not prevent it from being able to be the parent of the tax group, insofar as it has its own legal personality and is subject to and not exempt from corporate income tax.

### 2.4 Corporate income tax.- Satisfaction of the 10% minimum taxation requirement to apply the exemption to foreign dividends (Directorate-General for Taxes. Ruling V0256-16, of January 25, 2016)

To apply the exemption for dividends and income derived from the transfer of shares in nonresident enterprises, the Law requires the nonresident investee to have been subject to and not exempt from a foreign tax of a nature identical or similar to Spanish corporate income tax at a nominal rate of at least 10%. For taxes to qualify as such, they must be foreign taxes on the income obtained by the investee, regardless of whether it is the income, the revenues or any other element indicative of income that is taxed.

In the case examined for this ruling, the investee is resident in Guatemala, with which Spain has not signed a tax treaty. In that country, income from

activities for profit may be taxed under any of the following regimes:

**a)** Regime on the profits from activities for profit, in which the taxable income will be determined be subtracting exempt income and deductible costs and expenses from gross income. Once the taxable income has been determined, a 25% tax rate is applied to determine the tax payable, and there are no tax credits.

**b)** Optional simplified regime on revenues from activities for profit, in which the taxable income will be determined by subtracting only the exempt income and applying to that taxable income tax rates ranging between 5% and 7%.

The DGT recalled that the law requires the income to be taxed in a foreign country to Spain, even if they are taxed via charges that do not directly use the measurement of income as their reference, and it is allowed for the tax to fall, among other elements, on the revenues of the investee.

In the case examined for the ruling, bearing in mind the regimes to which the investee may be subject, the DGT held that:

**a)** The subsidiary is subject to a tax of a nature identical or similar to Spanish corporate income tax for the purposes of applying the exemption set out in article 21 LIS.

**b)** The minimum taxation requirement of at least 10% if the simplified optional regime is elected will be considered to be satisfied if the enterprise is subject to an effective rate higher than the result of dividing the amount paid in respect of this tax by the income for accounting purposes of the enterprise before taxes.

**2.5 Corporate income tax and personal income tax.- The neutrality regime cannot be elected for mergers or spinoffs of compartments of SICAV open-end investment companies (Directorate-General for Taxes. Ruling V0249-16, of January 25, 2016)**

A small number Spanish resident individuals have a minority interest in a SICAV open-end investment company (A) formed in Luxembourg. The interest in that SICAV confers on them all the economic and noneconomic rights attached to a compartment or subfund (compartment A). It is intended for another Luxembourg SICAV (B) or one of its compartments or subfunds (compartment B), to acquire compartment A in a merger or a partial spinoff, with the resulting dissolution without liquidation of this compartment.

It was clarified that the two SICAVs have legal personalities, though not compartments A and B of those SICAVs, which are not legal entities distinct from the SICAVs. It was also mentioned that:

**a)** The transaction would be a merger by absorption or a partial spinoff, as applicable.

**b)** The transaction would comply with Luxembourg domestic law in terms of the legislation on collective investment undertakings (implementing Directive 2009/65/EC).

**c)** The intention is for the tax neutrality regime implemented by the Directive on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares and change of registered office by a European Company or a European Cooperative Society.

Despite this, the DGT disallowed application of the tax neutrality regime to those transactions in relation to the Spanish investors. In particular, it affirmed that:

**a)** It cannot be elected for the merger because the dissolution without liquidation of an entity (SICAV A) does not occur, but rather of a compartment of that entity (compartment A), which is not considered to be an entity.

**b)** Regarding the spinoff:

**a.** It is not a partial spinoff as defined in the law because the assets, rights and liabilities in compartment A do not form an independent economic operation with separate organization and management: the

block of assets rights and liabilities formed by the securities and other liquid assets is not a line of business.

**b.** Nor is it a financial partial spinoff (for this to be the case the transferred shares must confer ownership of the majority of the capital stock). In accordance with article 56.1 of Directive 2009/65/EC, undertakings for collective investment in transferable securities (UCITS) cannot acquire controlling stakes in the companies in which they invest.

### 2.6 Personal income tax.- Deduction of expenses in relation to the principal residence associated with the economic activity (Directorate-General for Taxes. Ruling V0190-16, of January 20, 2016)

An individual carries on an economic activity and determines the net income from their economic activity using the simplified direct assessment method. To carry on that activity they have fitted out a room in their principal residence as an office.

The DGT held that:

**a)** The law allows partial use of divisible assets for an economic activity, if the part concerned may be used separately and independently from the rest. Accordingly, part of a residence may be used for the activity.

**b)** This partial use means that:

**a.** Every expense derived from the ownership of the residence may be deducted (such as depreciation, real estate tax, interest, garbage collection charges, insurance, owners' association charges, etc.) in a proportion relative to the part of the residence that is used.

**b.** In relation to utility costs, the DGT applied the view adopted by TEAC, which, in its Decision of September 10, 2015 rendered for a ruling on a point of law, set the principle that in these cases "*utility costs cannot be deducted simply in the proportion that the square meters used for the economic activity represent of the total number of square meters. However, under the matching revenues and expenses principle, to determine the net income of the economic activity, costs of this type of cost could be deducted, if their relationship with the obtaining of revenues is evidenced by the party with tax obligations.*"

**c.** Lastly, the ability to deduct those costs is conditional on their being suitably supported with the original invoice (or equivalent document), which must also be recorded in the record books that are mandatory for taxpayers who carry on economic activities.

### 2.7 Wealth tax.- Claiming the family business exemption for private equity companies (Directorate-General for Taxes. Ruling V0119-16, of January 18, 2016)

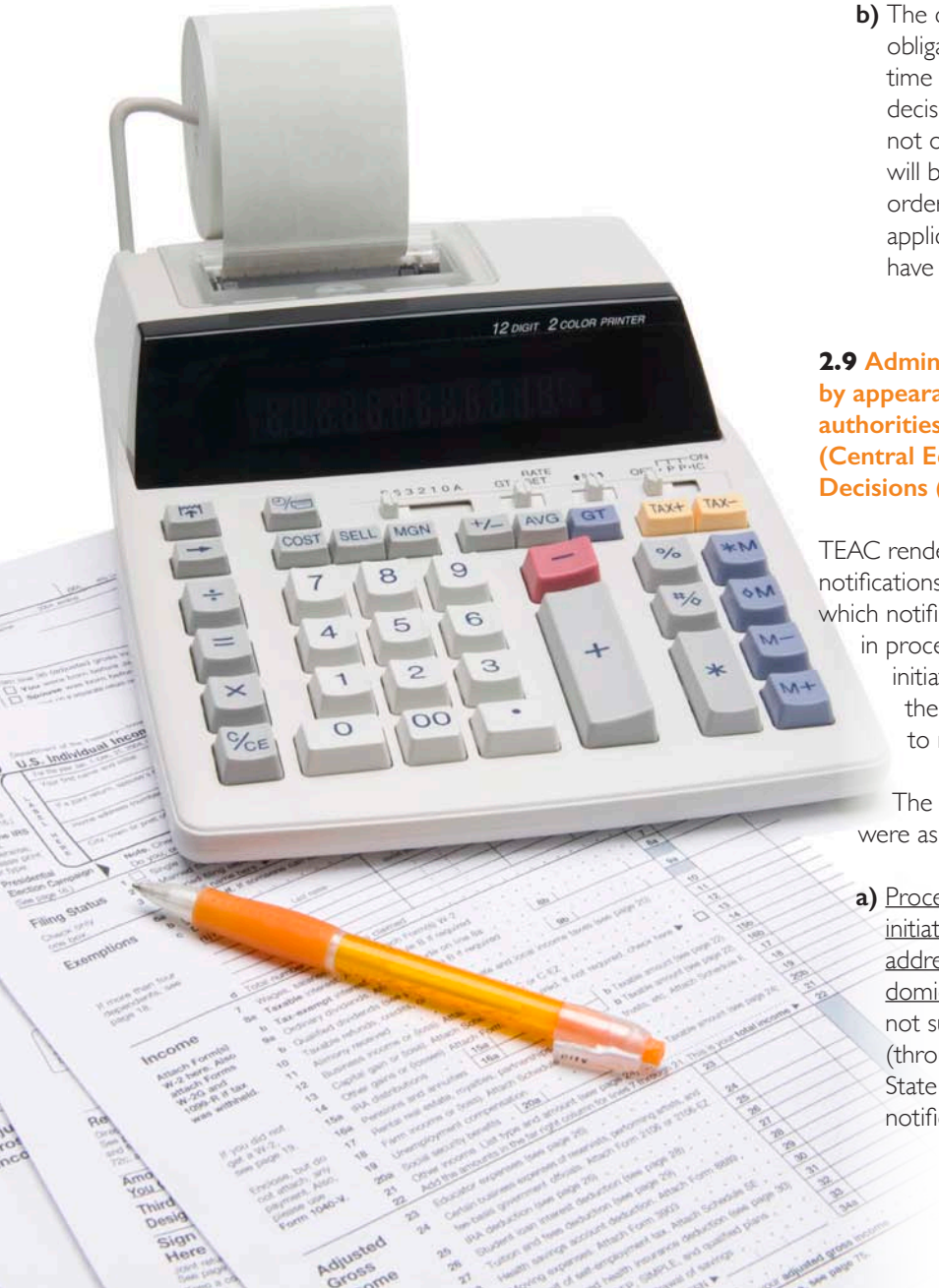
For the wealth tax exemption claimable for shares in entities, the entity receiving the investment must not be primarily engaged in the management of assets in the form of movable property or real estate, and it is specified that the securities "*held to comply with legal and regulatory obligations*" will not be computed to determine the portion of assets formed by securities or elements of property not used in the business activity.

The private equity companies under Law 22/2014, of November 12, 2014 must comply with a mandatory investment ratio, by having to invest at least 60% of their computable assets in a given type of securities, a percentage that may be higher, which is implicit from the wording of the article.

As a result, the DGT concluded that the securities included in the mandatory investment ratio cannot not be computed as securities not used in the business activity.

**2.8 Collection procedure.- Reconsideration not allowed for the denial of a deferral in the voluntary period (Central Economic-Administrative Tribunal. Decision of February 25, 2016)**

The tax authorities rejected an application for deferral made in the voluntary period and granted a new payment period. Before the end of this second payment period, the taxpayer applied again for deferral of the debt, but when the debt was not paid within that period the tax authorities issued an enforced collection order.




The issue centered on determining whether, after the denial of a deferral applied for in the voluntary period, a new application for deferral of the debt may be made which has staying effects and, therefore, prevents the commencement of the enforcement period.

TEAC concluded that:

**a)** Reconsideration is not allowed for the denial of a deferral applied for in the voluntary period, and therefore only an appeal or claim may be filed against the decision denying the deferral.

**b)** The consequence of denial of deferral is the obligation to pay the debt in the new payment time limit in the voluntary period offered by the decision rejecting the application. If payment does not occur in that period, the enforcement period will begin and the relevant enforced collection order will be issued, and any potential new application for deferral filed in that period will not have staying effects.

**2.9 Administrative procedure.- Notification by appearance is only possible where the tax authorities use the available means to notify (Central Economic-Administrative Tribunal. Decisions (3) of February 25, 2016)**

TEAC rendered on the same date three decisions on notifications in which it examined the conditions on which notification may be given by appearance (whether in procedures commenced on the authorities' initiative or at a party's request) and referred to the specific treatment for cases of notifications to nonresidents.

The cases analyzed and the conclusions obtained were as follows:

**a)** Procedures commenced on the authorities' initiative in which the authorities know of other addresses for the taxpayer apart than their tax domicile: in these procedures, said TEAC, it is not sufficient to use notification by appearance (through a notice published in the Official State Gazette –BOE-) after two attempts at notification at the tax domicile resulting in the

"wrong address". If it has been evidenced that the authorities had evidence of the existence of other addresses for the taxpayer, they should have attempted notification at these other addresses.

**b)** Procedures commenced at a party's request in which the taxable person has determined a place for notifications other than the tax domicile: in these cases, before giving notification by official notice (because two unsuccessful attempts at notification have been attempted at the address provided for notifications purposes by the taxpayer), the authorities must use all other options. In particular, they must try the tax domicile if they have easy access to that address, without requiring any effort, either because it is in the case file or because it could be accessed simply by searching the databases of the acting authority.

**c)** Notifications to nonresidents without a permanent establishment: in these cases, TEAC held that the authorities are not just required to attempt to deliver the notifications at the properties or addresses that they have seen within Spain, but are also required, before giving notification by official notice, to use the stipulated international cooperation instruments, with the aim to deliver the notifications efficiently to ensure effective knowledge of their decisions.

The imposed penalties were rendered invalid by the Catalonia TEAR (Regional Economic-Administrative Tribunal), which held that those grounds were simply a conventional, general and stereotype mechanism which did not support the intentional element that had to exist for the infringing conduct to be penalized.

AEAT lodged a special appeal for a ruling on a point of law, in which TEAC –with reference to the Supreme Court's case law on the grounds for imposing penalties– specified the following principles:

**(I)** Expressions such as the one used by those decisions imposing a penalty may not be considered valid for the purposes of considering the founding requirements to be satisfied.

**(II)** Any automatic conclusions must be rejected, meaning that the objective elements of the infringement are a necessary condition but not sufficient to result in the existence of fault by the purported infringer.

### 2.10 Penalty procedure.- The use of general or stereotyped procedures is not a sufficient ground for finding fault (Central Economic-Administrative Tribunal. Decision of February 18, 2016)

In the context of a penalty procedure, various penalties were imposed on a taxpayer as a result of given breaches of customs legislation. The grounds provided in the decisions to impose penalties simply stated that "*after examining the existing circumstances the party with tax obligations has conducted itself with negligence and no ground for a release from liability has been found*".

**(III)** The grounds play a crucial role in penalty proceeding in that they enable a conclusion is reached as to whether or not there was fault in the conduct. The factual and legal elements on which the authorities founded the existence of fault must be set out in the penalty case file and in the penalty decision, and it is not acceptable to try and evidence its existence by referring to the facts that have been evidenced in the case file on the proceeding for adjustment of the debt or to other documents apart from the penalty case file apart from the penalty decision.

**(IV)** After a penalty has been rendered invalid in a decision or judgment due to being unfounded, by reason of it being essential element, the authorities are prevented from initiating a new penalty proceeding.

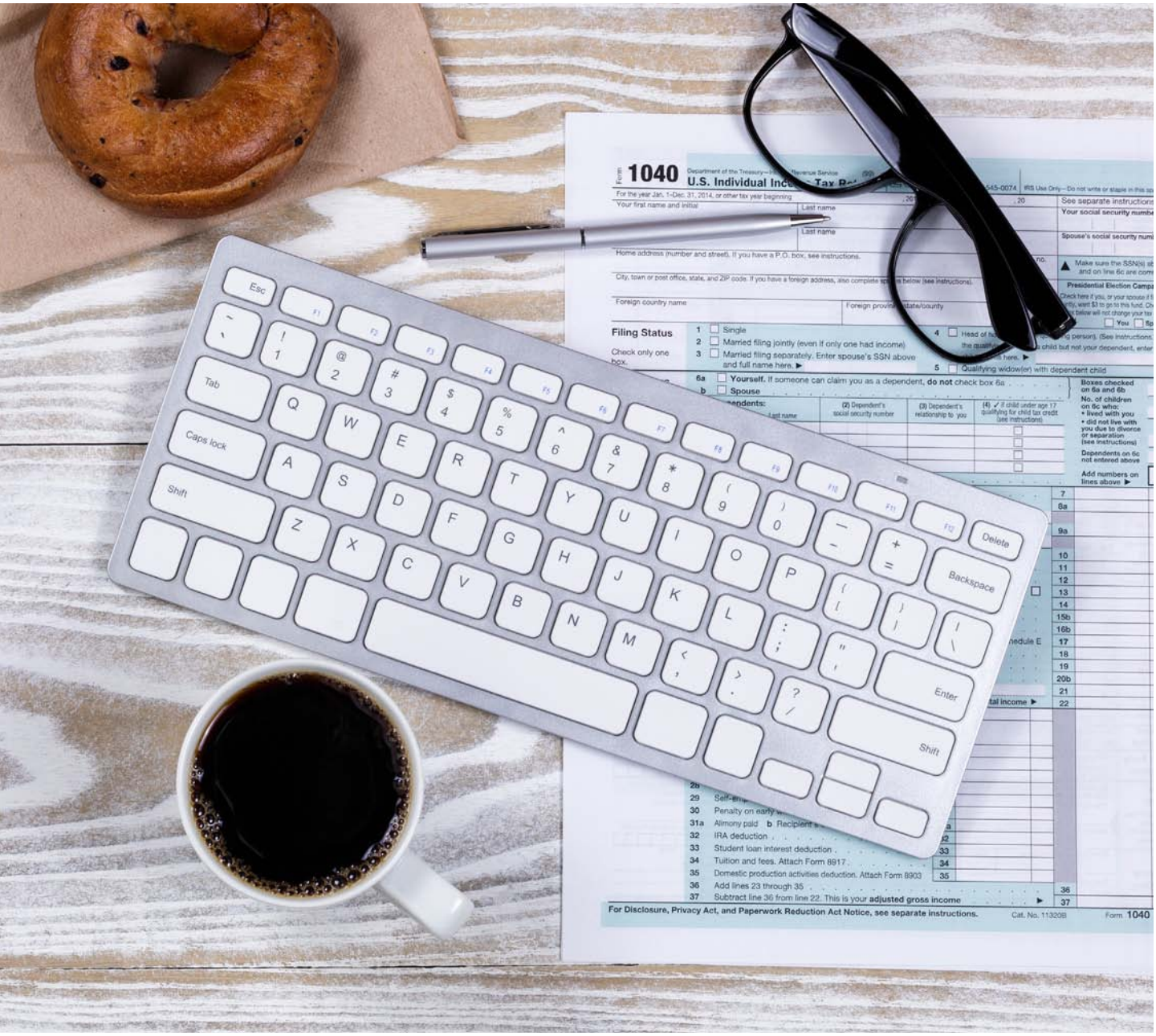
**2.11 Review and collection procedure.- Late-payment interest on stayed debt obligations before the entry into force of the LGT (General Taxation Law) is calculated from the date of entry into force of that law using the statutory interest rate (Central Economic-Administrative Tribunal. Decision of February 4, 2016)**

The inspectors issued an assessment on a taxpayer in respect of corporate income tax. Due to disagreeing with that assessment (including tax debt and late-payment interest) the taxpayer filed the required appeals, and its claims were ultimately partially upheld regarding the calculation of late-payment interest. The enforcement of that assessment had been stayed in the voluntary payment period since 1996. The issue centered on determining the amount and how to calculate the interest on stayed debt obligations that must be assessed on the taxpayer following a partial upholding of its claims.

TEAC concluded that:

**a)** Because the tax liability has remained unchanged –in that it was confirmed at all instances–, the initial decision subsists, and only has to be rectified in relation to late-payment interest, meaning that the subsistence of the debt entails the requirement to claim interest on stayed debt obligations.

**b)** Regarding the calculation of that interest on stayed debt obligations, TEAC concluded that when the stay with a bank guarantee was requested before the entry into force of the LGT (General Taxation Law), the required interest on stayed debt obligations must be calculated using the statutory interest since the entry into force of the LGT.




It must be remembered that the LGT provides that "*in cases of deferral, split-payment or stayed debts secured in full by a joint and several bank guarantee from a credit institution or mutual guarantee society or with a surety bond certificate, the late-payment interest will be the statutory interest*".

This is an about-turn from the principle adopted by the Tribunal in earlier decisions (i.e. Decisions of February 6, 2014, of May 8, 2014 and of February 5, 2015) in which it had argued that this article was only applicable in cases where the application for a stay had been filed after the entry into force of the LGT. The change was based on the Supreme Court judgment of March 31, 2014.

# 03 LEGISLATION

## 3.1 Approval of the personal income tax and wealth tax forms for 2015

On March 22, 2016, the Official State Gazette (BOE) published Order HAP/365/2016, of March 17, 2016, approving the personal income tax and wealth tax return forms for 2015.

The Order adapts the forms to the personal income tax reform made by Law 26/2014, of November 27, 2014, and to the autonomous community tax credits in force for 2015

The following elements are worth noting:

**a)** For the personal income tax return, the chance to obtain the draft return has been broadened to be made available to any taxpayer, regardless of the type of income received (unless it results from the performance of economic activities), for which certain information may be requested in advance. The draft may be changed before its confirmation and filing.

**b)** On the wealth tax return:

**a.** A new box has been added for non-Spanish resident taxpayers residing in another member state of the EU or the EEA to be able to specify the autonomous community in which their assets or rights with the greatest value are located and on which they are going to be taxed for wealth tax.

**b.** These forms will still only be able to be filed electronically online. Moreover, any taxpayers filing a wealth tax return must also file their personal income tax returns electronically or, if possible, over the phone.

**c)** The general filing period for both personal income tax and wealth tax returns falls between April 6 and June 30 2016, inclusive, where they are filed electronically online. If they are filed by any other means, the filing period will fall between May 10 and June 30 2016.

The following special requirements must also be taken into account:

**a.** The period for confirming the draft personal income tax return electronically or over the phone will begin on April 6; if any other method is used, the period for confirming the draft will begin on May 10.

**b.** The period for filing returns on which the payment of both taxes is to be made directly into a bank account begins on April 6 and runs only until June 25, 2016, unless only the second payment is to be made into a bank account, in which case the period ends on June 30La presente Orden entró en vigor el pasado 23 de marzo de 2016.

This Order entered into force on March 23, 2016.

## 3.2 Obligation to provide security for deferred or split payments of debts in respect of devolved taxes

The Official State Gazette (BOE) of March 17, 2016 published Order HAP/347/2016, of March 11, 2016 which raises to €30,000 euros the threshold for the obligation to provide security in applications for deferred or split payments of debts in respect of the devolved debts that the autonomous communities are responsible for collecting.

Under the provisions in this Order, and consistently with Order HAP/2178/2015 raising the same threshold in relation to debts managed by AEAT (Spanish Tax Agency), no security will be required for applications for deferred or split payment of the public-law debts that the autonomous communities are responsible for collecting, where their aggregate amount does not exceed €30,000 and they are in the voluntary payment period or in the enforcement period, although in this second case any attachments on the debtor's property or rights are maintained when the application is filed.

The calculation to determine the amount of the foregoing debt will be made by adding together at the time of the application both the debts to which the application relates, and any other debts owed by the same debtor for which an application for deferred or split payment has been made but no decision has been rendered, together with the amount of any outstanding past-due deferred or split payments, unless they have been appropriately secured.


The provisions in this Order entered into force on March 18, 2016 and will apply to any applications for deferred or split payments filed after that date.

### 3.3 Average trading value in the fourth quarter of 2015 for securities traded on organized markets for wealth tax purposes

On February 24, 2016, the Official State Gazette (BOE) published Order HAP/214/2016, of February 18, 2016, approving the list of securities traded on organized markets, with their average trading value for the first quarter of 2015, for the purposes of the wealth tax return for 2015 and the annual informative return on securities, insurance and income (including securities traded on a securities market, securities traded on the book-entry public debt market and securities on the AIAF market (Spain's benchmark market for corporate debt and private fixed income).

### 3.4 Informative return for aid received under the Canary Island Economic and Tax Regime and other state aid

The new EU legislation on regional aid (Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty) has replaced the EU notification and subsequent authorization system hitherto in force with a mechanism to adapt the incentives falling under the Canary Island Economic and Tax Regime to that EU Regulation.

Accordingly, it has introduced the obligation for the beneficiaries of these incentives to file a new informative return relating to the various aid measures or regimes used in that Canary Island Economic and Tax Regime, and for any others qualifying as state aid.

For these purposes, the Official State Gazette (BOE) of March 9, 2016 published Order HAP/296/2016, of March 2, 2016, approving form 282, "Annual informative return for aid received under the Canary Island Economic and Tax Regime and other state aid, derived from the application of EU Law" and establishing the conditions and procedure for filing it.

By filing this return, any personal income, corporate income, or nonresident income, taxpayers who have been beneficiaries of state aid will report on that aid in the period provided for filing the self-assessment nonresident income tax, corporate income tax or

personal income tax return, as applicable, in relation to the information for the immediately preceding calendar year.

The Order entered into force on March 10, 2016.

## 04 MISCELLANEOUS

### 4.1 AEAT report on the deduction of late-payment interest

AEAT (Spanish Tax Agency) published, on March 7, 2016, a report on deductions on corporate income tax returns of late-payment interest on assessments issued by the tax authorities and concluded that this is a nondeductible expense.

It did consider to be deductible, however, the late-payment interest derived from challenging assessments where there has been a stay (intereses suspensivos, interest on stayed tax obligations). In this case, it considers that it is a finance cost derived from a deferral of payment granted by the public treasury as a result of an agreement with that authority.

In relation to all those cases in which an assessment is rendered invalid and the issue of another assessment is ordered, on which late-payment interest is calculated (as directed in article 26.5 of the LGT) from the start date (in other words, from the date on which the computation of interest on the invalid assessment starts), AEAT considers that there are two separate cases: (i) any late -payment interest arising on the new liability between when the breach by the party with tax obligations occurred and the first assessment by the authorities (rendered invalid), which will not be deductible, and (ii) any subsequent interest, which will be deductible.

### 4.2 Agreement between the European Union and Andorra for the application of OECD automatic exchange of information standards

On February 22, 2016, the Official Journal of the European Union published Council Decision 2016/242 of 12 February 2016 on the signing, on behalf of the European Union, of the Amending Protocol to the Agreement between the European Union and the Principality of Andorra providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, in which the Council authorized the signing of the amending protocol on behalf of the European Union.

### 4.3 Review of the guarantees for customs authorizations in the transitional period for application of the Union Customs Code

The publication has taken place of Informative Note 01/2016, of February 2, 2016 of the Department of Customs and Excise and Other Special Taxes, on the review of guarantees for customs authorizations in the transitional period for application of the Union Customs Code.


The purpose of this note is to inform operators (for reasons related to legal certainty) that the new Union Customs Code (UCC) does not imply that the guarantees currently provided in relation to the authorizations already granted must be reassessed.

Moreover, in relation to any potential optional guarantees (including those associated with certain customs regimes) advance information is provided on the rules in the UCC on exemption from the guarantee obligation for operators with proven financial solvency due to holding an Authorised Economic Operator (AEO) certificate.

In any event, the exemption from the guarantee obligation will not apply to guarantees for transit governed by their own specific rules and those required in single authorizations under economic customs regimes.

Lastly, it must be noted that this guarantee review will only be performed at the request of the interested party.

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