Tax Newsletter

Spain

GARRIGUES

July and August 2022

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1. Borrowing costs in respect of loans for distribution of dividends are deducctible

Supreme Court holds that these types of borrowing costs are connected with the business and therefore cannot be classed as a gift.

The deduction of borrowing costs is restricted by the corporate income tax legislation. As a general rule, the legislation provides that these costs are deductible to the extent of 30% of the company's operating income. The law also provides that the following costs are not deductible (i) borrowing costs in respect of debts with group entities incurred to purchase shares in entities from other group companies, unless valid economic reasons can be substantiated, or (ii) interest in respect of participating loans. And, where the borrowing takes place between related parties, they also have to observe the transfer pricing legislation.

The tax authorities have nevertheless repeatedly questioned the deduction of borrowing costs for a variety of other reasons, in other words, going beyond cases breaching these legal limits on deduction (which, moreover, have only existed in the law on the tax for a few years).

The Supreme Court has examined in recent judgments delivered on July 21 (appeal **5309/2020**) and July 26, 2022 (appeals **4762/2020** and **5693/2020**) various cases in which the tax authorities had denied the deduction of borrowing costs due to having their origin in loans received to distribute dividends or to purchase treasury shares for their redemption.

In the various cases examined by the court (a few of which were handled by **Garrigues** lawyers), the tax authorities had concluded that these costs were not deductible because either they should have been characterized as cost of equity, or as gifts or gratuities which are not matched with the taxpayer's economic activity.

The court held in these judgments, however, that they are deductible expenses. Namely, based on its conclusions in an earlier judgment delivered on March 30, 2021 (summarized in our April 2021 Newsletter), it recalled the following:

(i) Firstly, borrowing costs cannot be characterized, generally, as cost of equity, due to the nature of these costs.

(ii) Additionally, borrowing costs in respect of a loan that is related, directly and immediately, to the performance of a business activity by the company, cannot be characterized as a gift or gratuity, because they are incurred for consideration, in the same way as the loan that they were incurred to pay for is for consideration also.

In this regard, the matching revenues do not have to result from a specific transaction or project generating a separate revenue at the company, instead regard must be had to the company's economic management as a whole.

Therefore, according to the court, if the expense is properly accounted for and supported by documents it will be deductible.

2. Judgments

2.1 Form 720. – Repealed unjustified capital gains regime cannot be applied, even if the assets were acquired with non-statute barred income

Supreme Court. Judgment of July 12, 2022

The obligation to report assets and rights abroad (Form 720) has been subject to very severe penalty rules. Among other consequences, late filing of the form carried the recognition for personal income tax purposes (in the earliest non-statute barred period) of unjustified capital gains equal to the value of the assets and rights reported outside the time limit, with a penalty equal to 150% calculated on the tax debt in respect of the recognized capital gains. Additionally, procedural penalties could be imposed for every item or set of data not reported within the time limit.

In relation to the **recognition of unjustified gains and 150% penalty**, the Supreme Court concluded recently that those rules are not applicable, even if it could not be evidenced that the assets were acquired in statute-barred periods. Namely:

(i) In a judgment delivered on January 27, 2022 (case C-788-19), the CJEU concluded that these penalty rules were precluded by the principle of free movement of capital, among other reasons, because they lead to liability for tax on the unreported income without the taxable person being able to plead expiry of the obligation (see our alert dated January 27, 2022). Since that judgment, the legislation containing those penalty rules was overturned by Law 5/2022 of March 9, 2022 (see our alert dated March 10, 2022).

(ii) However, on the basis of the CJEU's reference to the non-applicability of any statute of limitations period, regional economic-administrative tribunals and TEAC, as well as a number of high courts of justice, have been interpreting that the CJEU only overturned the penalty rules as far as they relate to the late reporting of assets acquired with statute-barred income. As a result, these tribunals have been ordering a reversion of the proceeding in numerous non-penalty proceedings to give the taxpayer a fresh chance to prove that they purchased the assets with income obtained in statute-barred periods; and in these proceedings auditors are applying strict principles for accepting proof that the income is statute-barred. Among others, this principle was supported by TEAC in decisions delivered on March 22, 2022 (March 2022 Newsletter) and May 12, 2022 (June 2022 Newsletter).

(iii) Later, in a judgment delivered on June 20, 2022 (also discussed in our June 2022 newsletter), the Supreme Court concluded that unjustified capital gains cannot be assessed without being subject to a statute of limitations period in a case where it had been proven that the assets reported outside the time limit had been purchased with statute-barred income. The court did not pronounce, however, as to whether, in cases where this had not originally been proven, a reversion of the proceeding could be ordered in line with the principle adopted by economic-administrative tribunals or high courts of justice.

(iv) Finally, the Supreme Court, in a judgment delivered on July 12, 2022, in an appeal handled by **Garrigues** lawyers, concluded that those rules on recognition of unjustified capital gains cannot be applied under any circumstances, regardless of whether expiry of the statute of limitations period has been proven. The court reasoned as follows:

- Firstly, it recalled that European Union law is binding and requires the judges and ordinary courts of the member states not to apply a national law, where they are faced with a law that is precluded by European Union law. Additionally, it underlined that CJEU judgments delivered in proceedings for nonperformance of obligations are enforceable and have ex tunc effects (without limitation to the CJEU's right to expressly limit their timing effects).

- The CJEU's judgment of January 27, 2022 flatly concluded that Spanish law was precluded by the right to free movement of capital and cannot be applied. In other words, the CJEU was not making the null and void nature of the law conditional on whether it could be proven that the income with which the reported assets were purchased was statute-barred.

With respect to the **procedural penalties**, the Supreme Court concluded as follows. Specifically, in a judgment delivered on July 6, 2022, it concluded that a penalty decision imposing a fixed monetary fine for late performance of the obligation is precluded by EU law. According to the court, that CJEU judgment of January 27, 2022 also makes it necessary to render these penalty rules null and void.

2.2 Corporate income tax. – Shareholder's compensation is deductible if it pays for work performed to benefit the company

Supreme Court. Judgment of July 11, 2022

In the examined case, the tax authorities had denied the deduction of compensation paid by an entity to its shareholder even though it had been proven that this compensation was in respect of services he had provided to the company. According to the auditors, the amounts of compensation were not mandatory, and therefore were either a gift or gratuity, or could have been characterized as income from movable capital (although the auditors did not adjust the shareholder's personal income tax liability - or the withholdings the company had made - even though the compensation was taxed as salary income).

The Supreme Court rejected this conclusion.

First, it explained that the same conclusion was needed regardless of whether the compensation is recorded on a pay slip or on an invoice, in other words, both if the shareholder is registered as a worker at the company, and if the shareholder provides his services as an independent contractor, because the crucial factor is that the payment is in respect of a service (in which case, moreover, it cannot be denied that it is related to the business).

Having said that, it examined the definition of "deductible expense" and recalled that the starting point for any expense is its recognition for accounting purposes. In this regard, it affirmed that:

(i) "… a non-accounting expense, therefore, cannot be tax deductible;" and, in parallel, "an expense for accounting purposes is a necessary first requirement for identifying a tax-deductible expense."

(ii) Because the law defines the expenses that are not deductible, the general rule has to be that they are deductible.

(iii) Not allowing deduction must be based on a legal rule, and it is not valid to adopt interpretations that force a legal characterization of the facts (except where it is necessary to use mechanisms such as conflict in the application of tax provisions or sham transactions).

(iv) The crucial factor is the reason or purpose determining the existence of the expense. In the examined case, the compensation is not deductible if it relates purely to his shareholder status, but is deductible if it relates to an activity performed or service provided. Where an amount of compensation exists for a task or obligation that was actually performed, its authenticity as such cannot be disregarded as a general rule by classing it as a gratuity.

Although not raised in the appeal, the court underlined that it is inconsistent to deny deduction of the compensation due to considering it a payment for shareholder status while at the same time accepting liability for personal income tax in respect of salary income; or even arguing that it is not deductible because it can be classed as either a gift or income from capital. In this respect, the court criticized that the facts giving rise to the adjustment have not been clearly defined.

2.3 Personal income tax. – Enforcement of judgment making it mandatory to hand over a property, by delivering an equivalent sum of money, gives rise to loss included in savings component of income

Supreme Court. **Judgment of June 29, 2022**

A judgment ordered a taxpayer to return a property. Because the property could not be returned, it was ordered to enforce the judgment by delivering the equivalent sum of money. At issue was whether the capital loss has to be included in the general component of taxable income or in the special component (now, the savings component) for personal income tax purposes.

The lower court had supported that the capital loss had to be included in the general component, because it was not obtained from the transfer of an asset. The Supreme Court disagreed with this conclusion. According to the court:

(i) In the examined case a type of "equivalent performance" ("*cumplimiento por equivalencia*") occurred. In other words, the sum of money to be delivered was calculated as the equivalent amount to the value of the property. Therefore, it cannot be considered that, legally, there was only a transfer of money falling outside the definition of "transfer of an asset".

(ii) In these types of cases of equivalent performance, the tax liability for the transaction should not be altered. If the property had been delivered, the loss would have been included in the special component of taxable income, because it would have been obtained from a transfer. Therefore, the same treatment should be retained, even if it is an equivalent sum of money to the value of the property that is ultimately delivered.

(iii) The loss may be offset against any potential capital losses in the same taxable period that are included in the special component of taxable income.

2.4 Personal income tax. - Eldest son with no income cannot be held jointly and severally liable for parents' debt

Navarra High Court. Judgment of May 27, 2022

The personal income tax legislation allows taxpayers forming part of a family unit to elect joint taxation. Family unit means, among other cases, which formed by the spouses and their dependent offspring who are minors. In these cases, the individuals who are members of the family unit are jointly and severally liable for tax, although they may split the debt among them by reference to their share of taxable income.

Under these rules, the appellant's parents elected the joint taxation option on their personal income tax return. The family unit included the appellant, a minor, who moreover had not received any income in the taxable period. Following nonpayment of the debt by his parents, the Spanish Tax Agency (AEAT) considered that the simple fact of the appellant being included in the family unit automatically made him jointly and severally liable for the debts of the other members.

The Navarra High Court, however, considered that AEAT's interpretation breached the constitutional principle of equality, because it implies that offspring who are of age and not members of the family unit cannot be held liable for their parents' debt, whereas offspring who are minors in the same circumstances can, by contrast, be held liable.

Furthermore, the Supreme Court has concluded that, for joint and several liability to exist, there must have been willful misconduct by the liable party, which cannot be found to exist for someone who, due to being a minor, cannot legally be held liable.

2.5 Gift tax. – Distribution in excess of the principal residence with no compensation in dissolution of a marriage is not subject to gift tax

Supreme Court. Judgment of July 12, 2022

By reason of the dissolution of the marriage of a couple who had a separate property arrangement the principal residence was distributed to one of the spouses (who took on the outstanding mortgage). This distribution was made without any financial compensation to the other spouse. The tax authorities considered that a distribution in excess had occurred which had to be characterized as a gift and issued an assessment of inheritance and gift tax.

The Supreme Court concluded, against this, that a distribution in excess made to a spouse in the context of the dissolution of a marriage and resulting dissolution of their joint assets is not taxable, regardless of their financial arrangement. According to the court:

(i) Distributions in excess in cases involving a division of a jointly owned asset cannot be characterized as a gift because, among other reasons, there is no donative intention.

(ii) Furthermore, it is the provisions on transfers for a consideration in the transfer and stamp tax legislation that apply to them.

(iii) In addition to this, article 32 of the Transfer and Stamp Tax Regulations specifically define as a non-taxable event reported distributions in excess resulting from distributions of assets in the dissolution of a marriage or a change of marital financial arrangement, where they are a necessary consequence of the distribution to one of the spouses of the couple's principal residence.

2.6 VAT. - Under special VAT cash-basis accounting scheme, taxable person not required to pay unpaid VAT as of December 31 in year following transaction

Supreme Court. **Judgment of May 31, 2022**

Article 163 terdecies of the VAT law provides that, in transactions under the special VAT cash-basis accounting scheme, VAT becomes chargeable, generally, when the transaction price is paid, in full or in part. However, VAT becomes chargeable on December 31 of the year immediately following that in which the transaction was performed, to the extent of the portion not paid as of that date.

In this judgment, the Supreme Court does not pronounce on the point of law that qualifies for a cassation appeal, in other words, on the compatibility of article 163 terdecies of the VAT Law with article 66 of the Directive, nor does it consider a reference for a preliminary ruling to be necessary. However, basing its decision on the CJEU's case law, it decided not to admit for consideration an appeal lodged by the government lawyer and confirmed the appealed judgment (finding in favor of the taxable person), after concluding as follows:

(i) The VAT legislation allows taxable persons to modify the taxable amount where they have uncollectible debts. In the case of cash basis transactions, the debt may be treated as full or partial as of December 31 of the year following the year when the transaction was performed, because more than a year has run since that transaction.

(ii) Therefore, under the complete adjustment principle, any amounts payable as a result of the "presumed" tax chargeable as of December 31 should be offset against any that the taxable person is entitled to recover at that time in respect of modification of the taxable amount due to nonpayment.

2.7 VAT. - Absence of independence and autonomy prevents entitlement to exemption allowed for mediation activities in financial transactions

National Appellate Court. **Judgment of April 20, 2022**

The National Appellate Court examined whether the exemption under article 20. One.18.m) of the VAT Law applies to services provided by an entity that functioned as agent of a financial institution by selling its products.

The National Appellate Court affirmed (as TEAC had done) that the entity was not really acting as mediator, but instead as subcontractor, because (i) it did not identify itself as mediator to the potential customer, (ii) it received instructions from the financial institution as if were its employee; and (iii) simply sold the products of that financial institution.

Therefore, it cannot be considered that the entity acted with independence and autonomy, or that, therefore, its activities were those of an agent, and as a result they cannot be characterized as mediation activities but rather simply as a subcontracting of services. According to this analysis, the exemption does not apply.

2.8 Excise and special taxes - Failure to register activity and absence of activity and establishment code (CAE) does not prevent exemptions from applying if products are used for adequate purpose

Supreme Court. **Judgments of July 18** **and of** **July 19, 2022**

Article 51.2 c) of the Law on Excise and Special Taxes, in the wording in force until 2013, allowed an exemption from the excise tax on oil and gas in cases where the oil or gas is used for (i) generation of electricity at electric power plants, or (ii) generation or cogeneration of electricity and of heat at combined heat and power plants.

The tax authorities considered that failure to register an entity on the territorial registers for excise and special taxes, and therefore the absence of an activity and establishment code (CAE), meant that the plant could not be considered a factory, nor could it benefit from the exemption.

The Supreme Court (reproducing EU case law) concluded otherwise. According to the court:

(i) Energy products are taxed by reference to their effective use.

(ii) Disallowing a tax benefit purely on the basis of a breach of procedural requirements is disproportionate, where it is proven that the use that the legislature has provided as a condition for applying the benefit has been met substantively.

The Supreme Court reached a similar conclusion in a judgment delivered on July 19, 2022, although in relation to other tax benefits (non-taxable supplies and exemptions under article 47.1.b) and article 51.1 of the Excise and Special Taxes Law).

2.9 Local authority fees. - Right to charge and quantification of a fee for occupancy of the local public domain cannot depend on agreement Government signs with taxpayers

Supreme Court. **Judgment of June 14, 2022**

The Supreme Court examined the provisions in a set of local government tax rules allowing the rate for a fee on private or special use of the public domain to be determined by mutual accord between the local authority and taxpayers by concluding a partnership agreement between both parties.

The court concluded that the right to charge and the quantification of a fee cannot depend on a contract or agreement that the Government signs with taxpayers. For this reason, among others, it held to be null and void both the local government rules and the assessments of the fee issued by applying them.

2.10 Real estate tax. - Local authorities can determine separate tax rates purely by reference to uses set out in cadaster legislation

Valencia High Court. **Judgment of February 23, 2022**

The legislation governing real estate tax allows local authorities to set separate tax rates by reference to the priority use allocated, for the purposes of the cadaster, to each property (not including residential use).

In the case examined in this judgment, an entity challenged a real estate tax assessment in which the separate rate under the local government rules had been charged in respect of use for or as "development work, gardening, unbuilt land." As the entity noted, this use was not contemplated in the legislation on the cadaster.

The Valencia High Court confirmed the taxpayer's principle and rendered null and void both the article in the local government tax rules setting out the separate tax rate for that use, as well as the challenged assessment.

2.11 Tax on economic activities – Supreme Court rules that tax on economic activities for mobile phone operators is precluded by European Law

Supreme Court. **Judgment of July 14, 2022**

In this judgment, handled by Garrigues lawyers, the Supreme Court examined the tax on economic activities charge for mobile phone operators from the standpoint of Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services, and concluded that it distorts competition as a result of its configuration and high amount.

For further details see our alert dated August 3, 2022.

2.12 Right of access to information. – LGT does not contain specific rules excluding application of the Transparency Law

Supreme Court. **Judgment of July 18, 2022**

A private party, acting on behalf of an association, applied to a local authority for a list of properties benefiting from exemption from real estate tax which gave information on their ownership (unless the owners were individuals), domicile and amount and legal ground for the exemption. In the absence of a reply, it filed a claim with the Data Protection and Transparency Board, which ordered the local authority to provide that information. The local authority and the courts to which the board's decision had been appealed considered that the provisions in the Transparency Law were not applicable in view of articles 93 et seq. of the General Taxation Law (LGT), which (in their opinion) contained similar rules in the tax field and determine the secrecy of tax data.

The Supreme Court concluded the opposite. According to the court, the LGT does not contain a complete and separate set of rules on access to information, instead a principle or general rule on the secrecy of data with tax relevance to protect citizens' fundamental right to privacy (article 18 of the Spanish Constitution). These secrecy rules are laid down in the context of the performance of management and audit functions, but do not imply a replacement of the general rules in the Transparency Law, a basic law applicable to all public authorities. On top of this, the applicant excluded any data belonging to owner individuals from the petition.

However, according to the court, the request for data on the ownership of legal entities clashes with the provisions in article 51 of the Revised Cadaster Law, which determines to be "protected data" the name, surnames, registered office, identification number and domicile of anyone registered on the cadaster as owner. This phrase includes both the data of individuals and of legal entities.

Therefore, data on the ownership of the properties can only be provided if the assets do not belong to individuals or legal entities.

2.13 Audit procedure. - A change of principle based on a CJEU judgment cannot be interpreted as incorrect application of the VAT Directive

National Appellate Court. **Judgment of April 20, 2022**

In a judgment delivered on July 19, 2012 (case C-44/11), the CJEU concluded (modifying the principle upheld in earlier pronouncements) that services relating to the management of securities-based assets were not exempt from VAT. The DGT issued resolutions supporting that new principle.

Based on this, in the audit underlying this new national appellate court judgment, the auditors concluded that the services provided by the audited entity were not exempt.

The National Appellate Court concluded that a change of principle by the tax authorities concerning the interpretation of Spanish domestic legislation, promoted by a CJEU judgment, does not entail an instance of incorrect vertical application of a directive with a downward or upward effect. According to the court:

(i) The case does not involve the application to a citizen of a directive that has not been transposed or has been transposed incorrectly, but rather a change of interpretation of the legislation by the Spanish tax authorities.

(ii) Moreover, the change of principle is founded and justified, and therefore the appellant is not protected by legitimate expectations in relation to the previous principle upheld by the tax authorities.

2.14 Tax procedure. - Error in identification of the assessed tax cannot be corrected

National Appellate Court. **Judgment of June 3, 2022**

In the examined case, audit activities were initiated in relation to the permanent establishment in Spain of a nonresident company. Those activities ended with an assessment in respect of nonresident income tax for the audited years, even though the permanent establishment was

the parent company of a consolidated tax group in Spain and therefore subject to corporate income tax.

TEAC considered that the error made in the assessment by referring to nonresident income tax instead of corporate income tax was simply one of form and ordered a reversion of the proceeding for the auditors to correct that defect by issuing a new assessment.

The National Appellate Court recalled that economic-administrative tribunals can order reversion of the proceeding where two requirements are met: (i) the existence of an error in form, and (ii) that error in form must not cause denial of the taxpayer's right to a defense.

This case involved a substantive defect in relation to selection of the applicable tax legislation and therefore cannot be corrected. Therefore, it is only possible to void the assessment without being able to order a reversion of procedure.

3. Decisions

3.1 Personal income tax. - The threshold determining the obligation to report a pension from a foreign source not subject to withholding tax amounts to €14,000 per annum

Central Economic-Administrative Tribunal. Decision of June 28, 2022

The Personal Income Tax Law contains a set of thresholds (by reference to type of income) below which a return does not need to be filed. The general threshold for salary income amounts to €22,000. This threshold is reduced to €14,000, however, where, among other cases, the payer did not have a withholding obligation.

This decision examines which threshold needs to be considered where the taxpayer's only income is a pension from a foreign source subject to withholding in the payer's state of residence.

TEAC concluded that in this case the specified threshold amounting to €14,000 applies, precisely because the income was not subject to withholding in Spain.

3.2 Personal income tax - Contribution of property to community property system does not give rise to capital gain for personal income tax purposes

Madrid Regional Economic-Administrative Tribunal. Decision of May 25, 2022

A taxpayer contributed a separately owned real estate asset to a community property system. The tax authorities considered that this contribution gave rise to a capital gain equal to the difference between the acquisition value of 50% of the real estate asset and its transfer value.

By reference to the supreme court judgment delivered on March 3, 2021 (summarized in our April 2021 Newsletter) the Madrid TEAR concluded that the contribution of a property to the community property system does not amount to a capital gain for personal income tax purposes.

The court underlined that, if the taxpayer contributing the separately owned property continues to be owner of the contributed asset (in other words, if the property is not gifted in whole to the spouse to become the spouse's separate property), there cannot be a capital gain on the common property.

3.3 Personal income tax. - Tax authorities cannot deny the deduction of an expense recorded after it was incurred if not proven that this gave rise to lower tax

Andalusian Regional Economic-Administrative Tribunal. Decision of March 29, 2022

The personal income tax legislation refers to the corporate income tax rules for determining the timing of recognition of the revenues and expenses of an economic activity. The Corporate Income Tax Law provides that an expense recorded in a later year than that in which it was incurred is deductible in the year in which it is recorded if this does not give rise to a reduction or deferral of tax.

In the case examined in this decision, the tax authorities rejected the deduction of an expense recorded in a later year than that in which it was incurred because it had been evidenced that that later recognition had not given rise to lower tax. Against this, the Andalusia TEAR concluded as follows:

(i) Firstly, it affirmed that the burden of proving the lower tax lies with the tax authorities.

(ii) For the purposes of this proof, it will not be considered that it gives rise to lower tax if it is a consequence of the progressive effect of personal income tax.

(iii) The adjustment must be complete in all cases. In other words, if it is concluded that an expense is not deductible in the year it was recorded, an adjustment also has to be made in the year when the expense should have been recorded if it is not statute-barred.

3.4 Tax on economic activities. - A decision recognizing removal from the list of taxable persons is a document of material value for the purpose of bringing a special application for judicial review of final decisions

Central Economic-Administrative Tribunal. Decisions of May 18, 2022

A company applied for removal from the list of taxable persons for the tax on economic activities. The tax authorities upheld its removal to be effective in November 2013. When the removal was acknowledged, the tax on economic activities assessments for 2014 through 2016 had already become final.

The LGT provides for a special application for a judicial review of final decisions where documents of material value appear, if they (i) are from a later date than the appealed act or decision or could not have been produced at the relevant time, (ii) evidence the error made by the tax authorities when issuing the appealed act or decision; and (iii) the application is lodged within three months from when its existence was known.

On the basis of this legislation, the company lodged a special application for judicial review of financial decisions against the assessments for 2014 through 2016. TEAC concluded that the administrative decision acknowledging removal effective from 2013 is a document of

material value for the purposes of lodging a special application for judicial review of final decisions, because it reflects facts or factual elements rather than legal principles. For that reason, it upheld the application and recognized the entity's right to a refund of the tax on economic activities incorrectly paid.

3.5 VAT. - TEAC examines place-of-supply rules applicable to web hosting services

Central Economic-Administrative Tribunal. Decision of May 18, 2022

An entity not established in the VAT area received hosting services for network systems, Internet connectivity services, and power and cooling services for those systems, which were treated as taxable services for Spanish VAT purposes by the supplier of the service. The entity applied for a refund of input VAT in the procedure provided for non-established traders, although its application was denied because the tax management office considered that the transactions were subject to VAT.

To conclude on the liability for Spanish VAT, TEAC examined whether the services had to be characterized (for the purposes of their place of supply) as property leasing services or as telecommunications services.

Based on the CJEU judgment delivered on July 2, 2020 (case C-215/19), the court concluded that hosting services at a data center cannot be characterized as property leasing services where the supplier does not provide an area or space to its customers which may be used by them as if they were its owners if, additionally, the space provided (rack cabinets in the judgment) does not form an integral part of the building in which they are installed nor are they installed there permanently. Because these requirements were not met in the examined case, TEAC concluded that the supplied services have to be characterized as telecommunications services, which are supplied for VAT purposes at the place where the recipient of the services is established. Therefore, in the examined case they are not subject to Spanish VAT.

3.6 Administrative procedure / refunds. - Right to a refund under the VAT legislation is governed by the general rules on the statute of limitations

Central Economic-Administrative Tribunal. Decisions of April 26, 2022 **and** of July 11, 2022

In the case underlying the first decision, in July 2015 an entity filed its corporate income tax self-assessment for 2014, which showed an overpayment of tax. In May 2021, the taxpayer filed a submission with the tax authorities requesting a refund. The tax authorities concluded, however, that the entity's right to obtain the refund had become statute barred.

TEAC concluded that, after a self-assessment has been filed which shows an overpayment of tax, the tax authorities have a maximum time period in which to make the refund (six months in relation to corporate income tax). After the end of that period, the right to obtain a refund under the legislation on the tax arises. This right is also governed by the rules on the statute of limitations, however. Therefore, after four years have run from the end of that six-month period, the entity must be considered to have forfeited its right to the refund.

3.7 Administrative procedure. - Economic-administrative claim cannot be filed against decisions charging taxes if there is no dispute between private parties

Central Economic-Administrative Tribunal. Decision of June 23, 2022

The LGT contains a proceeding for claims between private parties where there is a dispute over taxes withheld or charged. In these cases, any taxable person who does not agree that a withholding should be made, or a tax should be charged, may file an economic-administrative claim for the tribunal to determine whether the withholding or the tax charge is correct.

In the case underlying this decision, a person with tax obligations issued an invoice on which they charged to the customer the cost incurred in respect of the excise tax on coal; it was the issuer of the invoice that brought the claim with TEAC in the proceeding described above for it to conclude whether the charge was correct.

TEAC concluded that the initiated proceeding is not valid because this proceeding for claims between private parties may only be initiated where there is a dispute between them. For this reason, it decided not to admit the claim for consideration.

3.8 Collection procedure. – Intent by liable party is not prevented even though the tax authorities already knew concealment of debtor's assets

Central Economic-Administrative Tribunal. Decision of June 21, 2022

This decision examines the conditions for joint and several liability under article 42.2.a) of the General Taxation Law to apply, in other words, the liability arising as a result of having caused or cooperated in the concealment or transfer of assets or rights of the person with the payment obligation for the purpose of preventing the tax authorities from using them in their work:

TEAC noted that the rule on liability in that article requires three requirements to be met:

(i) Concealment of the debtor's assets or rights for the purpose of preventing or escaping their attachment.

(ii) An act or omission by the person allegedly liable consisting in causing or cooperating with that concealment.

(iii) The provision of evidence, by the authorities, that the liable party's participation in the concealment was conducted in bad faith, by seeking to deceive to avoid paying the debt or render the debtor's liability useless through facts or legal mechanisms designed to prepare, cause, create the appearance of or aggravate a decrease in the debtor's financial condition.

The rule does not require willful misconduct by the liable party, instead simply the knowledge that its actions could cause a loss.

In the examined case, the tax collection body proved that the described requirements were met. In line with this, TEAC held that the debt should be sought from the person jointly and severally liable. This is not prevented (contrarily to the arguments submitted by this liable party) by the fact that the activities conducted to divert assets or rights started a long time earlier, or that tax authority bodies were aware of this concealment.

3.9 Collection procedure. - In a tax context, a collection proceeding may only be stayed on the ground of a preliminary criminal issue in cases of offenses against public finance

Central Economic-Administrative Tribunal. Decision of June 21, 2022

An entity challenged an official notice of attachment by submitting, among other reasons, that the collection proceeding had to be stayed because a criminal judicial proceeding was in progress in relation to the rendering void of the gift deed that gave rise to the tax debts being sought.

Against this, TEAC concluded that the LGT only allows tax administrative proceedings to be stayed or halted where offenses against public finance are reported. Therefore, as far as the orders initiating enforced collection proceedings giving rise to the attachment had been properly served and none of the grounds for objection provided in the legislation existed, the challenged order is lawful.

3.10 Collection procedure. - Members of unincorporated joint venture (UTE) liable for joint venture's tax debts resulting from its activity

Central Economic-Administrative Tribunal. Decision of June 18, 2020 **and** of June 21, 2022

It was examined whether the unpaid debts of an unincorporated joint venture could be sought from its members.

TEAC examined Law 18/1982 of May 26, 1982 on the tax regime for unincorporated joint ventures and concluded that, under this law, to hold the member companies of an unincorporated joint venture jointly and severally liable for the joint venture's debts, there are only two requirements needing to be met:

(i) The unincorporated joint venture must have failed to pay its tax debts in the voluntary period.

(ii) Those debts must have resulted from the conduct of its activity.

This is therefore a strict type of liability.

4. Resolutions

4.1 DAC 6. – Analysis of obligation to report unit-linked insurance policies provided by foreign insurers

Directorate General for Taxes. Resolution V1212-22 of May 30, 2022

Under the LGT (following the implementation of Directive 2011/16/EU or DAC6), interested intermediaries or taxpayers are required to disclose information to the tax authorities on cross-border arrangements in which they participate where they present certain hallmarks. The items having to be disclosed include standard arrangements that are available to more than one taxpayer and do not need to be substantially customized for implementation. The main benefit test also needs to be satisfied in these cases.

In this resolution, the DGT analyzes whether such an arrangement exists in the selling of unit-linked life insurance policies by foreign insurers operating in Spain under the freedom to provide services.

The DGT noted that, as far as the personal income tax treatment applicable to these types of insurance policies is that provided generally for life insurance policies giving rise to income from movable capital, then the main benefit test is not satisfied. According to the DGT, this treatment cannot be conceptualized prima facie as a special or extraordinary regime, but instead as a general or ordinary regime determined by the legislature for income from movable capital obtained from life insurance policies.

As a result, there will be no obligation to disclose the cross-border arrangement.

4.2 Corporate income tax. - Substantiating prior year's tax credit requires applying for correction of self-assessment for period when it arose

Directorate General for Taxes. Resolutions V1510-22 and V1511-22 of June 24, 2022

The DGT had supported until recently that taxpayers could substantiate prior years' tax credits in two ways:

(i) Substantiating the tax credit in a later year than that in which the right arose, provided it falls within the maximum period allowed for applying the tax credit.

(ii) Applying for correction of the self-assessment relating to the taxable period in which the right to the tax credit arose, as far as the taxable periods in which the activity was conducted are not statute barred.

In these two new resolutions, however, concerning the tax credit for hiring workers with disabilities and R&D&i tax credits, the DGT changes principle. According to the DGT:

(i) A tax credit may only be used if its amount has been reported on the corporate income self-assessment for the tax period in which it was generated.

(ii) Otherwise, an application must be made for correction of that self-assessment, although only within the statute of limitations for making that correction.

4.3 Corporate income tax and VAT. – DGT analyzes treatment of special temporary reduction for sale of energy products to general public

Directorate General for Taxes. Resolution V1035-22 of May 6, 2022

Royal Decree-Law 6/2022 of March 29, 2022, adopting urgent measures in the context of the National Plan in response to the economic and social consequences of the war in Ukraine, has provided a special temporary reduction to the sale price to the general public of certain energy products and additives (corporate law commentary dated April 5).

The holders of rights to operate fuel retail facilities and companies making direct sales to end customers of the products qualifying for the reduction will assist with implementing the reduction as authorized distributors. These authorized distributors have to apply a discount to the sale price of each supply, inclusive of tax, equal to the amount of the reduction; and they may later apply for a refund of all reductions they have made.

The DGT concluded that this tax treatment applicable to that reduction by the authorized distributors is as follows:

(i) Corporate income tax: according to ICAC, the Spanish Accounting and Audit Institute, (ruling 4 - Spanish Accounting and Audit Institute's Official Gazette issue 129, 2022), these authorized distributors must be regarded as acting as intermediaries between the Government and the end customer, who is the true beneficiary of the reduction. Therefore, the distributors will have to record an account receivable from the public finance authority in respect of the reduction to the end customer, without any impact on its net sales figure. In other words, they must record a sales revenue in respect of the amount received from the customer plus the account receivable from the public finance authority.

(ii) VAT: the taxable amount for supplies of fuel will consist of the amount of the consideration obtained in those supplies from the customer or from third parties. That taxable amount will not be altered by the reduction, because it is a payment discount (as AEAT explained in a report published on its website, and we discussed in our alert dated April 6, 2022).

The invoices must include at least one of the following details: (i) the amount of the transaction, stating separately the price before applying the discount and after applying the reduction, as well as the amount applied in respect of the reduction; and (ii) an express mention that the reduction was applied.

4.4 Personal income tax. - Analysis of the ability to recognize a loss in respect of fraud relating to investment in cryptocurrencies

Directorate General for Taxes. Resolution V1579-22 of June 30, 2022

An individual made an investment in cryptocurrencies on a platform which turned out to be fraudulent, and therefore lost the whole amount invested. In April 2021, the requesting party filed a report of an offense with the police (Policía Nacional). In relation to the ability to recognize a capital loss on the individual's personal income tax self-assessment, the DGT replied as follows:

(i) The individual and the platform held a contractual relationship under which the individual delivered funds to the platform in respect of the purchase and storage of cryptocurrencies, and the platform had an obligation to repay the funds at the agreed time. Because that repayment did not take place within the agreed time period, an unpaid claim has arisen.

(ii) However, the amount of the unpaid claim does not automatically give rise to a capital loss, due to the creditor holding a right to payment. It is only where that right to payment may be regarded as uncollectible that a capital loss for personal income tax purposes will be determined to have taken place.

For these purposes, the filing of the report of an offense does not amount to the start of a judicial proceeding for enforcement of the debt, which will allow the loss to be recognized, even though a year has passed since the report was filed.

4.5 Personal income tax. - Maternity benefit does not affect calculation of exemption for work performed abroad

Directorate General for Taxes. Resolution V1437-22 of June 20, 2022

The submitted request concerns an individual who has been traveling abroad for work reasons and has received, in addition to her regular wage, an extraordinary compensation payment in respect of the results of work performed abroad. Additionally, she received a benefit in respect of the birth and care of a minor as a result of the birth of her son.

Under the personal income tax legislation, employees who travel to perform work abroad are entitled to the exemption defined in article 7.p) of the law if certain requirements are satisfied. This exemption is calculated by reference to the specific amounts of compensation for that work performed abroad plus any non-specific amounts of compensation that may be considered to have been received for that work. This second type is calculated by multiplying those non-specific amounts of compensation by the number of days spent abroad and dividing the result by the number of days in the year.

In the analyzed case, in which the taxpayer receives maternity benefits, the DGT gave the following explanation on calculation of the exemption:

(i) To calculate the non-specific amounts of compensation earned each day in respect of work performed abroad the denominator must include the number of days in the year, without excluding the days she received maternity benefit.

(ii) The sums received for her maternity leave, cannot be included in the calculation of exempt income even though sums may be exempt under article 7.h) of the law.

4.6 Personal income tax. - Bonus for signing up to voluntary departure program is non-exempt salary income

Directorate General for Taxes. Resolution V1337-22 of June 13, 2022

A collective agreement contemplated a voluntary departure program providing for payment of (i) a monthly amount of compensation until the age of 63, (ii) a bonus for signing up to the program, equal to two months' gross salary, and (iii) a final sum of €20,000 on receiving the last monthly payment.

The DGT replied that the personal income tax treatment for that program must be as follows:

(i) Signing-up bonus: The signing-up bonus that the worker receives by reason of voluntary departure must be treated as salary income.

(ii) Monthly compensation and final payment: Because termination of employment takes place by mutual agreement, the exemption for severance does not apply. Additionally, because the compensation is paid monthly over a number of years and not in a single taxable period, the 30% reduction for multi-year income does not apply.

4.7 Personal income tax. - Spanish national transferring residence to Gibraltar will keep Spanish tax resident status

Directorate General for Taxes. Resolution V1310-22 of June 9, 2022

The Personal Income Tax Law states that personal income taxpayer status will not be forfeited by Spanish nationals who evidence their new tax residence in a country or territory considered to be a tax haven. This rule applies in the taxable period in which the change of residence takes place and in the following four tax periods.

The request concerned a Spanish national who intends to transfer their residence to Gibraltar due to starting an employment relationship with a company resident there.

The DGT recalled that Gibraltar is currently on the list of tax havens, as a non-cooperative jurisdiction. Moreover, under the International Agreement on tax and the protection of financial interests between Spain and the United Kingdom regarding Gibraltar, done *ad referendum* in Madrid and London on March 4, 2019 (and in force since March 4, 2021), Spanish nationals who move their residency to Gibraltar after the date on which this Agreement is signed must in all cases only be considered tax residents of Spain.

Therefore, the requesting party will continue to be treated as a tax resident in Spain in the period stated in the law.

4.8 Personal income tax. - Contributions to occupational pension plans with flexible compensation arrangements are not subject to withholdings

Directorate General for Taxes. Resolution V1209-22 of May 30, 2022

Starting on January 1, 2022, the quantitative limits for contributions to pension and welfare systems have been modified. The maximum reduction cannot exceed the lower of the following two figures:

(i) 30% of the sum of the net salary income and income from economic activities income received individually in the year.

(ii) €1,500 per annum. However, this limit will be increased by €8,500, whenever that increase comes from the employer's contributions or employee's contributions to the same pension and welfare program in an amount equal to or higher than the respective contribution by the employer. For these purposes, any amounts contributed by the employer that stem from a decision by the employee will be treated as contributions by the employee.

In relation to this increased limit, the DGT had already concluded in resolutions V0299-22 and V0300-22 that, if the sums contributed by the employer are made within a flexible compensation system, in which the worker may choose the composition of the compensation system, those contributions will be considered to arise from a decision by the employee.

Now, the DGT has added that that conclusion only relates to calculation of the limit mentioned above and does not alter characterization of the income for other purposes. As a result, employers' contributions stemming from obligations acquired with employees in the context of a flexible compensation system will retain their nature as compensation in kind, and therefore are no subject to withholdings.

We discussed these resolutions in detail in our blog post on June 21, 2022.

4.9 Personal income tax. - Delayed compensation payments under collective labor agreements arising from variations in the CPI are recognized in taxable period they become payable

Directorate General for Taxes. Resolution V0969-22 of May 3, 2022

Collective labor agreements often require pay to be increased each year in line with the CPI. However, because the variation in the CPI is not known until December 31 each year, the higher amount of compensation resulting from that review is usually paid in the year following the year to which it relates. In this request it was asked whether that added compensation has to be recognized in the year to which the review relates.

The DGT recalled that salary income has to be recognized in the taxable period in which it becomes payable. In the analyzed case, that point is when the variation in the CPI is known. Therefore, this compensation is not regarded as a payment in arrears and must be recognized in the year to which the payment relates.

4.10 Tax on increase in urban land value. – Various issues clarified regarding new calculation method for property developer's taxable amount for capital gains tax

Directorate General for Taxes. Resolution V0983-22 of May 4, 2022

A company engaged in property development purchases a plot of land on which it is going to build a number of buildings which it will later transfer.

Starting out from this assumption, the DGT analyzed various issues in relation to the new calculation method for the taxable amount for capital gains tax in relation to each of the properties transferred following completion of their construction. It must be recalled for these purposes that, since the legislation was amended in November 2021, the taxpayer has a right for the tax (calculated using the objective method based on the cadastral value of the land and the ownership period) not to be higher than the actual capital gain obtained.

According to the DGT:

(i) The acquisition value of the land for each of the transferred properties (so that it can be compared against its transfer value) is determined by multiplying the acquisition value of the originally acquired land by the percentage that the transferred property bears to all the properties included in the deed for horizontal division.

(ii) The transfer value of the land for each of the transferred properties must be determined as follows:

- Firstly, you have to calculate the proportion the cadastral value of the land bears to the total cadastral value on the date the tax falls due (i.e., the transfer date).

- Next you have to multiply the transfer value of the property as recorded in the instrument documenting the transfer by that proportion.

If on the date the tax falls due the property does not have a cadastral value and the taxable person considers that there has not been an increase in value of the land (by comparing the transfer and acquisition values), or that the increase may be lower than the taxable amount determined under the objective calculation rules, they may file a submission with the local authority (when they give notice of the transfer), so that, the necessary assessment can be made when the cadastral value has been determined. In any case, if the local authority does not take this fact into account, the taxable person retains their right to file pleadings in a potential challenge against the assessment.

5. Legislation

5.1 Amendments to information return forms 345 and 187

Order HFP/823/2022, of August 24, 2022, published in the Official State Gazette on August 29, 2022, amends:

(i) Form 345 "Information return. Pension plans, pension funds and alternative systems. Welfare Mutual Insurance Societies, Insured Provident Plans, Individual Systematic Savings Plans, Company Welfare Plans and Dependent Care Insurance Policies. Annual return for members, payments and contributions."

(ii) Form 187 "Information return. Shares representing the capital or the equity of collective investment vehicles and annual summary of personal income tax, corporate income tax and nonresident income tax withholdings, in relation to income or capital gains obtained as a result of transfers or repayments of those shares and subscription rights."

The main amendments made to the information returns are summarized below:

- **Form 345**: The General State Budget Law for 2022 (Law 22/2021 of December 28, 2021) amended the Personal Income Tax Law, effective January 1, 2022, by limiting the general tax credit for contributions to pension plans. As a result of this legislative reform, form 345 is amended so that the tax information made available to taxpayers fulfills the new limits.

It needs to be recalled that, effective January 1, 2023, Law 12/2022 of June 30, 2022 has further amended the financial and tax limits applicable to pension plans (alert dated July 1, 2022).

The order that has now been published, applicable to information returns relating to fiscal year 2022, does not contain these new amendments.

- **Form 187**: This form is adapted to accommodate amendments to Law 11/2021 of July 9, 2021, on measures to prevent and combat tax fraud (see our commentary dated July 10, 2021). This law laid down (i) additional requirements for open-ended investment (OEIC) to be able to apply the 1% tax rate, and (ii) transitional rules for any OEICs which resolve to be wound up and liquidated, to allow their members to transfer their investments to other collective investment vehicles meeting the requirements for applying this reduced rate.

  Now form 187 is amended to create new codes in the "Transaction type" field and a new field for "Identification of the company in liquidation or liquidated company".

This order came into force on December 30, 2022 and will apply for the first time to the annual returns for 2022 which will be filed in 2023.

5.2 Waste tax devolved to autonomous community governments

Organic Law 9/2022 of July 28, 2022, published in the Official State Gazette on July 29, 2022, has amended, among others, Organic Law 8/1980 of September 22, 1980, on autonomous community financing.

It states, in particular, that the tax on waste sent to landfill, incineration and co-incineration may be devolved to the autonomous community governments, which will have legislative powers in relation to determining the tax rates and managing the tax.

This tax was introduced in Law 7/2022 of April 8, 2022, which we analyzed in our commentary dated April 10, 2022.

5.3 New tax legislation on self-employed workers and independent contractors published

On July 27,2022, the Official State Gazette published Royal Decree-Law 13/2022 of July 26, 2022, establishing a new contribution system for self-employed workers or independent contractors and enhancing protection for enforced inactivity.

Below is a summary of the tax measures introduced by this legislation (effective January 1, 2023):

(i) Self-employed workers who have employees will be able to make the **deduction in respect of employers' contributions to occupational pension and welfare systems** as defined in article 38 ter of the Corporate Income Tax Law, subject to the terms and conditions set out in article 68.2 of the Personal Income Tax Law.

In other words, they will be entitled to a tax credit against gross tax liability, equal to 10% of the employers' contributions recognized in respect of workers with gross annual compensation below €27,000, or in the proportional amount if their

compensation is equal to or higher than that sum, provided the contributions are made to occupational pension plans, welfare plans or pension plans under Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016.

(ii) Article 96.2 of the Personal Income Tax Law is amended to lay down the **obligation to file a personal income tax return** (with no exceptions) for anyone who at any time in the taxable period had been registered as a self-employed worker, under the Special Regime for Special Social Security Regime for Self-Employed Workers or Independent Contractors, or under the Special Social Security Regime for Seafarers.

(iii) Lastly, the LGT is amended to provide that **the tax management bodies will have the power** to audit special tax regimes (following the numerous judgments by Spanish courts which have voided assessments issued by those bodies in which eligibility for regimes of this type was questioned).

5.4 Tax on fluorinated greenhouse gases modified

Law 14/2022 of July 8, 2022, amending Law 19/2013 of December 9, 2022 on transparency, access to public information and good governance was published in the Official State Gazette on July 9, 2022. This law makes changes to the tax on fluorinated greenhouse gases in final provision one. The new rules came into force on September 1, 2022.

Later, Royal Decree 712/2022, of August 30, 2022, approving the Regulations on the tax, was published in the Official State Gazette on August 31, 2022.

Both pieces of legislation were analyzed in our commentary dated September 5, 2022.

5.5 Amendments introduced to financial and tax thresholds related to contributions to pension plans

Law 12/2022 of June 30, 2022 to encourage occupational pension plans, which amends the revised Pension Plans and Pension Funds Law, was published in the Official State Gazette on July 1, 2022.

We summarized the main new tax legislation in our alert drawn up on the same date .

5.6 Orders revised on certain elements of collection management of payment of collected VAT by operators outside the EU

Published on July 1, 2022 in the Official State Gazette, Order HFP/603/2022, of June 30, 2022, amends Order HAC/665/2004 of March 9, 2004, on certain elements of collection management of the payment of VAT collected by non-EU operators supplying electronically-supplied services to end customers and amending the Order of December 27, 1991, issuing instructions relating to AEAT's economic and financial regime.

More specifically:

(i) It adapts references in Order HAC/665/2004 to the recent amendments to the VAT legislation regarding the new special schemes applicable to distance sales and certain domestic supplies of goods and services (by removing those related to the disappeared special scheme applicable to electronically supplied services).

That same order is also adapted to the accord or agreement with Basque Country and Navarra finance authorities. Namely, the order regulates management of any transfers that have to be made by those finance authorities to AEAT of the payments collected when acting as a one-stop shop, with respect to taxpayers who have to perform the obligations under those schemes with those finance authorities.

(ii) Lastly, it updates the Order of the Economic and Finance Ministry of December 27, 1991, regarding collection management on behalf of other EU member states concerning VAT revenues relating to those new special schemes.

5.7 Schedule for notifications of changes in composition of tax groups amended

Published on July 1, 2022 in the Official State Gazette, Order HFP/604/2022 of June 30 introduces changes to form 202 (corporate income tax and nonresident income tax prepayments relating to permanent establishments and pass-through entities formed abroad with presence in Spain), and form 222 (corporate income tax prepayments under the consolidated tax group regime).

One of the most notable amendments is that where the composition of a tax group changes, the following information will have to be reported on form 222 (i) the date of the transaction that gave rise to the change and (ii) the reason for that change. The tax authorities will prepare a list of reasons from which to choose.

This Order came into force on July 2 and form 222 will be applicable for the first time to returns for prepayments with filing periods commencing in October 2022.

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