Tax Newsletter

GARRIGUES

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1. Software projects give entitlement to tax credit for technological innovation

The National Appellate Court has endorsed including software in the definition of "production processes" even if it is developed in non-manufacturing sectors; and criticized denial of entitlement to the credit for software projects on the basis of technical reports from the Spanish finance authority containing legal assessments.

For several years now, the tax authorities have questioned the right to claim the tax credit for research and development activities and technological innovation under the Corporate Income Tax Law. In particular, they have repeatedly questioned whether the tax credit should be allowed in relation to software projects which generally fall within the field of technological innovation. They have supported their conclusions on ad hoc reports issued by Spanish tax agency's own computing department.

Although those reports do not usually question whether software projects fall within technological innovation where the taxpayer has obtained reasoned reports from the Ministry of Science and Innovation (formerly the Ministry of the Economy and Competitiveness), the tax credit base is practically reduced to zero because it is considered that the costs associated with the projects generally do not fall within those included in "the tax credit base" under article 35.2.b).1 and 2 of the law. These paragraphs state that the following elements form part of the credit base:

(a) Technological diagnosis activities to identify, define and guide advanced technological solutions.

(b) Industrial design and production process engineering (including the conception and preparation of plans, drawings and media to be used to define the descriptive elements, technical specifications and operating characteristics needed for the manufacturing, testing, installation and utilization of products), among others.

For these purposes, tax auditors have been finding that the costs incurred in software projects, are either not included in any of the foregoing items, or only the part relating to "technological diagnosis" is included not the part relating to "development expenses" for the projects. The tax auditors' conclusion is underpinned by the idea that where the law mentions "production processes" it means production processes in the manufacturing industry.

In a judgment on July 1, 2021 (appeal 120/2018), the National Appellate Court allowed, in opposition to this argument, (i) the technological innovation credit to be claimed for software projects in non-manufacturing industries (the particular case examined in the judgment involved banking software); and (ii) also allowed the tax credit base to include both diagnosis and project development expenses. It had already delivered a similar ruling in its judgment on May 12, 2021 (appeal 1087/2017), in which it stated that "it cannot be said either that the development of software for banking is restricted to technological diagnosis".

The National Appellate Court also criticized tax auditors for basing their conclusions on technical reports making legal assessments, and which, indirectly, although they say they are discussing the tax credit base, are actually questioning whether software projects may be included in technological innovation, even where the taxpayer has produced the Ministry's reports.

Later, in its judgment on July 7, 2021 (appeal 286/2018), also related to banking software, the National Appellate Court recalled that, although the Ministry's reports only bind the tax authorities in relation to characterizing the activity as research and development or as technological innovation, it cannot be overlooked that in these reports the Ministry may also give its opinion on the expenses that form part of the tax credit base as an element of its "examination work", within the meaning supported by the Supreme Court in its judgment on March 17, 2016 (appeal 2799/2013); and therefore, these reports have, in relation to this issue, "a value, a significance and an importance which cannot neither be ignored nor overlooked".

2. Judgments

2.1 Corporate income tax. – Tax credit for advertising and publicity expenses to publicize events of exceptional public interest is calculated on aggregate cost of containers

Supreme Court. Judgments of July 20, 2021 (appeals 4081/2018, 1773/2018 and 6716/2017)

In these judgments, the Supreme Court modified its principle concerning the method of calculating the corporate income tax credit equal to 15% of the advertising and publicity expenses to publicize events of exceptional public interest, in cases concerning purchases of containers bearing the events' logos.

The court concluded that the tax credit base is the aggregate cost of the containers bearing the logo. In our alert on July 27, 2021 we discussed this judgment in detail.

2.2 Corporate income tax. – Promotional expenses for sports activities are deductible if related to the entity's corporate purpose

National Appellate Court. Judgment of June 8, 2021

The examined case concerned a property developer who recorded advertising and sponsorship expenses (including expenses for participating in rallies) which were treated as deductible expenses in its 2005 corporate income tax self-assessment. Tax auditors disallowed deduction of these expenses by arguing that they were not related to the entity's activity, besides which their amount (slightly over one million euros) was far too high in comparison with revenues.

In its judgment, the National Appellate Court underlined that property development was not the only activity in the appellant's corporate purpose, it also contained, among others, providing motor racing sports services. Moreover, bearing in mind that its reported revenues amounted to €10 million, there does not appear to be any ground for stating that the one million euro expense is "far too high". Whatever the case, the court stressed that it is the tax authorities who have to prove that the expenses they are not allowing to be deducted do not have any impact on the entity's activity (knowledge of it, raising awareness of its brand, etc.), which was not proved in the proceeding.

2.3 Personal income tax. – EU law precludes legislation that does not allow tax benefits to be claimed based on origin of income obtained by taxpayer

Court of Justice of the European Union. Judgment of July 15, 2021. Case C-241/20

An individual who is tax resident in Belgium worked for an employer in Luxembourg in respect of which they received salary income. Additionally, they received rental income in respect of a property located in Luxembourg.

Under the Belgium-Luxembourg tax treaty, both types of income are taxable in Luxembourg and exempt from tax in Belgium. Under Belgian law, however, claiming this exemption means partially forfeiting certain Belgian personal income tax benefits.

The CJEU concluded that the Belgian legislation amounts to a restriction on the free movement of workers and of capital, insofar as it determines different treatment based on the origin of the income (in this case, income obtained in Luxembourg) and may act as a deterrent for the taxpayer to exercise those freedoms. The CJEU held moreover that this legislation does not seek a legitimate objective justified by overriding reasons in the public interest.

Lastly, the CJEU noted that the foregoing conclusion is not altered by the following circumstances: (i) the taxpayer did not receive significant amounts of income in the state of residence (Belgium), (ii) the resident had benefited from tax advantages in the member state of employment (Luxembourg) in respect of the income taxable in that state, and those advantages did not include those granted by the state of residence; or (iii) that in the state of employment the taxpayer had obtained a tax reduction equal, at least, to the reduction in respect of the tax advantages to which the taxpayer was entitled in the state of residence.

2.4 Personal income tax. – Even if taxpayer's family keep their residence in Spain until the end of the school year, the taxpayer may be nonresident

National Appellate Court. Judgment of March 4, 2021

The National Appellate Court settled the case of a taxpayer who relocated his principal residence for work reasons from Spain to the United Kingdom starting on January 1, 2011. The tax authorities, however, considered that the taxpayer was a Spanish personal income taxpayer in that period, on the basis that both his wife and his children kept their residence in Spain until the end of the children's school year (after June 2011). To draw that conclusion, the tax authorities based their arguments on the rule contained in the personal income tax legislation, according to which the taxpayer is presumed to be resident in Spain if they live there with their spouse and children.

After recognizing that this is simply a question of evidence, the court held that it had been proved that the only reason for the taxpayer's family remaining in Spain beyond June 2011 was the end of the school year for their younger children, because it had been proved that the whole family relocated to the United Kingdom in August 2011 with the intention of residing in that country. In short, according to the court, it is clear that postponement of the relocation of the taxpayer's family was justified by schooling reasons.

Therefore, it may not be concluded that in 2011 the taxpayer's economic or family interests were in Spain and therefore the taxpayer cannot be treated as resident in Spain in that period for personal income tax purposes.

2.5 Nonresident income tax. – Parent-subsidiary exemption cannot be denied where the sole shareholders are mostly nonresident, if it is not proved that the parent company was set up to benefit from the exemption

National Appellate Court. **Judgment of May 31, 2021**

A Luxembourg entity received dividends and attendance fees for the shareholders' meetings of its Spanish subsidiary.

The parent-subsidiary exemption was claimed on the dividends, and for that reason the subsidiary did not withhold any nonresident income tax on them. The tax authorities rejected the exemption on the basis that the majority of the parent company's voting rights were held by persons who were non-EU resident (due to the sole shareholder being an entity resident in Qatar).

The National Appellate Court recalled that the legislation allows the exemption to be claimed in these cases also, if, among other requirements, it can be proved that the parent company (the Luxembourg entity in this case) was set up for valid economic reasons.

In the National Appellate Court's view it is inferable from the data in the case file that the Luxembourg parent company is a holding company which engages is making investments in various European countries, and the reason for setting up that company was not simply its interest in claiming the exemption on the dividends at issue. Therefore, after not finding any fraudulent intention, it confirmed the existence of valid economic reasons and allowed the exemption.

In relation to attendance fees for shareholders' meetings, the subsidiary applied for a refund of the withholdings made under the Luxembourg-Spain tax treaty. The refund was denied by the tax authorities who argued that those payments were really dividends.

The National Appellate Court held that attendance fees for shareholders' meetings cannot be treated as if they were dividends, because they are not paid in respect of investment in the entity's income, being instead a payment to shareholders for attending shareholders' meetings. Moreover, Spain does not give the same tax treatment to dividends and attendance fees (the double taxation credit is not claimable on this second type of payment). It concluded therefore that, under the Luxembourg-Spain tax treaty (article 22), those fees are not taxable in Spain.

2.6 VAT. – Absence of proof that correction invoices were submitted to the debtor means taxable amount cannot be changed

National Appellate Court. **Judgment of June 23, 2021**

An entity changed the taxable amount on a number of invoices following insolvency orders on two creditors. It issued correction invoices and filed the required notification (on form 952) to the tax authorities. The submitted invoices were sent to the creditors by ordinary mail.

The tax authorities argued that it had not been suitably proved that the invoices were submitted, and for that reason rejected the change to the taxable amount, all of which was confirmed by TEAC.

The National Appellate Court confirmed the tax authorities' reasoning. The court stated that the obligation incumbent on the taxable person to issue and submit the correction invoice to the customer respects the principles of both tax neutrality and proportionality. It is not, therefore, a simple procedural requirement, instead a proportionate requirement in relation to the legitimate aim to ensure the correct collection mechanism for VAT, and eliminate the risk of loss of tax revenues.

2.7 VAT. – Tax authorities cannot rely, to the detriment of the taxpayer, on a directive that has not been transposed fully or correctly

Supreme Court. Judgments of June 10 (appeal 1045/2020) and June 14 2021 (appeal 1093/2020)

A company purchased a few properties in 2006. It was specified in the deed that the transaction was subject to and not exempt from VAT. Additionally, the purchaser paid stamp tax.

Article 5.One.b of the VAT law in force when the purchase took place stated that commercial companies had trader status for VAT purposes in all cases. Later, however, Law 4/2008, of December 23, 2008, amended the wording of that article to treat commercial companies as traders or professionals "unless there is proof to the contrary".

It was concluded in an audit that the entity could not be characterized as a VAT taxable person because it had not engaged in any trading activity since it was created, which determined that the company was liable for transfer and stamp tax under the "transfers for consideration heading" rather than stamp tax, despite the wording of the law when the transaction was performed. The auditors argued that the legislation then in force had not transposed the VAT Directive correctly and that therefore regard should be had to the directive (which the 2008 amendment wrote into the law).

The Supreme Court concluded that taxable persons may rely, to their benefit, on directives not transposed within the time limit or transposed incorrectly (ascendant vertical direct effect), whereas the tax authorities do not have that prerogative (descendant or inverse effect) if it is detrimental to a private party. According to the court, a directive cannot create obligations for a private party with respect to a government that did not implement it within the time limit or in the proper manner.

2.8 Inheritance and gift tax. – Value of property left by bequest must be included in calculation of personal items

Supreme Court. Judgment of June 24, 2021

Article 15 of the Inheritance and Gift Tax Law states that "personal items shall form part of the estate and shall be valued at 3% of the amount of the decedent's estate (…)".

In the case examined in this judgment, the heirs calculated personal items by multiplying only the inherited assets by 3%, without including bequests. They supported this by relying on various resolutions by the Directorate General for Taxes according to which the term "estate" means the set of assets in the inheritance transferred on a universal basis, excluding any deductible debts and charges and the assets and rights transferred in particular to one person and through a bequest.

The Supreme Court, however, concluded that bequests cannot be treated in the same way as the deductible charges and debts that the law excludes from the estate, because these are clearly conceived and treated differently in the Civil Code. The court added that, if the appellants' view is adopted and all the assets in the inheritance were distributed or attributed in bequests, or the bequests of real estate did not include a mention that they include personal items, then this would mean that, although the inheritance of personal items is presumed, the heirs would not be taxed in this respect, which is contrary to the legislation on the tax.

2.9 Tax on increase in urban land value. – Even if real estate assets have been leased out under finance leases, their transfer may be subject to the tax

Supreme Court. Judgment of June 21, 2021

A financial institution purchased a number of real estate assets to be leased out under finance leases. Later, after the lessee had exercised the purchase option, the local council issued assessments to the financial institutions in respect of the tax on increase in urban land value.

The Supreme Court concluded that an increase in the value of the land may exist where the transferred real estate assets have been leased under finance leases, although whether or not they are subject to the tax on increase in urban land value will depend on the specific circumstances of each case. The court added in relation to this last point that it is the taxable person that has to prove the non-existence of an actual increase in value under the general rules on the burden of proof in the General Taxation Law (LGT).

2.10 Real estate tax. – Procedure for correcting cadastral value tolls tax authorities' right to determine tax debt

Supreme Court. Judgment of July 6, 2021

As a result of a procedure for correcting the cadastral value in which the cadastral value of a real estate asset was changed with retroactive effect, additional real estate tax assessments were notified to a taxpayer for non-statute barred periods. Namely, the decision (delivered on September 20, 2016) amended the cadastral value taking effect on January 22, 1998 and the additional assessments related to the years between 2013 and 2016.

The taxpayer considered that the additional assessment for 2013 was statute-barred because it was notified to the taxpayer in 2017.

The Supreme Court found in favor of the tax authorities, however, because the procedure for correcting the cadastral value had tolled the four-year statute of limitations period in which the local council had to determine the tax debt.

2.11 Environmental taxes. – Taxes on value of electricity output and on storage of spent nuclear fuel at centralized facilities are not contrary to Spanish Constitution or to EU law

Supreme Court. Judgments of June 8 (appeal 2554/2014) and June 15 2021 (appeal 2092/2015)

Law 15/2012, of December 27, 2012, on tax measures for energy sustainability contained 3 new taxes:

- Tax on the value of electricity output.
- Tax on production of spent nuclear fuel and radioactive waste resulting from nuclear power generation.
- Tax on storage of spent nuclear fuel and radioactive waste at centralized facilities.

The Supreme Court confirmed that these taxes do not breach the constitutional principle of economic capacity, a conclusion that had already been determined by the Constitutional Court, despite the similarity of their taxable events with that for the tax on economic activities.

It also ruled that, as determined in CJEU judgments on November 7, 2019 and March 21, 2021, those taxes are not contrary to EU law either.

2.12 Tax on customers' deposits at credit institutions in Andalusia. – Tax on customer deposits at credit institutions in Andalusia is not an indirect tax and does not generate double taxation due to taxable persons being taxable for corporate income tax purposes

Supreme Court. Judgments of June 15, 2021 (appeals 3082/2017 and 1305/2018)

The tax on customer deposits at credit institutions in Andalusia was a regional tax which, between its creation date and 2012 (when it was rendered invalid due to the creation of a national tax) was charged to credit institutions on customer deposits at the head office or local offices situated in Andalusia. The legislation governing the tax contained a deduction system allowing both general deductions (which depended on whether the institution's registered office was in Andalusia and on the number of offices situated in the region) and specific deductions (which depended on the amount used for sustainable economy projects and the amount used for the community projects of savings banks and the fund for education and promotion of credit cooperatives).

On the basis of the CJEU's judgment on February 25, 2021 (summarized in our March 2021 Newsletter), the Supreme Court concluded as follows:

(a) The tax on customer deposits at credit institutions in Andalusia cannot be characterized as an indirect tax.

(b) The €200,000 tax credit allowed for credit institutions having their registered office in Andalusia is precluded by freedom of establishment because it involves an unjustified difference in treatment, whereas the €5,000 tax credit does not involve that difference in treatment (unless it is proved that this second tax credit also generates unjustified discrimination).

(c) The tax does not generate double taxation. Corporate income tax is charged on the income of credit institutions, whereas the tax on customer deposits at credit institutions in Andalusia is only charged on the attraction of deposits or funds from third parties, whatever their legal nature, which carry the obligation to return them. This attraction of funds is a specific and isolated transaction which, in itself, does not generate income, so it cannot give rise to the existence of double taxation in relation to corporate income tax breaching the economic capacity principle.

2.13 Administrative procedure. – Correction of self-assessment cannot be requested to substantiate tax losses generated in statute-barred years

Supreme Court. Judgment of July 22, 2021

As a result of an insolvency proceeding, the taxpayer realized that it had made a mistake in its financial statements in the period between 2003 and 2009 which had caused it to be taxed on incorrect revenues. If those revenues had not been computed, a tax loss would have been recorded in those (now statute-barred) years.

After correcting the accounting error, the taxpayer requested correction of its corporate income tax self-assessment for the earliest non-statute barred period, to report on that return the tax losses believed to be generated in the statute-barred periods; bearing in mind that, in any event, those tax losses had not occurred more than 10 years earlier, which is the period that the tax authorities have to review them.

The Supreme Court concluded, however, that the 10 year period does not apply to the taxpayer, instead to the tax authorities (in relation to their right to review). The taxpayer is subject to a 4 year statute of limitations and therefore cannot request correction of a self-assessment for a non-statute barred period to recognize for the first time tax losses that were not included in the self-assessments for statute-barred periods.

2.14 Administrative procedure. – Voiding of assessment with reversion of procedure requires refund of amount paid in respect of original assessment

Supreme Court. Judgment of June 23, 2021

An economic-administrative tribunal voided a corporate income tax assessment on the ground that the valuation of a few assets had not been substantiated, but a reversion of procedure was ordered for the competent body to conduct a new and properly substantiated audit of reported values.

The Head of the Audit Service delivered a decision implementing TEAC's decision in which he (i) voided the original assessment, (ii) made a new provisional assessment "on account" of the assessment that would result from the procedures that had to be initiated to fulfill the reversion order; and (iii) ordered a refund of the payment made by the taxpayer in respect of the voided assessment plus the relevant late-payment interest, although the balance due obtained from that assessment on account was offset against the refund.

The Supreme Court concluded in this judgment that, where an assessment is voided on the ground of a procedural defect and the procedure is reverted, it involves a rollback of the original proceeding. In other words, a new procedure does not have to be initiated, instead the procedural breach that rendered the original procedure void has to be remedied, without precluding preservation of the acts that occurred in the process which have not been affected.

As a result, the tax authorities cannot, before the procedure has resumed, deliver a provisional assessment on account of the assessment that will ultimately be made following the new procedures or, therefore, offset the amount resulting from that provisional assessment against the amount to be refunded in respect of the voided original assessment.

2.15 Refund procedure. – Request for refund of incorrectly paid tax is correct mechanism for questioning self-assessment contrary to Spanish Constitution or EU law

Supreme Court. Judgments of July 12 (appeals 4087/2020 and 4066/2020), July 14 (appeal 3524/2020), July 15 (appeals 4036/2020 and 4144/2020) and July 16 2021 (appeal 3699/2020)

It was examined whether the correction of a tax self-assessment is the correct procedure for requesting a refund of an incorrect payment due to being contrary to the Spanish Constitution or to EU law.

The Supreme Court concluded that there is no restriction in this respect and that the fact of alleging as the only ground for challenge the unconstitutionality or incompatibility with EU law of the law creating a tax does not imply any alteration of the procedure and mechanism for seeking judicial review.

2.16 Audit procedure. – Tax authorities cannot verify, assess or levy penalties on the basis of proof found incidentally in a search conducted on third parties and held null and void by a criminal judgment

Supreme Court. Judgments of July 14, 2021 (appeal 3895/2020) and July 16, 2021 (appeals 2778/2020 and 2190/2020)

The tax authorities conducted a house search authorized by a judge in a judicial review proceeding on commercial companies. The search produced “incidental finds” (documents relating to other parties and relating to other taxes and periods other from those included in the court authorization for the search) which were used by AEAT to issue assessments and penalties to other taxpayers.

Pontevedra Provincial Appellate Court held in a final criminal judgment that the search had not been lawful because AEAT had not respected the necessary constitutional guarantees and multiple serious irregularities had been committed.

The Supreme Court concluded that the tax authorities cannot validly conduct reviews, determine assessments or impose penalties on a taxpayer by taking as the factual basis for alleged breaches of tax obligations documents or evidence seized as a result of a search conducted at the home of third parties (even if the search was authorized by a judge in this jurisdiction), where a final criminal judgment has been delivered concluding that the documents were obtained with a breach of fundamental rights. The court added that the same conclusion would be drawn even if the irregularity of the search had been formally declared by a criminal court, because in that case the search would be null and void under article 11 of the Judiciary Organic Law, which states that "evidence obtained, directly or indirectly, with a breach of fundamental rights or freedoms shall not have any effect".

In the judgment there is a dissenting opinion provided by a senior judge according to which the tax authorities are allowed to make tax adjustments and impose penalties on a taxpayer by taking into account documents seized in a house search conducted on another taxpayer (search authorized by a judge in a judicial review proceeding). The judge further specified that, where those documents are held null and void by a criminal court, the judge in the judicial review proceeding has to assess and characterize the documents and the irregularity occurred for tax purposes.

2.17 Tax management and audit procedures. – Reviewed tax losses cannot later be questioned

National Appellate Court. **Judgment of June 8, 2021**

Tax auditors denied the right to offset tax losses generated in 2003 and 2004 and used on the 2005 return, even though these tax assets had already been revised in a limited review procedure.

The National Appellate Court confirmed that, if in a limited review procedure tax losses were reviewed and were not changed as a result of that review, they cannot later be adjusted in an audit, having regard to article 140 of the General Taxation Law, because the tax authorities' right to audit those elements will have become statute-barred.

2.18 Review procedure. – Evidence produced in a judicial proceeding must be assessed by the court after it has been admitted

Supreme Court. **Judgment of July 27, 2021**

In a VAT review procedure, AEAT asked a taxpayer to produce a number of invoices in two official requests. Instead of delivering the invoices, the taxpayer notified the tax authorities that they were available for examination at the company's registered office. The tax authorities concluded from this that the taxpayer had not fulfilled the requests properly, because the taxpayer was required to deliver either photocopies of the invoices or the invoices in digitalized or scanned formats. For that reason, they denied deduction of input VAT.

In a judicial proceeding, the taxpayer produced the invoices, which were admitted by the court as evidence; but it declined to examine and assess them, arguing that the invoices should have been examined earlier by the tax authorities. The Supreme Court examined in this judgment whether the court should have examined and assessed them, even if they had not been produced earlier.

The court found as follows:

(a) After the evidence had been admitted by the lower court, that court should have assessed that evidence, in view of the reviewing role of the judicial review court and the taxpayer's right to effective judicial protection.

(b) Therefore, according to the court, any discrepancies over obligation, manner and form in relation to how invoices should be produced to the authorities do not imply the existence of improper use of procedure or conduct that is unfair or contrary to good faith by the taxpayer, which prevents subsequent assessment of the evidence by a judicial court.

2.19 Review procedure. – Reversion of procedure cannot be ordered by economic-administrative tribunal where observed defects are substantive and not procedural

Supreme Court. Judgment of July 22, 2021

In an audit, the taxpayer argued that the income received in respect of the distribution of copies of standard software without adaptation or reproduction rights should not be characterized as royalties, instead as business profits. In a proceeding heard by TEAC, the taxpayer produced an expert's report supporting that view.

TEAC upheld the claim, although it ordered the procedure to be returned to the tax authorities for their experts to review the characterization of income in view of the new report. According to the tribunal, the review of technical computing issues fell outside its powers confined to reviewing.

The taxpayer appealed against that order to revert the procedure to the National Appellate Court, but this court failed to admit the appeal because TEAC's decision found in favor of the claim and therefore could not be appealed.

The Supreme Court found in favor of the taxpayer. It held in particular as follows:

(a) Firstly, that an order to revert procedure is not the same as fully upholding the claim, therefore the appeal should have been admitted.

(b) In any event, that TEAC should not have refused to deliver a decision alleging that it was not able to analyze technical issues and therefore that it should not have ordered a reversion of procedure. A reversion is only allowable where (i) the existence of formal defects is found in the challenged act or in how the procedure was conducted and (ii) these defects have denied the claimant's right to a defense.

    In other words, since the defect observed by TEAC was substantive not simply procedural (due to consisting of substantiating the characterization of types of income), a reversion of procedure to give the authorities a new chance to improve the reasoning for the first assessment was not needed.

2.20 Review procedure. – Time limit for AEAT to appeal starts to run from notification of challenged decision to Office for Court Relations or to any other tax authority department

Supreme Court. Judgments of June 17 (appeal 6123/2019), June 18 (appeal 2188/2020), and June 21 2021 (appeal 6194/2019)

The tax authorities are allowed to lodge appeals with the Central Economic-Administrative Tribunal (TEAC) against the decisions of regional economic-administrative tribunals. In these three judgments it was examined when the time period for lodging that appeal starts to run, whether it is (i) when the decisions are notified to the tax authority body authorized to lodge the appeal (generally, directors of department at AEAT) or (ii) when they are notified to the Office for Court Relations or any other tax authority department.

The Supreme Court concluded that the tax authorities have a single legal personality and that, therefore, for the time period for appealing to start to run it is simply necessary for the notification to be received at the Office for Court Relations or at any other tax authority department, facility or office, which received it for the purpose of its enforcement. It added further that, under the principle of good administration, the administrative case file should contain documents or computerized records evidencing the notification date of the decision.

The same conclusions apply for computing the time period that the tax authorities have for enforcing a given decision or judgment, as was stated by the Supreme Court in a judgment delivered on November 19, 2020, summarized in our December 2020 Newsletter.

2.21 Enforcement procedure. – Tax authorities cannot enforce a decision partially upholding a claim until appeal filed against that decision has been settled

Supreme Court. Judgment of June 28, 2021

At issue was whether the tax authorities can enforce a decision partially upholding an economic-administrative claim (which sets aside and orders reversion of procedure for another assessment to be issued) while an appeal filed by the taxpayer against that decision is being processed, in cases where enforcement of the original assessment had been suspended at the taxpayer's own request.

The National Appellate Court concluded that, although enforcement of the assessment would have been suspended at the taxpayer’s request, the tax authorities could have enforced the order for reversion of procedure. Since it failed to do so, when it ultimately issued a new assessment, its right to assess had become statute-barred.

The Supreme Court concluded, however, that, where enforcement of an assessment is suspended at the taxpayer’s own request, the tax authorities cannot enforce the decision until the appeal brought against it has been settled on a final basis.

3. Decisions

3.1 Corporate income tax. – Requirement determining that payments under a finance lease agreement must be equal or incremental is anti-abuse clause

Central Economic-Administrative Tribunal. Decision of April 22, 2021

The special regime contained in the Corporate Income Tax Law for finance lease agreements requires the annual amount in respect of finance lease payments relating to recovery of the cost of the asset to remain the same or be incremental over the term of the agreement.

In the case that gave rise to this decision, the tax authorities had adjusted a taxpayer’s corporate income tax liability because this requirement had not been fulfilled.

TEAC confirmed the tax authorities’ assessment. According to the tribunal, this requirement is an anti-abuse clause to prevent transactions being carried out under the appearance of a finance lease when they more closely resemble a sale and purchase.

3.2 Personal income tax. – Large family status may be substantiated by any means of proof admissible in law

Central Economic-Administrative Tribunal. **Decision of June 24, 2021**

The Personal Income Tax Law allows a tax credit for large families.

TEAC concluded in this decision that, to be able to claim this credit, the requirements and conditions laid down in the Law on Protection of Large Families need to be substantiated. This status may be substantiated, however, by any means of proof admissible in law, not just with the official large family document.

3.3 Personal income tax. – The election to be taxed individually or jointly may be modified following change of factual circumstances taken into account for original decision

Murcia Regional Economic-Administrative Tribunal. **Decision of May 28, 2021**

Under article 119.3 of the General Taxation Law, options that have to be elected when filing a return cannot later be corrected, unless that correction is filed in the statutory filing period.

In the examined case, the interested party filed her personal income tax self-assessment on an individual basis. In this self-assessment she reported her maternity benefit as taxable and not exempt.

Later, after a provision had been added to the personal income tax law making these benefits exempt, she realized that a joint return would have been more favorable, so she applied to modify her election.

The tax authorities recognized her right to claim the exemption, but denied the change of reporting option because it had been requested after the end of the voluntary filing period for the self-assessment.

Murcia TEAR recalled, first, that although the election of one option or another is voluntary, it must be expressed in the filing period for the tax, and cannot later be modified. It underlined, however, that for this option to be elected correctly the decision cannot be tainted by intent that was defective for reasons not attributable to the interested parties. Continuing with this reasoning, the tribunal concluded that the amendment to the law mentioned above is a justified reason for modifying the elected option, because a material change had occurred in the circumstances that determined election of the option and this change is not attributable to the taxpayer.

3.4 Personal income tax. – The 40% reduction is claimable for benefits from a number of pension plans

Valencian Regional Economic-Administrative Tribunal. **Decision of April 29, 2021**

As we saw in our Alert on July 23 2021, the Valencian TEAR contradicted the theory traditionally applied by the Directorate General for Taxes and allowed the reduction to be claimed on pension plan benefits that are received in more than one year.

3.5 Personal income tax. – Madrid TEAR examines effects of voiding transactions with preferred shares and subordinated bonds

Madrid Regional Economic-Administrative Tribunal. Decision of April 28, 2021

A party applied for a declaration voiding share purchase agreements signed in May 2009 and subordinated bond purchase agreements signed in May 2010, as well as a subsequent exchange of shares. In a judgment on June 2014, those agreements and transactions were declared void, resulting in the financial institution having to return to the claimant the sums it had received from the claimant to purchase the financial products.

Following the judgment, the claimant applied for a correction of their personal income tax self-assessments for 2009 through 2012, to remove the income (preferred share coupons) received from those financial products. The applications were upheld by AEAT.

In November 2018, the tax authorities commenced a limited review of personal income tax for fiscal year 2013, a period that had not been included in the taxpayer's earlier application for correction and in which the taxpayer had included losses arising on the exchange. On commencement of this procedure, however, fiscal year 2013 was statute-barred.

The tax authorities argued that the statute bar had not occurred under the connected obligations rule, because in their view all types of income from the transactions (financial product purchases and the subsequent exchange) were related.

Madrid TEAR concluded as follows:

(a) The case did not involve connected obligations. The coupons received in respect of the preferred shares between 2009 and 2012 were not related to the losses obtained on a subsequent exchange transaction and the reason behind the need to modify the income reported in 2013 was the final judgment declaring the agreements and the exchange void, not the events that occurred or were reported between 2009 and 2012.

(b) Although the judgment that declared the agreements and the exchange void entailed recommencement of the statute of limitations, because it was rendered in June 2014 and the limited review procedure commenced in November 2018, four years had already run, and therefore the tax authorities' right to asses had already become statute-barred.

The tribunal therefore upheld the taxpayer's claims and declared that the tax authorities' right to determine the tax debt for fiscal year 2013 was statute-barred.

3.6 VAT. – If deferred import VAT is not reported in the self-assessment, enforced collection period starts

Central Economic-Administrative Tribunal. Decision of June 21, 2021

A company that had made imports did not report in box 77 of its VAT self-assessment the payable VAT assessed by the customs authorities. The tax authorities issued orders initiating enforced collection proceedings to collect those VAT amounts.

The claimant later filed a correction of its self-assessment requesting modification of (i) box 77, to include the assessed amount of import VAT payable; and (ii) boxes 32 and 33, to compute deductible VAT. The tax authorities refused the requested correction.

After the appropriate claim was filed, TEAC concluded as follows:

(a) Failure to include an outstanding amount of import VAT assessed by the customs authorities on a VAT return means that the enforced collection period starts, which does not preclude the taxpayer's right to a tax credit in respect of that VAT liability.

    This means that box 77 on the VAT self-assessment is a payment mechanism for a debt that has already been assessed.

(b) The right to claim a tax credit for input VAT is not forfeited, instead that right may be exercised later. Therefore, there is no unjust enrichment for the tax authorities.

In short, in TEAC's view, an adjustment in respect of assessed import VAT that was not reported in the self-assessment differs from adjustments in cases involving the reverse charge mechanism, in which taxpayers' immediate rights to deduct the VAT that was not originally self-charged are recognized.

3.7 VAT. – In vehicle leasing transactions, civil liability insurance and own damage cover are separate services from the supply of vehicles

Central Economic-Administrative Tribunal. Decisions 00/00449/2019/00/00 and 00/06518/2019/00/00 of June 21, 2021

It was examined whether, in cases where a vehicle leasing company offers customers the chance to take out an own damage insurance policy with a third party, the two transactions (the supply of the vehicle and the insurance transaction) have to be treated as one and the same transaction or separate transactions.

In these decisions, TEAC confirmed the tax authorities' view that own damage insurance cover taken out with an external insurance company is an insurance service in its own right, which is perceived by the customer as an additional and separate service to the supply of the vehicle. One of the reasons for this conclusion is that the insurance is optional. The conclusion is the same, according to the tribunal, where the own damage cover is provided in a "motor insurance" policy.

By contrast, according to the TEAC, in cases involving short-term lease agreements, in which the total cover service is not offered separately, but included instead in the other services provided to the customer by the leasing company, it is a single (non-exempt) service. In these cases, the customer cannot choose among the various types of cover offered by the contract and it would not be feasible to sign for the vehicle and the insurance separately.

In relation to civil liability insurance, TEAC affirmed that this also is an ancillary transaction, due to being a mandatory insurance policy. This is regardless of its undeniable close relationship with leasing, because the insurance does not *per se* prompt better enjoyment or use of the vehicle.

3.8 Transfer and stamp tax. – Exemption for purchases of government protected housing is not claimable by legal entities

Central Economic-Administrative Tribunal. Decision of April 28, 2021

A legal entity purchased (in one transaction) a number of government-protected housing units (VPO). In its transfer and stamp self-assessment it reported the transaction as exempt, and the Madrid autonomous government denied that exemption.

TEAC confirmed the authorities' assessment on the basis of the social purpose sought by government-protected housing units and therefore by the legal exemption. Therefore, according to the tribunal, the exemption may only be claimed by individuals.

3.9 Tax on economic activities. – If requirements to prepare consolidated financial statements are not fulfilled, the tax on economic activities exemption must be determined by reference to the individual net revenues figures of the companies belonging to a group

Central Economic-Administrative Tribunal. Decision of July 15, 2021

The Local Finances Law allows an exemption from the tax on economic activities for companies having a net revenues figure below one million euros. Moreover, where a company forms part of a corporate group within the meaning of article 42 of the Commercial Code, the net revenues figure for the purpose of the exemption is the figure for all the companies in the group put together.

In the case examined in this decision, a local council denied the claim for exemption by a company that had recorded a net revenues figure below one million euros on an individual basis, by arguing that the aggregate net revenues figure had to be computed for all the companies which, in the authorities' opinion, formed part of the group to which the company belonged.

TEAC concluded, however, that, consistently with the principle stated by the Supreme Court, if companies are not legally required to filed consolidated financial statements, regard must be had to the individual net revenues figures of each of the companies.

It needs to be recalled, however, that Law 11/2021, of July 9, 2021, on measures to prevent and combat tax fraud (see our tax commentary) has amended the legislation which now states that the aggregate net revenues figure must be taken, even if there is no obligation to file consolidated financial statements.

3.10 Refund procedure. – Incorrect payments resulting from a change of circumstances must be refunded with late-payment interest calculated from when original self-assessment was filed

Extremadura Regional Economic-Administrative Tribunal. Decision of April 30, 2021

Tax auditors adjusted a company's reported corporate income tax liability due to arguing that the amounts of compensation that the company had paid to its shareholders and directors were not deductible expenses. Their conclusion was based on the existence of an agreement not having been substantiated and on it appearing in the bylaws that directors were not compensated for their services. Following the adjustment, one of the company's shareholders, who had originally reported those compensation payments on his personal income tax return, as salary income, filed an application for correction of his personal income tax self-assessment so as to treat those compensation payments as income from movable capital, which gave rise to a refund due to him.

In the subsequent claim, it was discussed whether that refund had to be treated as a refund of incorrect payments (meaning that late-payment interest would fall due from the payment date) or as a refund resulting from the legislation on the tax (meaning that late-payment interest would fall due only if a period longer than six months had run from the application for correction of the self-assessment).

Extremadura TEAR recalled that, consistently with the supreme court judgment of January 28, 2021 (rec. 3010/2018), this case involved an incorrect payment due to a change of circumstances, and therefore the refund cannot be characterized as resulting from the legislation on the tax. Therefore, interest must be calculated from when the tax was paid following the filing of the self-assessment.

3.11 Tax management and inspection procedures. – Assessment made in tax management procedure commenced as a result of a return causes preclusion of requested tax benefits

Central Economic-Administrative Tribunal*.* **Decision of March 25, 2021**

Under the applicable legislation, taxable persons for inheritance and gift tax purposes may elect to self-assess the tax or to file a return on which they must report the elements needed for the tax authorities to make an assessment.

In the case examined in this decision, it had been elected to file a return instead of a self-assessment. On the return recognition was requested of the right to a reduction to the taxable amount claimable for transfers upon death of family businesses, and this was recognized in the subsequent provisional assessment. Later, however, the tax auditors commenced a limited review procedure in which they denied that reduction and made the resulting adjustment.

The interested party submitted that the earlier provisional assessment made by the tax management authorities made it impossible to review again the tax benefit at issue, a principle that TEAC accepted by applying the Supreme Court’s case law.

According to TEAC, the tax authorities cannot be allowed, after they have had access from the start to all the information supplied by the taxable person, to adjust and assess again the same element of the tax obligation that they had already assessed.

3.12 Collection procedure. – Joint and several liability of anyone causing or cooperating in concealment of assets or rights of the main debtor has an intentional nature.

Central Economic-Administrative Tribunal. Decision of June 16, 2021

A company was held jointly and severally liable for the tax debts of another company, as a result of having cooperated in concealment of assets from the tax authorities by entering into a purchase agreement relating to two plots and a portion of land. Castilla-La Mancha TEAR set aside that decision to extend liability, because the purchase agreement had not been performed, insofar as the price had not been paid on its due date.

TEAC confirmed the decision to extend liability. According to TEAC, the joint and several liability for tax of anyone who causes or cooperates in the concealment or transfer of assets or rights of the debtor has an "intentional nature" and does not depend on the subsequent success or failure of transactions to transfer or conceal. In short, a declaration of joint and several liability must be made where the associated legal requirements are fulfilled, even if the legal transaction that triggered that declaration is later rendered invalid at the request of the parties or of third parties.

3.13 Collection procedure. – Debtor's control of a company may be substantiated by prima facie evidence or presumptions

Central Economic-Administrative Tribunal. Decision of May 19, 2021

A taxpayer was declared jointly and severally liable for payment of a company's tax debts and penalties. In an extension of liability procedure, the tax authorities (i) ordered the preventive attachment of a property and of the taxpayer's shares in another company and (ii) rendered a decision prohibiting disposal of any real estate assets owned by this company (at which the person held liable and their spouse were shareholders and directors). According to the tax authorities, effective control of this company was exercised by that taxpayer.

The taxpayer argued, among other issues, (i) that, following various capital increases at that company, their ownership interest in the company was not higher than 26%, (ii) that the married couple were subject to the separate property system and (iii) that, in any event, the measure was not proportionate because it affected all the shareholders, rather than the taxpayer's ownership interest in the company.

TEAC concluded that the list provided in article 42 of the Commercial Code is not a finite list of circumstances determining control, meaning that control of a company by a debtor may exist where, even though none of the circumstances actually stipulated exist, effective control is substantiated sufficiently by prima facie evidence or presumptions. In this case, TEAC confirmed the prohibition on disposal ordered on the basis of the existence of family ties among the individuals whose shares had been attached and the person or persons who held formal control of the company to which the prohibition on disposal related, in view of the close bonds of affection and trust which may be attributed, in principle, to marital or family relationships.

3.14 Penalty procedure. – Infringement consisting of incorrectly applying for refunds requires presence of an aggravating factor, such as omission of relevant information or inclusion of false information

Central Economic-Administrative Tribunal. Decision of May 21, 2021

The General Taxation Law states that incorrectly applying for refunds amounts to an infringement.

According to TEAC, however, to impose a penalty in these cases the tax authorities need to prove that the taxable person omitted relevant information or included false information in the application. In other words, where a refund is requested incorrectly, but those requirements (similar to the ones for concealment) are not fulfilled, the conduct does not warrant a penalty.

3.15 Review procedure. – Effects of voiding a general provision are retroactive to approval date

Central Economic-Administrative Tribunal. **Decision of April 22, 2021**

The tax authorities delivered an assessment decision in relation to a company's corporate income tax, which included in the tax base an amount relating to a real estate transaction conducted by reason of a division project which was later declared null and void in a court judgment.

TEAC voided the assessment. According to the tribunal, the declaration that the division project was null and void had *ex tunc* effects, in other words, running from when the project was approved not from when it was rendered null and void. Put another way, because that project had never existed from the standpoint of the law no effect of any type could arise from it, including tax effects.

4. Resolutions

4.1 Digital services tax. – Hotel management does not trigger taxable event consisting of "online intermediation services"

Directorate General for Taxes. Resolution V2153-21 of July 28, 2021

The DGT analyzed the digital services tax liability of a company engaged in hotel management.

Under the hotel management agreement, the manager acts in dealings with third parties for and on behalf of the hotel owner, with powers to manage and operate the hotels. Among other duties, the manager takes care of marketing rooms and stays, using digital technology on its own channels (corporate website) and on channels belonging to others. In both cases the rooms and stays are included on the digital platforms.

The exact issue analyzed by the DGT was whether the provision of marketing services for rooms and stays by the manager triggers the taxable event for the digital services tax consisting of "online intermediation services" and its conclusion was that:

(a) The taxable event for the digital services tax consisting of "online intermediation services" involves the making available of a multi-sided digital interface to users, which allows users to interact with other users and which facilitates the making of supplies of goods or services directly between users (or allows users to find other users and interact with them).

A DGT resolution issued on June 25, 2021 said that intermediation services require the existence of, at least, two users.

(b) This circumstance does not occur in a hotel management agreement:

(i) Although the services for accommodation, stays and maintenance at hotels appear on paper as being provided by the hotel owners, these services are actually provided by the manager, under the granted authorization.

(ii) Therefore, the provider of the hotel services and the owner of the digital interface is the same person.

(iii) Which means that the requirement for there to be, at least, two users is not fulfilled, because there is only one; the end user using or booking the hotel services.

(iv) In short, no intermediation service as such exists, because the manager does not mediate between two independent parties, there is instead only a relationship between the manager and the third party.

Because the hotel manager acts in the place of the owner in the whole marketing and operating process at the establishment, there is no intermediation service within the meaning of article 4.7 of the Digital Services Tax Law.

4.2 Corporate income tax. – Interest resulting from voided collar or ‘floor’ clauses is taxed in the fiscal year when right to a refund is recognized

Directorate General for Taxes. Resolution V1996-21 of June 24, 2021

In this resolution, the DGT analyzed the corporate income treatment of interest paid to banks refunded as a result of a void collar clause in a mortgage.

In response to a request for a report on the accounting treatment, the Spanish Accounting and Audit Institute (ICAC) explained that, by analogy with the method determined for refunds of the tax on retail sales of certain oil and gas products (*céntimo sanitario* or “health cent”), a right has to be recognized to collect interest credited to an extraordinary revenues account (account 778) for the fiscal year in which the refund must be made.

ICAC added that, although the revenue is financial in nature, because it is an extraordinary payment it cannot be characterized as periodical revenue for the purposes of calculating the company's earnings. However, if the amount is not significant, the company may credit it against financial revenues (account 769).

According to the DGT, this revenue will form part of the tax base for the period in which it is recorded for accounting purposes, regardless of its actual payment date.

4.3 Corporate income tax. – Analysis of how distribution of dividends affects capitalization reserve

Directorate General for Taxes. Resolutions V1952-21 and **V1956-21 of June 21 2021**

The DGT analyzed in two resolutions how the distribution of dividends affects the capitalization reserve for the same year and prior years.

(a) For the same year:

Resolution V1952-21 concerned a company that was going to approve the distribution of a **dividend out of income for 2021** and wanted to know how it would affect calculation of the capitalization reserve for that year.

The DGT recalled that, to determine the capitalization reserve for 2021, the increase in equity must be calculated as the positive difference between:

- The equity as of the 2021 fiscal year-end, not including the earnings figure for that fiscal year, and

- the equity as of the beginning of 2021, not including the earnings figure for 2020.

In other words, the earnings figure for 2021 is not taken into account to determine the increase in equity, and therefore the change in equity resulting from that earnings figure will not affect determination of the base for the reduction. Therefore, the distribution of dividends in 2021 out of the income for that same fiscal year will not affect the base for the reduction for the 2021 capitalization reserve, although it will affect determination of the increase in equity for the following tax period.

(b) For prior years:

Resolution V1956-21 concerned a company that claimed the reduction for the capital reserve in fiscal years 2015, 2016 and 2017 and which in 2020 distributed a dividend out of voluntary reserves recorded in fiscal years prior to 2015.

The DGT confirmed that:

- The reduction for the capitalization reserve is conditional on the increase in equity that gave entitlement to that reduction being held for five years from the end of the tax period to which the reduction relates, unless there are losses for accounting purposes.

- The holding requirement relates to the aggregate amount by which equity increased not to each one of its captions. Consequently, the disposal of any of the equity captions at the end of the year in which the increase takes place does not imply non-fulfillment of the holding requirement, provided that the aggregate amount by which equity increases is preserved for a minimum holding period.

- A reasonable interpretation of the law supports that, in each of the 5 years in the minimum holding period, the difference between equity at the end (not including the earnings figure for that year) and at the beginning of the fiscal year (not including the earnings for the previous year) must be equal to or higher than the increase in equity that gave rise to the reduction.

  In the analyzed case the voluntary reserves caption decreased in 2020 as a result of the distribution of dividends. This charge to reserves will mean a lower equity figure as of the 2020 year-end, for the purposes of determining whether the requirement to hold the increase in equity taken into account to claim the tax benefit in 2015, 2016 and 2017 has been fulfilled.

- If the requirement to hold equity is not fulfilled, the company will have to pay, together with the liability for the tax period in which the non-fulfillment of that requirement takes place, the gross tax liability relating to the tax benefit claimed in previous periods with late-payment interest.

4.4 Corporate income tax. – Market value for other taxes does not bind the tax authorities in relation to corporate income tax

Directorate General for Taxes. Resolution V1812-21 of June 9, 2021

As a result of the winding up of a company, a rural property would be allocated to its shareholders. The Balearic Islands Tax Agency had previously issued a valuation decision on the property, for a tax other than corporate income tax.

The DGT took the view that, under article 18 of the Corporate Income Tax Law, this value is not binding on the tax authorities for determining the market value of the property for corporate income tax purposes.

4.5 Corporate income tax. – Spanish subsidiary in international group with foreign parent company not required to file country-by-country report

Directorate General for Taxes. Resolution V1767-21 of June 7, 2021

A Spanish company forms part of an international group with a German parent company.

The Spanish subsidiary fulfilled its obligation to report, before the end of the tax period, that the German company was required to prepare the country-by-country report. However, the German country did not include information on the Spanish company in its country-by-country report due to the reduced size of the subsidiary (which allowed it to exclude its data from the consolidated information).

In spite of this, the DGT confirmed that the Spanish company was not required to file the country-by-country report in Spain, due to not falling within any of the cases specified in article 13.1 of the Corporate Income Tax Regulations.

4.6 Corporate income tax. – No breach of holding requirements to use the capitalization reserve in the event of a cross-border merger and allocation of the absorbed elements to a branch in Spain

Directorate General for Taxes. Resolution V1775-21 of June 8, 2021

The request concerned a cross-border merger in which company (X), resident in Italy would absorb its subsidiary (E), resident in Spain. Company E is engaged in real estate activities and owns properties located in Spain, housing premises leased to related entities or third parties. To carry out its activities it has human and material resources. By reason of the merger, the assets and liabilities of company E would be allocated to a branch in Spain.

Company (E) had used the capitalization reserve in the past, and recorded the relevant reserve. The endowment fund for the new branch would include the existing amount in the reserve at the company at the time of the transaction.

DGT concluded that the transaction does not breach the requirement to hold the reserve. To analyze from one year to the next whether this requirement continues to be fulfilled, (i) the increase in equity must be computed by reference to the new branch, regardless of the changes in equity at the head office; and (ii) the holding period will continue to be five years running from the end of the tax period in which the tax benefit had been claimed.

4.7 Personal income tax. – Days spent traveling to or from the destination country are included to calculate exemption for work performed abroad

Directorate General for Taxes. Resolution V1696-21 of June 2, 2021

The personal income tax legislation allows an exemption for income obtained for work actually performed abroad subject to certain requirements.

The portion of non-specific compensation that benefits from the exemption is quantified using a proportional distribution method, by reference to the number of days that the worker actually spent abroad out of the total number of days in the year (365 or 366).

To compute the days worked abroad (numerator), the following rules apply:

(a) The number of calendar days that the worker actually spent abroad to perform work must be taken.

(b) This number must include the non-working days (public holidays or weekends) in the period spent abroad, from the start of actual performance of the work.

(c) It does not include any public holidays or weekends in which the worker stays abroad for personal reasons before the work commences or after it ends.

(d) However, under the method adopted by the Supreme Court in judgment 274/2021, of February 25, 2021 in cassation appeal number 1990/2019 (see our summary here), days spent traveling to the destination country or returning to Spain do have to be included.

4.8 Personal income tax. – Expenses associated with remote working are not deductible

Directorate General for Taxes. Resolution V1635-21 of May 28, 2021

A taxpayer had been working remotely for which a computer and screen had been provided by the employer. However, the worker paid his own internet costs.

According to the DGT, these costs cannot be treated as deductible expenses for determining net salary income, because they are not included in the finite list of deductible expenses provided in the personal income tax legislation.

4.9 Personal income tax. – Benefits from Liechtenstein pension plan are eligible for 40% reduction if received in lump sum

Directorate General for Taxes. Resolution V1444-21 of May 18, 2021

The requester, who is tax resident in Spain, received in a lump sum retirement benefit under the occupational benefits system relating to the so called "second pillar" of the pensions system in Liechtenstein.

The DGT recalled that Liechtenstein is not an EU member state although it is part of the European Economic Area, and therefore Directive (EU) 2016/2341 of the European

Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision might be applicable.

Consequently:

(a) If the pension plan is not among those regulated in the directive, the general regime will apply and the benefits under the occupational plan must be treated as salary income with no further stipulations.

(b) If the pension plan is among those regulated in the directive, the 40% reduction may be claimed on the portion of the benefit relating to contributions made until December 31, 2006, if it is received in a lump sum and more than two years have run between the first contribution to pension plans and the date of the occurrence of the contingency triggering the benefit.

4.10 Personal income tax. – Clarification of a few elements of the tax credit for gifts

Directorate General for Taxes. Resolutions V1234-21 of May 5, 2021, and V1340-21 of May 11, 2021

On the tax credit for gifts, the DGT has clarified the following points:

(a) Timing of recognition (resolution V1234-21):

The tax credit must be claimed in the fiscal year when the gift is received by the beneficiary. Therefore, if the transfer order is made in December 2020 but the gift arrives at the entity in 2021, the tax credit must be taken in 2021.

(b) Increased percentages (resolution V1340-21):

The Law on tax incentives for patronage allows increased tax credit percentages if, in the two immediately preceding tax periods, gifts were made to the same entity, in each of those years and in an amount equal to or higher than the gift made in the preceding year.

In other words, the increased percentage may be claimed (for example) in 2020 in relation to gifts made in that year to an entity to which gifts were made in 2018 and 2019 in an amount, in each of the three years, equal to or higher than the gift made in the immediately preceding year. Put another way, gifts made in 2018 must be higher than those in 2017, gifts made in 2019, higher than those in 2018, and gifts made in 2020, higher than those in 2019.

4.11 Personal income tax. – Properties in expectation of rent only require income to be recognized if they are not used for an economic activity

Directorate General for Taxes. Resolution V1294-21, of May 7, 2021, and V1401-21, of May 13, 2021

These resolutions concerned whether income from real property must be recognized in respect of properties in expectation of rent:

(a) In resolution V1294-21 it was concluded that, **if the properties are used for an economic activity** consisting of property leasing, income does not have to be recognized for the months they remain in expectation of rent.

In other words, if the requirements in article 27.2 of the Personal Income Tax Law are fulfilled for characterizing property leasing as an economic activity and additionally the properties are used for that activity only, there will be no obligation to recognize income from real property even if they have not been leased in part of the tax period.

(b) In resolution V1401-21, by contrast, it was concluded that income must be recognized in respect of the **periods** in which rental properties were not actually leased if they are **properties not used for economic activities**. This is consistent with the principle adopted by the Supreme Court in its judgment on February 25, 2021, in appeal 1302/2020 (see our summary here).

Taking its cue from the conclusions in that judgment, the DGT confirmed that, to determine net income from immovable capital in the period in which the properties had been rented out, the aggregate amount of the property's annual expenses cannot be included (depreciation, real estate tax, insurance expenses), instead proportionate amounts relative to the number of days in the tax period in which the property was leased out.

Lastly, the DGT added that, if upkeep and repair expenses have been incurred, they will only be deductible for determining net income from immovable capital if the purpose of the work is exclusively to obtain income from immovable capital in the future and not for the owner to enjoy the property, even if only temporarily.

The property being "in expectation of rent" must be substantiated by the owners by any of the means of proof generally admitted in law, which must be assessed by the audit bodies at AEAT.

4.12 Wealth tax. – The combined income/wealth tax limit must be calculated with exclusion of unproductive assets having regard to their nature or use when the tax falls due

Directorate General for Taxes. Resolution V1685-21 of June 1, 2021

The wealth tax legislation lays down a combined limit on liability for wealth tax and personal income tax ("combined income/wealth tax limit"). To calculate that limit, the portion of wealth tax that relates to assets which, by their nature or use, are not able to produce the income subject to personal income tax are not included.

To determine which assets need to be excluded to calculate that limit, the DGT concluded that regard must be had to their "nature or use" at the point when wealth tax falls due (December 31). In other words, the calculation will not include any assets which, at that point, do not produce income subject to personal income tax, regardless of whether they may later be used for income-generating transactions.

4.13 Wealth tax. – Valuation of purchased properties must include expenses and taxes associated with their purchase

Directorate General for Taxes. Resolution V1343-21 of May 12, 2021

The requester purchased two properties. One property was a new build, so the purchase was subject to VAT and an ad valorem stamp tax charge. The other property had been purchased from a private party and the transaction was subject to transfer and stamp tax under the "transfers for consideration" heading.

For wealth tax purposes, property values are determined by reference to the higher of the cadastral value, the acquisition cost, and the value determined by the tax authorities for other purposes. According to the DGT, acquisition cost must be determined under the personal income tax rules, in other words, by adding to the actual purchase price, the costs related to any investments and improvements and the expenses and taxes associated with the purchase (not including interest) paid by the purchaser (in other words, VAT, stamp tax or transfer tax under the "transfers for consideration" heading, as the case may be).

5. Legislation

5.1 New application form approved for opting in or out of the automatic set-off program for tax refunds and tax debts

On September 30, 2021, the Official State Gazette (BOE) published Order HFP/1032/2021, of September, 2021, approving the application form for opting in or opting out of the automatic set-off program for tax refunds and tax debts and regulating the format, conditions and procedure for filing it.

Among other elements, the order states that the form may only be filed online.

This new form will come into force on October 1, 2021.

5.2 Publication of annual equivalent rate for fourth quarter of 2021, for the purpose of characterizing certain financial assets for tax purposes

On September 27, 2021 edition of the Official State Gazette (BOE) published the Decision of September 22, 2021, by the Office of the General Secretary for the Treasury and International Finance, which sets out the annual effective interest rate for the purpose of characterizing certain financial assets for tax purposes, this time for the fourth calendar quarter of 2021. The rates are as follows:

- Financial assets with a term equal to or shorter than four years: -0.410 percent.
- Assets with terms between four and seven years: -0.297 percent.
- Assets with ten-year terms: 0.261 percent.
- Assets with fifteen-year terms: 0.538 percent.
- Assets with thirty-year terms: 1.123 percent.

5.3 New tax measures in relation to energy tax

On September 15, 2021 edition of the Official State Gazette published Royal Decree-Law 17/2021, of September 14, 2021, on urgent measures to reduce the impact of the steep rise in natural gas prices on the retail markets for gas and electricity

In the tax field a number of tax measures have been introduced, designed to reduce the cost of the final electricity bill, including (i) extending the temporary suspension of the tax on the value of electricity output until December 31, 2021 or (ii) reducing the rate of excise tax on electricity from 5.11269632% to 0.50% on a transitional basis until December 31, 2021.

For further details, see our Commentary on September 22, 2021.

5.4 Changes introduced to procedures for paying taxes through approved institutions

On September 2, 2021 edition of the Official State Gazette (BOE) published Order HFP/915/2021, of September 1, 2021, amending various laws related to tax debt payments through approved institutions.

Among other new provisions:

(a) The “Complete Reference Number” code (NRC or *Número de Referencia Completo*), which includes in encrypted format the basic information needed for the payment of tax debts, will come to be issued by AEAT at the approved institution’s request.

(b) Where debts are paid by direct debit, the receipts issued by the approved institutions as proof of payment of the debt will have to contain an NRC code in every case, which must be confirmed with AEAT.

(c) The procedure has been amended for payments made from other countries of amounts of tax payable determined on nonresident income tax self-assessments without a permanent establishment (form 210).

(d) Amendments have been made to the procedure for collecting charges.

This legislation is scheduled to enter into force on September 4, 2021, although it will take effect earlier or later in the following cases:

(a) For revenues collected through institutions approved by AEAT:

- In relation to payments made on AEAT's website or on AEAT’s Auctions Portal, the order will be applicable from September 7, 2021.
- The rules related to payments by direct debit (self-assessed and deferred or split payments) will be applicable for any payments that have to be made into the restricted accounts on or after November 30, 2021.
- In the case of orders to attach bank accounts filed remotely, the order will be applicable to payments in restricted accounts resulting from procedures notified to the credit institutions on or after December 17, 2021.

- In relation to all other payments, the order's provisions will be applicable to any payments that have to be made into the restricted accounts on or after January 24, 2022.

(b) The new procedure for payment from other countries of tax debts determined on nonresident income tax self-assessments without a permanent establishment (form 210) will be applicable on or after June 1, 2022.

(c) The stipulated amendments to the procedure for collecting charges will take effect on September 4, 2021.

Lastly, the December 3, 2021 edition of the Official State Gazette (BOE) also published the Decision of September 2 , 2021, by the General Directorate of the Spanish Tax Agency, amending (i) the decision of June 3, 2009 on assistance to taxpayers and citizens with remote identification in dealings with approved institutions by reason of tax procedures, and in particular, for the payment of debts under the debit to account system or by using credit or debit cards and (ii) the decision of January 18, 2021, defining the procedure and conditions for the payment of debts by transfer through approved institutions.

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