Tax Newsletter

Spain

GARRIGUES

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1. Judgments

1.1 Free movement of capital. - The CJEU prohibits discrimination against nonresident real estate funds

Court of Justice of the European Union. Judgment of April 27, 2023. Case C-537/20

In this new judgment, the CJEU declares to be incompatible with the free movement of capital the liability to tax in Germany of real estate income obtained in that country by a real estate investment fund created in Luxembourg as a specialized investment fund; taking into account that, under German law, real estate investment funds created under German law benefit from a full exemption in respect of the income they receive.

Germany had justified that difference in treatment by submitting that the exemption for the German funds was explained by the related liability to tax in Germany of their investors, under the transparency principle, whereas it could not guarantee that investors in nonresident funds would be taxed in Germany (hence the liability of the fund itself). However, the CJEU held that the difference in treatment between German funds and nonresident funds relates to comparable situations and moreover is not justified by the need to preserve a balanced distribution of the power of taxation for the German taxation system, since (1) the objective of transparency and to tax the investors may also be achieved with respect to the nonresident funds (it would only be needed to make the exemption of the fund in Germany subject to the liability to tax of the investors in their countries of residence); and (2) the nonresident funds may also have German investors who experience double taxation, only partially mitigated by a possible deduction (uncertain in practice) of the taxes incurred by the fund.

In Spain, nonresident real estate funds which are not established in the country are subject to nonresident income tax on income from a Spanish source (as a general rule, at 19% if they are resident in the European Union), whereas real estate investment funds falling under Law 35/2003 of November 4, 2003 on collective investment vehicles are subject to 1% tax if they fulfill certain conditions, relating, among other characteristics, to the number of investors and the purpose of their activity, which means that the judgment is particularly relevant in Spain.

1.2 Free movement of capital. – Spanish tax legislation discriminates against nonresident hedge funds in Spain

Supreme Court. Judgments of April 5 (appeal 7260/2021) and April 11 2023 (appeals 8220/2021, 7123/2021, 7127/2021)

Under the Nonresident Income Tax Law, hedge funds resident in Spain are subject to 1% tax, whereas hedge funds resident in other countries are subject to 19% (or, if applicable, the more reduced rate under the relevant tax treaty), on income obtained in Spain.

The Supreme Court has concluded (in an appeal handled by Garrigues) that this different treatment is precluded by the free movement of capital, under article 63 of the Treaty on the Functioning of the EU, which means that nonresident hedge funds have to be treated in the same way as resident funds if they provide proof that they are open-ended vehicles, have the necessary authorization, and evidence that they are managed by an authorized manager within the meaning of Directive 2011/61/EU.

In our alert dated April 12, 2023 we gave a brief preview of the content of the first of these judgments.

1.3 Related-party transactions. – A party which has benefitted from adjustments relating to controlled transactions has a legitimate right to appeal against the assessment decision in which that party is taxable person

Supreme Court. Judgment of March 31, 2023

Following a review of the transactions performed by a shareholder with their company, tax auditors concluded that these transactions had not been priced at market value. An adjustment was made that increased the shareholder's income from economic activities for personal income tax purposes and simultaneously reduced the company's corporate income tax base.

Adopting the opposite view to the lower court, the Supreme Court concluded that, in the context of adjustments relating to controlled transactions, the party that has benefitted (the company, in this case, because it reduced its tax base) has a legitimate right to challenge the tax authorities' assessment. According to the court, the fact that the tax cost is reduced in a certain fiscal year does not prevent the adjustment determining that result from having consequences on other elements in its legitimate sphere of interests, regarding any work by the tax authorities which may have an effect on the entity's accounting records.

1.4 Monetization of tax assets. – Refunds in respect of the monetization of deferred tax assets generate late-payment interest between the date of the decision acknowledging the right to receive them and the payment date

National Appellate Court. Judgment of January 30, 2023

A taxpayer applied for monetization of deferred tax assets (DTAs) on its corporate income tax self-assessment, which was accepted by the tax authorities, but for a lower amount than was requested. Later, TEAC partially upheld the entity's claim, and ordered the refund of an additional sum. This sum was not refunded with late-payment interest, and therefore the entity filed an enforcement appeal with TEAC, which concluded that no interest was payable because the regulations on the tax expressly state that late-payment interest does not accrue on sums paid in respect of the monetization of deferred tax assets.

The National Appellate Court confirmed TEAC's view, although only in respect of the period until TEAC's decision becomes final. After that point, namely, between when the refundable amount is determined and the date of its actual payment, late-payment interest payable to the taxpayer does indeed have to be recognized.

1.5 Tax on increase in urban land value. – The person with the obligation to pay the tax under an agreement also has a legitimate right to apply for correction of the self-assessment and the necessary tax refund

Supreme Court. Judgments of March 28 and April 18, 2023

In these two judgments, the Supreme Court acknowledged that the person with the obligation to pay the tax on increase in urban land value under a covenant or agreement has the legitimate right both to (i) apply for correction of the self-assessment of the tax and the refund of any incorrectly paid tax; and (ii) challenge a potential rejection by the tax authorities of that application for correction in both the administrative jurisdiction and the economic-administrative jurisdiction.

By doing so, the Supreme Court has included within the scope of self-assessments of the tax on increase in urban land value the principle determined in its judgment of October 30, 2019 (November 2019 Newsletter) in relation to self-assessments of this tax.

1.6 Tax on increase in urban land value. - Tax assessments which were still within the time limit for judicial review as of October 26, 2021 have to be set aside

Madrid High Court. Judgment of March 13, 2023

In a judgment dated October 26, 2021, the Constitutional Court held that certain articles in the legislation on the tax on increase in urban land value were unconstitutional and null and void (alert dated November 3, 2021). The court determined, however, that neither (i) circumstances which, as of the judgment date, had been finally decided (either in a judgment carrying the force of res judicata, or in a final administrative decision), nor (ii) assessments or self-assessments of the tax which had not been challenged as of that same date could be reviewed.

On the basis of that judgment, Madrid High Court concluded that an assessment could be reviewed which, as of October 26, 2021, was within the time limit for filing an application for judicial review.

1.7 Electronic notices. - Companies are required to enter the authorities' website periodically, and prior notification of each notice is not needed

Catalan High Court. Judgment of February 09, 2023

Under the Common Administrative Procedure Law, the authorities have to send notices of their notifications (whether they are made on paper or electronically) to the interested party's electronic device or postal address.

In the case analyzed in this judgment, a local authority sent notices of assessments of the tax on increase in urban land value electronically, but the taxpayer did not see them in the maximum period of 10 days from when they were delivered. Following expiry of the period allowed for challenging them, the entity filed an appeal for reconsideration. The authorities did not admit the appeal due to being outside the time limit, against which the entity submitted that it had not received notice of the assessment notification, and therefore they had not been validly notified.

Applying the doctrine of the Constitutional Court, the high court held that notifications were considered to be given because 10 days had run from when they were delivered at the company's electronic address. The court recalled that legal entities have an obligation to receive notifications electronically and therefore have to enter the website every ten days to check whether a notification has been delivered to them. The court held that prior notice is ancillary (rather than mandatory), and its only aim is to apprise that a notification has been delivered to the citizen.

1.8 Collection procedure. - An application for deferred payment should not fail to be admitted if the administrative request for correction has been fulfilled

National Appellate Court. **Judgment of February 23, 2023**

A company applied for deferred payment of a tax debt in respect of personal income tax withholdings. Two days after the application, the tax authorities issued a request for correction asking for further information to be produced evidencing "*the specific economic damage it would have on economic activity and jobs*".

In its reply to the request, the taxpayer submitted that it was unable to access the lending market and that the tax authorities owed it a large refund. Additionally, the taxpayer produced a draft expert report on its circumstances, informing that it would produce the final report when it became available. Later, it paid the debt and applied to discontinue the application for deferred payment.

The tax authorities nevertheless failed to admit the application due to considering that the appellant had not correctly fulfilled the request for correction. Because that non-admission resulted in the application being considered not to have been filed (and even though the debt had been paid), an order initiating enforced collection proceedings was issued.

The National Appellate Court concluded that in the examined case it cannot be considered that the entity failed to fulfill the procedure for correction of its application for deferred payment, because it submitted sufficient elements for its situation to be understood. For all these reasons, it held that the decision not to admit the application was clearly unfounded and that, if applicable, it should have been dismissed, and a new payment time limit in the voluntary payment period should have been granted to the taxpayer. The court therefore held that the order initiating enforced collection proceedings was null and void.

1.9 Management procedures. - Extended time limits requested by the taxpayer which are not expressly decided by the authorities do not amount to a delay attributable to the taxpayer

Galician High Court. **Judgment of May 18, 2022**

A taxpayer applied twice for an extension to the time limit for replying to requests made in a limited review procedure. The authorities did not expressly decide on these applications, and therefore, under the applicable legislation, they were considered to be granted automatically.

In the assessment issued following the review work, the authorities considered those extended time limits to be delays attributable to the taxpayer. As a result, they were not taken into account to compute the maximum period for completing the review work.

Applying the Supreme Court's case law, the Galician High Court recalled that the "automatic grant" of applications for extension is a consequence arising from a breach by the authorities of their obligation to decide and is justified for reasons of procedural expediency and legal certainty for taxpayers; and it does not extinguish the tax authorities' legal obligation to issue an express decision.

Since in this case the tax authorities did not expressly decide on the applications, they cannot benefit from their own breach. Consequently, extensions to the time limit granted automatically as a result of the absence of an express decision cannot be excluded from the time period for completing the procedure, which (in the specific case examined) determined expiry of the time limit for the procedure due to going above the maximum period.

1.10 Management procedure. – Expiry of the time limit for a management procedure must be declared expressly

Supreme Court. Judgment of April 11, 2023

In this judgment, the Supreme Court reinforced its doctrine on the obligation to expressly declare that the time limit for management procedures has expired before commencing another procedure relating to the same tax obligation. The judgment originated from a management procedure initiated by the Vizcaya provincial tax authorities, but, as the court itself recounted, the general tax law for that province is consistent with the General Taxation Law (LGT), and therefore the conclusions in the judgment are transferable to the procedures governed by that law.

The court underlined that expiry of the time limit must be declared expressly, because management procedures may cause unfavorable or tax effects for the taxpayer. The court clarified, however, that despite the authorities' unconditional duty to declare expiry of the time limit, the work performed in the course of an expired procedure may retain its validity and effectiveness for evidence purposes in any other procedures that may be initiated later, provided that expiry of the time limit is first declared expressly and the statute of limitations has not ended.

1.11 Review procedure. – Applications for judicial review by owners' associations without a legal personality may be brought by their chairpersons, and do not need an express resolution by the owners' meeting

Supreme Court. Judgment of March 16, 2023

Article 45.2.d) of the Judicial Review Law requires that, when filing an application for judicial review on behalf of a legal entity, proof is provided that the person representing the maximum decision-making power within the entity has decided to file that application. In this judgment it was examined whether, in a case involving an owners' association without a legal personality, the application needs to be accompanied by a resolution of the owners' meeting to bring legal action.

The Supreme Court concluded that the adoption of resolutions of this type is not necessary, and the chairperson of the association may bring legal action directly on behalf of the association. The court underlined that the Horizontal Property Law grants authority to the chairpersons of owners' associations to act on behalf of those associations in and out of court.

1.12 Penalty procedure. - EU law precludes national legislation that allows the activities of an authorized operator to be suspended on the ground that the operator has been formally charged in criminal proceedings although not convicted, provided that the penalty is of a criminal nature

Court of Justice of the European Union. Judgment of March 23, 2023. Case C-412/21

Following a search carried out at the premises of a Romanian company authorized to operate as a tax warehouse for products subject to excise duty, criminal proceedings were initiated for suspected infringements of the Romanian Tax Code. Simultaneously, the Romanian authorities suspended the authorization granted to the entity for a specified period, due to interpreting that its national law allowed this measure to be imposed simply on the basis of evidence that infringements under the legislation on excise duty may have been committed. At the end of the initial suspension period, the Romanian authorities suspended the authorization once more, this time for an indefinite period, on the ground that the entity had been formally charged in the criminal proceedings brought against it.

The CJEU concluded that legislation of the type described that allows an authorization of that nature to be suspended until the conclusion of criminal proceedings, on the sole ground that the holder of that authorization has been formally charged in those criminal proceedings infringes the principle of the presumption of innocence, if that suspension constitutes a criminal penalty, something that must be assessed by the national court.

However, the imposition of a criminal penalty for infringements of the legislation on excise duty on a company that has already been the subject of another final criminal penalty in relation to the same facts, is not precluded by the *ne bis in idem* principle where certain requirements are fulfilled, notably: (i) that the possibility of duplicating those two penalties is provided for by law, (ii) that the duplicated penalties relate to different aspects of the same unlawful conduct at issue, (iii) that there are clear and precise rules setting out which acts or omissions may be subject to a duplication of proceedings and penalties, and (iv) that the first penalty is taken into account in the assessment of the second, meaning that the overall penalties imposed correspond to the seriousness of the offenses committed.

2. Decisions

2.1 Tax on economic activities. – Tax elements must be computed by reference to availability rather than effective use

Central Economic-Administrative Tribunal. Decision of March 22, 2023

Calculation of the tax on economic activities liability in respect of an economic activity requires computation of the "tax elements" specifically mentioned in the relevant caption.

In the case examined in this decision, an entity had been classified under captions 969.2 *"Gambling casinos"* and 969.4 *"Recreational and gambling machines",* in which the tax liability is calculated by reference to the tax elements "number of tables" and "number of recreational machines" used in the activity, respectively.

Following an audit, the authorities increased the number of tax elements, by taking into account all the gambling tables and machines that had served to carry on the economic activity at any point in the year, instead of computing only the tax elements that had been put to real and effective use in the activity when the tax became payable (on January 1 of each year), as the entity had done.

TEAC held that the use of a tax element in the taxable activity is imposed by objective conditions, and determination of the taxable amount for the purposes of the tax on economic activities cannot be made indeterminate based on the decision of the interested party. In other words, the fact that the tax elements (the number of tables / machines in this case) that the taxpayer uses over the year varies (they are used more in some months and less in others) does not imply that they have ceased to be used in the activity at any point.

2.2 VAT. – For a holding company to be able to deduct amounts of VAT associated with services received to acquire shares, the cost of those services must be included in the price of the services it provides to its subsidiaries

Central Economic-Administrative Tribunal. **Decision of February 21, 2023**

In a limited review procedure, the tax authorities concluded that the amounts of input VAT incurred by a holding company on services received to acquire shares in its subsidiaries were not deductible, even though that entity provided management services to its subsidiaries. According to the tax authorities, the expenses at issue were not part of the overheads of its activity (which would indeed give entitlement to deduct input VAT), because they were related to exempt activities (the potential future sale of the shares) or non-taxable activities (the obtaining of dividends).

TEAC confirmed that the input VAT was not deductible. According to the tribunal, in a review of its received and issued invoices, it was found that the cost of the services received to acquire the shares was not included in the invoices issued in respect of the services provided to the subsidiaries. Therefore, it had to be concluded that it had not been evidenced that the received services relate to the performance of activities generating the right to deduct.

2.3 Inheritance and gift tax. – The family business reduction may be applied to the value of shares relating to the entity's financial assets, if proof is provided that they are used in the activities of the business

Central Economic-Administrative Tribunal. Decision of February 28, 2023

A mother and her two offspring filed inheritance and gift tax self-assessments following the death of the father of the offspring. Among the property and rights of the decedent there were shares in an entity that fulfilled the requirements for the family business regime, and therefore they were exempt from wealth tax and, consequently, benefitted from the reduction allowed for inheritance and gift tax purposes.

The auditors considered that the exemption from wealth tax (and therefore, the family business reduction for inheritance and gift tax purposes) was not a full exemption, because only part of the company's assets was used in its economic activity. The reason being that certain financial investments (notably a loan provided to another entity in the family group) were not considered to be used insofar as, under the Personal Income Tax Law (which is taken into account in the Wealth Tax Law), assets of this type cannot, under any circumstances, be considered to be used in the economic activity.

TEAC applied the principle determined by the Supreme Court in its judgment of January 10, 2022 (appeal 1563/2020) (January 2022 Newsletter) to conclude that the assets representing an investment in the equity of an entity and the transfer of capital to third parties may indeed be considered (in the same way as any other asset or element on the financial statements that is used in an economic activity) to be used in an economic activity, if evidence is provided that they are needed for the performance of that activity. In any event, it lies with the taxpayer to provide proof of that use.

2.4 Inheritance and gift tax. – Central government rather than autonomous community legislation has to be applied where the beneficiary of a life insurance policy does not receive other property in the estate

Central Economic-Administrative Tribunal. Decision of February 28, 2023

The issue consisted of determining which legislation (central government or autonomous community) was applicable in relation to inheritance and gift tax in a case where, following the death of the decedent (resident in France), their spouse (resident in Portugal) received a sum under a group life insurance policy signed with a Spanish entity.

TEAC underlined that article 32 of Law 22/2009 of December 18, 2009 states that income for inheritance and gift tax purposes is considered to arise in the territory of an autonomous community, where the sums received under life insurance policies are added to the other property and rights in the beneficiary's portion of the estate. This rule, therefore, is not applicable where the only taxable event consists of the receipt of sums under life insurance contracts, in other words, where the beneficiary of those sums does not receive any other property out of the estate. In these cases, the power to assess inheritance and gift tax lies exclusively with the central government and the applicable legislation is that of the central government also.

This is so regardless of whether the individual is liable for the tax as a resident or nonresident taxpayer, in addition to which no discrimination may be observed based on the insured's nonresident status.

2.5 Management procedures. - TEAC determines its final interpretation on the examination powers of the tax management bodies with respect to persons with tax obligations who have applied special regimes

Central Economic-Administrative Tribunal. Decisions of February 23 (0552/2021) and of March 22 (9093/2022), 2023

In its judgment of March 23, 2021 (appeal 3688/2019), the Supreme Court declared that the tax management bodies cannot carry out any work that implies an examination of the application of special regimes, and that any such work can only be performed by the tax audit authority.

This interpretation was applied by the Valencia Regional Economic-Administrative Tribunal in a decision dated June 14, 2022 (December 2022 Newsletter), in which it concluded that the prohibition determined by the Supreme Court relates to both examination of the application the special regime concerned as well as of any fact, item of information or circumstance related to that regime.

However, in a decision dated October 4, 2022 (October 2022 Newsletter), TEAC pronounced to the opposite effect, and declared that, insofar as (in the case then being examined) the tax management body simply contrasted information held by the tax authorities against that produced by the interested party to examine whether the application for correction of the self-assessment filed by the interested party could be accepted, that work did not encroach on the powers of the audit bodies.

In determining its final interpretation, TEAC altered this principle and clarified that the tax management bodies can indeed perform administrative tax examinations on parties with tax obligations that have applied a given special regime, whenever the subject-matter of the work does not relate to an analysis of fulfillment of the requirements laid down for the application of that regime and whenever the adjustment is not based on the specific rules of this regime, but on the common rules on the tax.

3. Resolutions by the DGT

3.1 Personal income tax. - Interest on delayed payment of salary is a capital gain not subject to withholding

Directorate General for Taxes. Resolution V0272-23 of February 15, 2023

In this resolution, the DGT recalled that the purpose of compensatory interest is to compensate the creditor for the loss caused by a breach or delay in correct performance of an obligation, as occurs with interest on the delayed payment of salary. Therefore, this interest must be taxed as a capital gain. This classification means that no withholding is required.

3.2 Personal income tax. - The supply of reduced products on vending machines located in a company dining hall may be exempt from tax

Directorate General for Taxes. Resolution V0284-23 of February 15, 2023

A company is considering installing automatic vending machines in its cafeteria for products including drinks, coffee, sandwiches, snacks, nuts, sweets, cold food, etc. Workers will be able to buy the products using a customized card associated with the holder's name, so for each worker a record will be kept with a list of their purchased products, stating the date, the product and the cost of each use, subject to a €11 daily limit. Additionally, the machines will only run on working days at the company.

The DGT concluded that the exemption allowed in the legislation for income in kind consisting of supplies of products at reduced prices made in company canteens or cafeterias or staff discount stores may be applied without having to fulfill the requirements laid down for "indirect mechanisms" (meal vouchers). Namely, it will be sufficient if the service is supplied on working days for the employee or worker if they are not entitled to the payment of nontaxable per diems for meal and accommodation expenses for those days.

3.3 Personal income tax. – The determination of shares to be awarded to workers by reference to their salaries does not meet the necessary requirement for income in kind for personal income tax purposes

Directorate General for Taxes. Resolution V0221-23 of February 13, 2023

The Personal Income Tax Law allows a €12,000 exemption for company shares awarded to serving employees, at no cost or at below the normal market price, where, among other requirements, the offer is made with the same conditions to every worker at the company, or in the group or subgroup of companies.

The case analyzed in this resolution concerns a company that was considering including in its flexible compensation plan the award of shares to workers at a price below their market value. Its intention was to restrict the numbers of shares they could purchase by reference to the workers' gross salaries, which would involve, for example, setting a 10% limit for workers with gross annual salaries between €14,000 and €20,000, a 15% limit for workers with salaries between €20,000 and €40,000, and a 25% limit for salaries above €40,000.

According to the DGT, in this case the requirement for the shares to be awarded to every worker with the same conditions would not be fulfilled, and therefore the exemption did not apply.

3.4 Nonresident income tax. – The delivery of products to a logistics company in Spain for them to be supplied to a subsidiary does not create a permanent establishment in Spain, if the subsidiary sells the products to customers on its own behalf

Directorate General for Taxes. Resolution V0452-23 of February 28, 2023

A company having its head office in Denmark with no employees in Spain transfers its goods to a warehouse located in Spain, which is owned by a separate company that provides logistics services to it and over which the Danish company does not have any right in rem for use and enjoyment (its workers can enter the warehouse, but only if they are accompanied by a member of staff of the logistics company). The Danish company's products are sent to Spain to be sold to a Spanish subsidiary that acts as wholesale distributor and takes care of the marketing and sale of those products to third party local distributors. Customers' relationships are held by the Spanish subsidiary, with which they place their orders. For its part, the logistics company, after the products have been received from Denmark, takes care of packing, labelling and packaging them (under instructions received from the Danish company) and of their physical delivery to the subsidiary's customers.

On the basis of that information, and taking into account the Spanish nonresident income tax legislation (because there is no tax treaty with Denmark), the DGT concluded that the Danish entity does not have a permanent establishment in Spain, insofar as (i) it does not have in Spain a fixed place of business with a sufficient degree of permanence, and (ii) it does not appear to have a dependent agent in Spain, since the logistics company is not authorized to enter into contracts for and on behalf of the Danish company, and the Spanish subsidiary apparently sells the acquired products on its own behalf and for its own account. However, if the Spanish company sold the products for the account of the Danish company, this company would have a dependent agent, and therefore, a permanent establishment in Spain.

3.5 Tax on large fortunes. - Inbound expatriates are subject to the tax as nonresident taxpayers

Directorate General for Taxes. Resolution V0420-23 of February 24, 2023

The DGT concluded in this resolution that the taxable persons for the temporary solidarity tax on large fortunes who have correctly applied the special regime applicable to workers sent to work in Spain under article 93 of the Personal Income Tax Law will be subject as nonresident taxpayers (throughout the period in which they apply that special tax regime) not only for wealth tax purposes, but also for the purpose of the temporary solidarity tax on large fortunes.

3.6 Tax on increase in urban land value. – The transfer of ownership of a building after it has been leased under a finance lease may amount to a taxable event for this tax

Directorate General for Taxes. Resolutions V0198-23 and V0199-23 of February 8, 2023

It was analyzed whether, under the currently in force legislation on the tax (see our alert dated November 9, 2021), exercising a purchase option in finance lease transactions gives rise to a taxable event for the tax on increase in urban land value; taking into account that the law states that transactions in which there is no increase in value are not taxable.

The DGT took the view that, in these cases, the income obtained by the financial institution is not represented by the difference between transfer value at the point of exercise of the purchase option (which is usually the residual value of the building at that time) and acquisition value. The economic capacity of that institution must include all the revenues obtained from the finance lease, including those in respect of interest expense and fees.

In other words, in these cases, under the principle adopted in the DGT's resolutions, the transfer of ownership as a result of exercising the purchase option will always give rise to the taxable event for the tax insofar as the transfer value of the building (calculated as the sum of the aggregate amounts paid by the lessee over the lease period, including the interest expense and fees, and the amount relating to the purchase option) will be higher than the acquisition value.

3.7 Tax on increase in urban land value. – The reference value cannot be used to evidence that the transaction is not taxable due to the absence of an increase in value

Directorate General for Taxes. Resolution V0157-23 of February 6, 2023

A married couple intend to give their three offspring absolute ownership of a building and they asked whether for the purpose of calculating whether there is an increase in value for the purposes of the tax on increase in urban land value the “reference value” of the building at the time of the gift may be taken as the transfer value.

The DGT did not accept this possibility on the basis that, under the law, the transfer value must be the value appearing on the instrument recording the transfer or the value audited by the tax authorities, and no reference value is mentioned.

3.8 Tax on economic activities. – The sale and purchase of cryptocurrencies for a person's own benefit is not an economic activity

Directorate General for Taxes. Resolution V0213-23 of February 9, 2023

According to the DGT, the sale and purchase of cryptocurrencies by an individual or legal entity for their own benefit does not amount to an economic activity by a trader or professional for the purposes of the tax on economic activities.

By contrast, an economic activity subject to the tax on economic activities does exist where cryptocurrency sale and purchase or mining services are provided to third parties. The caption in which the services must be classified in these cases is 831.9 *"Other financial services not elsewhere classified"* in the classifications for the tax.

4. Legislation

4.1 Reductions have been made to applicable net income and general reduction indexes for the personal income tax objective assessment method

Order HFP/405/2023 of April 18, 2023, published in the Official State Gazette on April 25, 2023, contains reductions for 2022 to the applicable net income and general reduction indexes for the personal income tax objective assessment method for agricultural and livestock activities affected by various exceptional circumstances (Annex I to the Order contains the applicable reductions classified by autonomous community, province and activity).

4.2 Amendments introduced regarding management of tax debt payments

Order HFP/387/2023 of April 18, 2023, published in the Official State Gazette on April 21, 2023, makes the following changes (among others):

(i) It extends the direct debit option as a payment method for debts owed to AEAT relating to self-assessments and applications for deferred or split payment of tax, where the specified account is held at institutions that are not authorized for central government tax collection management, if they are in the Single Euro Payments Area (SEPA), formed by the 27 member states of the European Union, Iceland, Liechtenstein, Norway, Andorra, Monaco, San Marino, Switzerland, the United Kingdom and Vatican City State. Any bank fees and expenses that AEAT has to pay to participating institutions authorized for tax collection management in respect of the necessary banking operations in this procedure will be charged to the person with the payment obligation.

(ii) Amendments are introduced to expressly include a range of exceptions to the obligation to use direct debit for deferred or split payments granted by bodies attached to the Tax Agency. These exceptions are due to the inability to approve direct debits from accounts held at the Bank of Spain.

This order came into force on April 22, 2023. However, the direct debit mechanism mentioned above will apply to the following payments:

(i) For deferred or split payments, to those filed with AEAT on or after July 1, 2023.

(ii) For payments of self-assessments, generally, to those filed on or after February 1, 2024. However, direct debits may also be specified from accounts held by institutions not authorized for tax collection management located in SEPA for the payment of any self-assessments that must be filed between July 1, 2023 and January 31, 2024 if the procedure specified in the order is followed.

4.3 Amendments made to form 036 and in relation to the obligation to keep VAT records

Order HFP/381/2023 of April 18, 2023, published in the Official State Gazette on April 20, 2023, makes the following amendments:

(i) **Form 036 (business taxation status notification form)**:

- This form now contains the request for inclusion on or removal from the Register of withdrawers from tax warehouses of products included within the objective scope of the tax on spirits and alcoholic beverages or of the hydrocarbon tax.
- A technical amendment has been added to include the effective date of the acquisition or removal of reseller status for the cellphones/mobile phones, videogame consoles, laptop computers and digital tablets referred to in article 84.one.2 of the VAT Law.

(ii) **VAT books**: Fields have been added to note in the record book for issued invoices any changes to the taxable amount and tax liability, where there is no obligation to issue a correction invoice (where, for example, special regimes are applied in which taxable amount is determined by reference to profit margin).

4.4 Various sets of tax regulations have been amended

Royal Decree-Law 249/2023 of April 4, 2023, published on April 5, 2023 in the Official State Gazette, contains various tax measures. These amendments came into force on April 25, 2023, with a few exceptions as mentioned below:

(i) **General Regulations on review in the administrative jurisdiction** and **General Collection Regulations.** Several articles have been amended to recognize that the reiteration of applications for suspension, deferred payment, split payment, offset, or payment in kind will not prevent commencement of the enforced payment period where another earlier application had been denied, in relation to the same tax debt.

(ii) **General Regulations on tax management and audit work and procedures and implementing the common rules on procedures to manage, collect and audit taxes:**

- Provisions have been introduced on formation of the Register of withdrawers from tax warehouses of products included within the objective scope of the tax on spirits and alcoholic beverages or the hydrocarbon tax.

- An amendment has been made to the reporting obligation of insurers in relation to certain life and disability and temporary and life annuity insurance policies, in line with the new valuation rules on these instruments for wealth tax purposes, introduced by Law 11/2021 of July 9, 2021 ("Anti-Fraud Law") (Commentary dated July 10, 2021).

- Virtual currencies:

  The reporting obligations regarding virtual and fiat currencies (and transactions performed with them) have been implemented. The specific requirements are:

  - Anyone (resident in Spain or having a permanent establishment in Spain) who provides services for safeguarding private cryptographic keys on behalf of third parties, or for holding, storing or transferring virtual currencies will have to report the amounts in virtual currencies.

  - Anyone who is Spanish resident (or has a permanent establishment in Spain) and provides exchange services between virtual and fiat currencies or between different virtual currencies, acts as intermediary in the performance of those transactions or provides services for safeguarding private cryptographic keys on behalf of third parties, or for holding, storing or transferring virtual currencies will have to report any transactions to acquire, exchange or transfer virtual currencies and report any collections and payments made in those currencies. This obligation also applies to anyone making initial offerings of new virtual currencies.

  The first returns will have to be filed on or after January 1, 2024, with respect to information relating to the previous year; except for the first return for transactions with virtual currencies which has to relate to transactions performed on or after April 25, 2023.

  The reporting obligation regarding virtual currencies located abroad has been implemented, which has been added to the current reporting obligation (form 720) relating to (i) financial accounts, (ii) real estate assets and rights over real estate assets and (iii) securities, rights, insurance contracts and income; all of which are abroad. This obligation will also apply from January 1, 2024.

- Assessment of late-payment interest payable to parties with tax obligations in respect of refunds decided in an audit: It has been stated that any amounts of time by which the time period for the audit is extended will not be included to compute the accrual period for the interest.

- Revocation of taxpayer identification numbers: (i) It has been stated that the revocation may be made in tax management, audit and collection procedures rather than only in business taxation status examination work; and (ii) a new ground for revocation has been provided, consisting of a breach of the obligation to file financial statements with the commercial registry in four consecutive fiscal years.

- With respect to entry to a constitutionally protected property, the application for authorization of entry is required to include the decision by the competent tax authority. This decision will also be required for entry to certain places other than the specified address if the taxpayer has objected to entry.

(iii) **Inheritance and Gift Tax Regulations.** Residents of EU member states or of states in the European Economic Area (with legislation on mutual assistance in relation to the exchange of tax information and collection) who are taxable as nonresident taxpayers, will not have to appoint representatives in Spain for their dealings with the Spanish tax authorities.

(iv) **VAT Regulations.** Effective on July 1, 2023 (for self-assessments relating to taxable periods commencing on or after that date):

- A technical amendment has been made regarding the record books for issued invoices, to enable changes to the taxable amount and tax liability to be recorded where a correction invoice does not have to be issued for them.

- The specific time limit has been provided for sending noted information that is not recorded in a correction invoice.

(v) **Personal Income Tax and Corporate Income Tax Regulations**

- Personal income tax: It has been stated that failure to pay the first personal income tax installment in the event of split payment (60%) will trigger commencement of the enforced payment period for the whole amount payable.

- Personal income tax / Corporate income tax: The existing exemption from withholdings for capital gains obtained from the redemption or transfer of shares in Spanish collective investment vehicles which are considered to be investment funds or listed investment companies has been extended to include equivalent collective investment vehicles created in other countries, regardless of whether they are listed on a domestic or foreign market, where their natures and operating rules are comparable to those of collective investment vehicles created in Spain.

4.5 Amendments have been made to the Economic Accord with Navarra and the Economic Arrangement with the Basque Country

Law 8/2023 of April 3, 2023, amending the Economic Accord between the central government and province of Navarra and Law 9/2023 of April 3, 2023, amending the Economic Arrangement with the Basque Country, were published on April 4, 2023 in the Official State Gazette.

For a summary of the main new provisions, see our alert dated April 12, 2023.

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