Tax Newsletter

Spain

GARRIGUES

March 2022

Contents

2.8 VAT. - Late-payment interest is not chargeable as a result of considering that a company operates through a fixed establishment where the reverse charge mechanism was used for the transactions

2.9 Tax on deposits at credit institutions. – An article making a tax reduction conditional on the credit institution's registered office being in the Canary Islands is unconstitutional

2.10 Cadastral values.- The purchase deed for a building can be used as proof to corroborate no support for its cadastral value

2.11 Management procedure / tax on construction, installation projects and works.- The rendering null and void of the legislation taken as the basis for a final assessment qualifies as a "supervening event" for the purposes of its revocation by the tax authorities

2.12 Tax management and audit procedures. – On the time period for tax authorities' auditing powers

2.13 Management and review procedures. – Tax authorities' inaction regarding a refund under the legislation on the tax gives entitlement to take the case to the judicial review courts

2.14 Extension of liability procedures. – Supreme Court delivers several principles in relation to procedures for enforcement of secondary liability and of chains of liability

2.15 Appraisal procedure. – If the procedure for appraisal at the taxpayer's instance takes longer than six months, the time period for the procedure containing it must resume

2.16 Data protection. - European data protection legislation does not bar public authorities from asking a provider of Internet advertising services to provide information on taxable persons that place those advertisements

3. Decisions

3.1 Corporate income tax. – Recognition of a tax asset for tax credits that have been carried forward raise income for the year and the maximum amount that can be allocated to reserve for investment in the Canary Islands (RIC)

3.2 Form 720.- The taxpayer has to prove that income used to purchase assets located abroad comes from statute-barred periods

3.3 Personal income tax.- Severance payments to senior managers for unjustified dismissal are exempt in amounts up to 20 days of salary per year worked, subject to a cap equal to twelve monthly payments

3.4 Personal income tax.- Incoming expatriate rules cannot be applied by senior managers who were also directors and became resident in Spain before January 1, 2015

3.5 Personal income tax. – New rulings on exemption for work performed abroad

3.6 Personal income tax. – Contribution of line of business by an individual to a company includes outstanding tax obligations in relation to the reserve for investment in the Canary Islands (RIC)

3.7 Personal income tax. – Various issues are examined in relation to the effects for personal income tax purposes of a confirmation of disability

3.8 Personal income tax. – Election of cash basis is considered tacitly renewed for a minimum three year period, unless expressly withdrawn by the taxpayer

3.9 Nonresident income tax. - A second request for a refund of withholding tax is not necessary if the assessment resulting from the first request has become final

3.10 Inheritance and gift tax. – Existence of handwritten will is not an event triggering suspension of the time period for filing tax return

3.11 Collection procedure.- TEAC determines new principles in relation to events triggering ability to enforce joint and several or secondary liability

3.12 Collection procedure.- Enforced collection order cannot be issued before decision on requests for suspension or deferred or split payment of tax debts

3.13 Review procedure.- The CJEU's judgments on requests for preliminary rulings are binding on both the judiciary and administrative tribunals from their pronouncement date

3.14 Audit procedure. – The suspension of time periods required during the pandemic must be taken into account in relation to tacit notifications of accepted notices of assessments

4. Resolutions

4.1 Corporate income tax.- Treatment in Spain of the licensing of optic fiber to Morocco

4.2 Personal income tax.- Providing mobile phones to employees for professional use is not compensation in kind

4.3 Nonresident income tax.- Presence of a remote worker in Spain does not create a permanent establishment in and of itself if, among other requirements, the arrangement was the employee's decision

4.4 Wealth tax.- If an employee managing leases dedicates a portion of working hours to another activity, even on an occasional basis, the family business exemption cannot be applied

4.5 Wealth tax.- Exemption does not apply to acquisitions of family businesses under living inheritance agreements

4.6 Transfer and stamp tax. - Reciprocal gifts are taxable as a sale and purchase or an exchange

5. Legislation

5.1 Reductions and suspensions of taxes on electricity bills and on electricity output have been extended

5.2 Publication of the annual equivalent rate for second quarter of 2022, for the purpose of characterizing certain financial assets for tax purposes

5.3 Tax measures introduced to provide better protection for orphan victims of gender violence

5.4 Approval of the 2021 personal income tax and wealth tax return forms

5.5 Tax measures to support the farming industry have been introduced against the adverse effects of the drought

5.6 Procedure for applications for requests for mutual assistance in relation to collection to be sent to AEAT by other tax authorities

5.7 Personal income tax. – The rules removing the penalty rules for form 720 have been published

5.8 New events of exceptional public interest confirmed along and tax rules applicable to the UEFA Europa League published

1. In judicial review proceedings, expert reports prepared by public officials do not have greater value than those produced by the applicant

Supreme Court holds that where the government is party in a proceeding, expert reports prepared by its public officials to defend its interests cannot be presumed objective and impartial.

In judicial review proceedings, taxpayer and government may rely on expert evidence to defend their interests.

This occurred in the case that gave rise to the supreme court judgment dated February 17, 2022 (appeal 5631/2019). The applicant had requested authorization to export a painting, which had been denied because, according to the government, the painting had exceptional value for the purposes of the Spanish historical heritage legislation and therefore had to stay in the country. In a judicial review proceeding, the appellant produced two reports by experts on the painter's work and both concluded that the merits of the painting were undeniable, but not exceptional in the context of the artist's work. Against this, the government lawyer produced two reports on the painting, prepared by two technical public officials and affirming that the value of the work was justification for it staying in Spain.

The Madrid High Court considered that the reports produced by the government had greater value as evidence because the government's experts generally act with a greater degree of objectivity and impartiality, and it went on to dismiss the application without examining the produced reports and opinions in depth.

Among the matters qualifying for examination in a cassation appeal are "*the nature and value as evidence of reports by the government existing in the administrative case file in addition to those produced in the courts as expert evidence, all of which must be prepared by the government's public officials or technical staff".* The Supreme Court gave the following reasoning:

(i) Under the Civil Procedure Law (applicable in this context), expert reports must be prepared by experts having the necessary scientific, artistic technical or practical knowledge to assess facts or circumstances relevant to the case and obtain certainty about them.

(ii) There can be no doubt that due to their training and selection processes, public officials and technical staff serving the government may be expected to have the relevant specialist knowledge to provide evidence of facts in expert reports. However, the probative force of an expert report is not a given in the law, and therefore must be appraised according to the rules of healthy criticism. In that appraisal, judges are free to form their own opinion, although they have to explain their reasons for accepting or reject the expert's comments, which requires all elements of the report to be analyzed rationally.

(iii) In any event, an opinion formulated by the government produced in a lawsuit between third parties does not have the same value as one produced in a proceeding in which the government is a party. In this case, *"it does not make sense to say that the report or opinion is impartial and therefore warrants extra credibility*", because "*a person who is a party cannot be impartial*". Furthermore, there are cases where reports originating from public officials cannot be considered as expert evidence, especially where the parties do not have the chance to request explanations or clarification. In these cases, the value of the reports is no

greater than their value as administrative documents and it is as such that they have to be appraised.

The Supreme Court therefore upheld the cassation appeal because the lower court's judgment had not compared the various reports and opinions produced in the proceeding and, without questioning the technical ability of its authors, based its decision only on the alleged greater objectivity and impartiality of the government's experts.

2. Judgments

2.1 Right to equality. – It breaches the right to equality to deny a civil partner an autonomous community reduction due to not being entered on the autonomous community register, even though she was entered on the municipal register

Constitutional Court. Judgment of March 21, 2022

A taxpayer resident in Madrid received a gift from her civil partner. The tax authorities denied her right to the reduction to inheritance and gift tax allowed in the autonomous community legislation for gifts between civil partners, because the couple were not entered on the Civil Partnership Register for the autonomous community of Madrid, although they were entered on the municipal register.

The Constitutional Court concluded that the authorities had breached the right to equality. According to the court, the aim of registration is to allow verification that it is not an arranged partnership and, for these purposes, the municipal register provides the same assurance as the autonomous community register.

2.2 Personal income tax. – The article in the law making the exemption for severance conditional on an actual severing of the worker's ties is not illegal

Supreme Court. Judgment of March 4, 2022

Article 1 of the Personal Income Tax Regulations provides that severance is conditional on the actual severing of the worker's ties with the company, and in relation to this it is presumed (unless there is proof to the contrary) that the severing of ties does not occur where in the three years following the worker's departure the worker again provides services to the company or to another related company.

In the case that gave rise to this judgment, the dismissed employee became a registered self-employed worker, providing services to a number of clients, including the company that dismissed him.

The Supreme Court examined whether by laying down this rule the regulations are in breach of the principle that certain matters are the exclusive preserve of legislation by statute, in addition to examining the described facts. It concluded as follows:

(i) In the tax field, there are precedents allowing a set of regulations to complete legislation by statute where this is necessary for technical reasons or for optimum fulfillment of the purposes of the Constitution and the law itself, which must be done on a subordinate basis, and to implement or supplement in all cases.

(ii) Although the determination, amendment, removal or extension of exemptions are subject to the principle that certain matters are the exclusive preserve of legislation by statute only, in this case the regulations only interpret the law without adding any element or requirement for the exemption. In fact, even if no provision existed in the regulations, the severing of ties would have to be necessary.

(iii) The presumption in the legislation also admits proof to the contrary, and therefore there is no breach of article 8.d) of the General Taxation Law, which lays down the principle that certain matters are the exclusive preserve of legislation by statute in relation to the exemptions.

(iv) Moreover, the restriction to three years is only "*a temporary flag which only serves the presumption, by introducing (…) an objective dimension in its functioning thereby benefiting legal certainty".* At the end of this time period, which is shorter than the statute of limitations, the tax authorities will not be able to found an adjustment on that presumption.

(v) This does not preclude having to consider the circumstances for each specific case. To examine each case, it has to be taken into account:

- That the severing of ties does not automatically have to be altered by any relationship between the employer and the worker after the dismissal, as long as that new relationship is unrelated in terms of the associated functions to the responsibilities held previously at the company.
- The absence of a severing of ties may be concluded even if the new relationship is civil or commercial in nature.
- Under the principle of ease of access to evidence, the person in the best position to prove the nature, content and functionality of the terminated relationship and the new relationship is the worker.
- In this specific case, the court found against the worker because he had not provided sufficient evidence to verify the necessary severing of ties with respect to the company that dismissed him and to which he continued providing services on a self-employed basis.

2.3 Personal income tax. – The contractual relationship theory cannot be applied automatically to deny the right to exemption for dismissal where the company is a sole-shareholder company

National Appellate Court. **Judgment of April 21, 2021**

An employee had a senior management contract with the company and was also its chief executive officer. The tax auditors considered that the employee's severance pay was not exempt from personal income tax because her senior management relationship had to be considered to be absorbed by her contract for services under the contractual relationship theory; and for these cases the law does not require mandatory severance pay.

In this judgment the National Appellate Court examined the senior manager's functions and found as follows:

(i) The fact of a senior manager belonging to the board of directors of a company is not necessarily an indication that the relationship is exclusively a contract for services. The particular circumstances of each case need to be taken into account.

(ii) Where a company is a sole shareholder company, the decisions of its governing body are adopted by the sole shareholder and may also be enforced directly by the shareholder without relying on the directors. In these cases, the company's managing body has a very limited amount of independence in its management decisions, and therefore there is little basis for concluding that its members actually form part of the company's strategic decision-making body. This does not apply in cases where the director is the sole shareholder.

(iii) In the specific case examined it had been evidenced that the senior manager did not have the influence normally exercised by directors. For that reason, the nature of her relationship as a contract for services is secondary to her senior management employment relationship, and therefore the contractual relationship theory does not apply.

(iv) Therefore, under the principle determined by the Supreme Court regarding the mandatory minimum severance for senior management contracts, the amount of severance must be exempt up to the cap determined in the legislation on senior management contracts.

2.4 Personal income tax. – The exemption for sale of a principal residence is valid even if the new residence is purchased after the end of the two year time period

Supreme Court. **Judgment of February 23, 2022**

A gain from the transfer of a principal residence is exempt if the proceeds are reinvested within two years in another principal residence.

The appellants sold their residence in January 2010, and in October 2011 paid the price of the new residence to a developer. Due to a delay in building work, however, the purchase deed for the new principal residence was signed in July 2012. The tax authorities took the view that the requirement to reinvest in two years had not been fulfilled and made an adjustment.

The Supreme Court, however, acknowledged the taxpayers' right to apply the exemption and found, in line with earlier judgments (see our March 2021 Tax Newsletter), that a capital gain obtained from transferring the principal residence is not taxable where the total amount obtained is reinvested within two years in the purchase of a new principal residence, even if that purchase is formalized after the end of that period.

2.5 Personal income tax. – Income in kind from movable capital received by an individual in a related-party transaction must be priced under the corporate income tax rules

Supreme Court. Judgment of February 9, 2022

A company paid the expenses of one of its shareholders, an individual. The tax authorities took the view that for the shareholder this involved obtaining income in kind from movable capital. At issue was whether this income must be priced (i) under the corporate income tax rules on related-party transactions, as referred to in article 41 of the Personal Income Tax Law, or (ii) under the special pricing rules for income in kind in article 43 of the Personal Income Tax Law.

According to the Supreme Court:

(i) Article 43 of the Personal Income Tax Law lays down special rules only for the pricing of salary income in kind and for capital gains in kind, and therefore these rules are not valid for pricing income in kind from movable capital.

(ii) In this case, after it has been confirmed that shareholder and company are related parties (ownership was 50%), the pricing rules in the corporate income tax legislation must be applied.

2.6 Nonresident income tax. - It is not precluded by EU law to require tax to be withheld on notional interest on loans between nonresident related parties

Court of Justice of the European Union. Judgment of February 24, 2022**. Case C-257/20**

The examined case concerned a Luxembourg entity which had provided an interest-free loan to its Bulgarian subsidiary. Under Bulgarian domestic legislation, tax avoidance includes borrowing or lending at an interest rate that diverges from the market interest rate at the time of conclusion of the transaction, including interest-free loans. For that reason, the Bulgarian tax authorities considered that tax on the unpaid interest should have been deducted at source.

The CJEU concluded that it is not precluded by EU law for national legislation to tax in the form of withholding tax the notional interest that a resident subsidiary which has been granted an interest-free loan by its non-resident parent company would have had to pay had the loan been granted at arm's length.

Nor does it preclude national legislation which requires that withholding tax to be calculated on the gross amount of that interest, without it being possible to deduct, at that stage, expenses related to that loan, if the length of the subsequent refund procedure that the taxpayer must apply for (to recover the excess tax paid due to not taking expenses into account) is not excessive and if the refund is made with late-payment interest.

2.7 VAT. Flexible compensation systems. - Provision of vehicles to workers is not a supply of a service for consideration if no consideration is received

National Appellate Court. Judgments of December 27, 2021, December 29, 2021 (780/2018, 235/2017) and January 17, 2022. And, to the same effect, the Central Economic-Administrative Tribunal. Decision of February 22, 2022

The tax authorities have been making VAT adjustments on vehicles made available by companies to their workers as follows:

(i) From one angle, by treating all of the input VAT incurred on the purchase or lease of the vehicle as deductible (in line with the company's deductible proportion in all cases).

(ii) From another angle, by characterizing the making available of vehicles for use by employees as a supply of services for consideration in respect of the portion relating to private use of the vehicle, which requires VAT to be charged on the value of that private use.

This principle, however, is only consistent with the view taken by the CJEU in its judgment on January 20, 2021 in case C-288/19, where the vehicle is made available to the employee in exchange for consideration.

This view was taken by National Appellate Court in a range of judgments finding that the described treatment is only valid where, as occurs in flexible compensation systems, it is agreed for the vehicle to be made available by the company in exchange for consideration in cash or in kind provided by the employee (including a waiver of a portion of earlier compensation in cash or in kind).

Otherwise (i.e. where no consideration is provided by the employee to the company in exchange for making the vehicle available) that making available of a vehicle is not subject to VAT; and, if the vehicle is used partly for private purposes, the input VAT incurred by the company on the purchase or lease of the vehicle is only deductible to the extent of the portion relating to company use of the vehicle.

The same principle applies, according to the National Appellate Court, in relation to accommodation made available to workers.

This principle was also endorsed by the Central Economic-Administrative Tribunal (TEAC) in a decision on February 22, 2022.

TEAC noted that for this type of making available of property to be classified as a transaction for consideration the employee must make payment in exchange for it, by, among other alternatives, having the necessary amount deducted from salary; or where a given quantifiable portion of the work performed by the employee may be regarded as consideration for the property or service received from the employer, due to being expressly so provided in the employment contract or in an attachment.

In several of the judgments mentioned, the National Appellate Court also pronounced judgment on the VAT paid on client entertainment expenses. Although TEAC confirmed that input VAT on Christmas dinners or lunches is not deductible, it concluded that input VAT on tickets purchased for sports shows and leasing spaces on motor racing circuits (VIP rooms)

may indeed be deductible, because in the examined cases the purpose of these expenses is to advertise and promote the company and therefore they are related to the company's business.

2.8 VAT. - Late-payment interest is not chargeable as a result of considering that a company operates through a fixed establishment where the reverse charge mechanism was used for the transactions

National Appellate Court. **Judgment of January 27, 2022**

After a business reorganization, a Swiss entity entered into contract manufacturing agreements, and distribution and services agreements with three Spanish companies in its group. Tax auditors considered that the entity acted in Spain through a fixed establishment, because it had offices and infrastructure at its disposal in Spain as well as the material and human resources of companies in its group to carry out manufacturing activities and distribution activities in Spain, on a habitual and permanent basis. The entity should therefore have charged VAT on sales of its products.

Because the entity had considered that it did not have a fixed establishment for VAT purposes, its sales were made using the reverse charge mechanism.

The National Appellate Court confirmed the tax authorities' reasoning and confirmed that the Swiss entity acted in Spain through a permanent establishment. It highlighted, among other factors, the facts of the distributor managing inventories as if they were its own and following the Swiss entity's instructions, although without needing its authorization for every transaction.

For that reason, the entity should have charged VAT on its sales. However, because VAT was paid by the customer under the reverse charge mechanism, there was no loss to the public purse, and therefore, according to the National Appellate Court, no late-payment interest is chargeable.

2.9 Tax on deposits at credit institutions. – An article making a tax reduction conditional on the credit institution's registered office being in the Canary Islands is unconstitutional

Constitutional Court. **Judgment of February 9, 2022**

The tax on credit institution deposits is a direct tax on deposits placed at credit institutions throughout Spain. The taxpayers for this tax are the credit institutions defined in Law 10/2014, of June 26, 2014, and the branches in Spain of foreign credit institutions.

Article 41.9.2 a) of Canary Islands Parliament Law 4/2012, of June 25, 2012 allowed a 50% deduction from the gross liability for that tax in cases where the credit institution's registered office was in the Canary Islands. In this judgment it was debated whether that deduction is in breach of the constitutional principle of equality (article 14), in connection with article 139.2 and article 157.2 of the Constitution and article 9 c) of Organic Law 8/1980, of September 22, 1980 on autonomous community financing, which prohibit autonomous community governments from approving tax measures that obstruct the free movement of persons, goods, services or capital and which affect the establishment of the residence of individuals or the location of companies and capital within Spain.

The Constitutional Court concluded that this deduction is unconstitutional because it is in breach of the principle of equality, in relation to article 31.1 of the Constitution, for the following reasons:

(i) All credit institutions attracting the funds of third parties in the Canary Islands are in a comparable position, because all of them operate economically in the Canary Islands, even though some may have their registered offices in the Canary Islands whereas others do not.

(ii) The unequal treatment of those institutions by reason of their registered office does not in or of itself determine the unconstitutionality of the article, because it needs to be examined whether it responds to a constitutionally legitimate purpose. However, neither the preamble to the law nor the pleadings of the Canary Islands government have expressed any purpose other than to benefit residents of the Canary Islands.

(iii) Although tax inequalities caused by the existence of different taxing powers (central, autonomous community and local governments) are justifiable, in principle, by the differences among the various territories, in this case the territory has ceased to be an element differentiating objectively comparable circumstances to become an element of discrimination.

In short, the provision is in breach of the principle of the free movement of goods and persons throughout Spain and the equality of the basic conditions for conducting economic activity, and is therefore unconstitutional.

2.10 Cadastral values. - The purchase deed for a building can be used as proof to corroborate no support for its cadastral value

National Appellate Court. **Judgment of February 2, 2022**

An entity challenged the cadastral value of a building (hotel) owned by it, due to the absence of support for that value. To support its claim, the entity produced the purchase deed for the building (recording a sale price below the cadastral value), and an expert report.

The National Appellate Court upheld the company's arguments. According to the court:

(a) It could not be ascertained, with a minimum degree of certainty, from the official schedule of values serving as a basis for the hotel's cadastral value, whether the market value on which that schedule was based was in line with the specific figure for the building concerned.

(b) The items of proof produced by the entity (which included that purchase deed) serve to corroborate the absence of support for the challenged cadastral value of the building.

2.11 Management procedure / tax on construction, installation projects and works. - The rendering null and void of the legislation taken as the basis for a final assessment qualifies as a "supervening event" for the purposes of its revocation by the tax authorities

Supreme Court. Judgment of March 4, 2022

Tax authorities are required to commence a procedure for revocation of their final decisions where, among other grounds, "supervening events" occur which affect a particular legal situation and bring to light the illegality of the delivered decision.

This judgment examined the case of a religious entity which was required to pay the tax on construction, installation projects and works (ICIO) by a local authority due to renovation work carried out on a building. After the tax authorities' assessment had become final, the entity applied for a refund, because it considered it was exempt from payment of the tax. The local authority rejected this application on the basis of the assessment having become final. Moreover, according to the local authority, the work was not exempt because under the applicable legislation (Order EHA/2814/2009, of October 15, 2009) it was taxable.

That order was later rendered null and void by the Supreme Court, however. For that reason, this court concluded (on the basis of an earlier judgment delivered by it on February 9, 2022, summarized in our February 2022 Newsletter) that the requirements for revocation by the local authority of the final assessment of ICIO were fulfilled, even though the religious entity had not applied for commencement of the revocation procedure from the outset.

More specifically, after Order EHA/2814/2009 had been rendered null and void by a court (which entailed recognition of the tax exemption in a similar case), the final assessment had been rendered null and void by a supervening decision, which is a sufficient ground for revocation of that assessment.

2.12 Tax management and audit procedures. – On the time period for tax authorities' auditing powers

Supreme Court. Judgment of March 1, 2022

In this judgment, the Supreme Court ruled on the ability to audit transactions which, despite continuing to have effects in non-statute barred years open for review, were performed in statute-barred periods. At issue in this case were the statute-barred periods between the entry into force of the General Taxation Law (in other words, from July 1, 2004) and its reform by Law 34/2015 (which came into force on October 12, 2015).

Contrarily to the court's earlier arguments on transactions performed in periods before July 1, 2004 (in a judgment on September 30, 2019 in appeal 6276/2017, among others), it was found on this occasion that the tax authorities had full auditing powers and were not subject to a statute of limitations or strict time bar, even before article 115 and article 66 bis of the General Taxation Law were amended by that Law 34/2015.

For further information on this new judgment, see our blog.

2.13 Management and review procedures. – Tax authorities' inaction regarding a refund under the legislation on the tax gives entitlement to take the case to the judicial review courts

Supreme Court. Judgment of March 4, 2022

The nonresident income tax legislation states that, where a tax return is filed showing a refund amount, the tax authorities must make the refund within six months, from which point late-payment interest starts to accrue to the taxpayer.

On this occasion the court examined the case of a French resident taxpayer who had applied for a refund of withholding taxes deducted from an amount of income (lottery winnings) which, according to the France-Spain tax treaty was not taxable in Spain. No decision had been delivered in a period far longer than six months. For that reason the taxpayer applied for a judicial review of the decision so as to claim the refund.

The Supreme Court concluded that the case involved a refund under the legislation on the tax and therefore the tax authorities had six months in which to make the refund. Because the tax authorities failed to deliver a decision in that period, the refund was regarded as accepted (positive silence) and a tax asset arose for the taxpayer against the tax authorities, which could be claimed under article 29.1 of the Law on the judicial review jurisdiction, in other words, by directly filing an application for judicial review. This amount must be refunded with late-payment interest.

According to the court, the reply would be different if the refund had been characterized as a refund of incorrectly paid tax because, in that case, silence on the part of the public authorities is a negative response and the required course of action would be to appeal to the economic-administrative tribunals.

2.14 Extension of liability procedures. – Supreme Court delivers several principles in relation to procedures for enforcement of secondary liability and of chains of liability

Supreme Court. Judgments of February 7, 2022 and February 17, 2022

The Supreme Court has delivered several judgments examining extension of liability procedures:

(i) In its February 7 judgment it examined a case in which the government of Castilla y León had initiated an extension of liability procedure to enforce secondary liability with respect to a company for a breach of its tax obligations by the main debtor, which had been declared in default by AEAT. After that declaration of default, AEAT issued several enforced collection orders which were notified to the main debtor which had already been declared in default.

Several issues were raised:

- Whether an autonomous community public authority could extend liability for tax on the basis of a declaration of default adopted by another public authority (AEAT).

The Supreme Court found that it could. It noted that it would be counter to the function of that declaration, and to the duty of public authorities to respect, among others, the principles of simplicity, cooperation, collaboration and coordination, if they had to obtain a new declaration of default against the same tax debtor.

- Whether the enforced collection orders issued by AEAT after the declaration of default were able to toll the statute of limitations for claiming payment from the person with secondary liability (which, under the *actio nata* principle starts to run when the declaration of default is made).

  The court held, once again, that, under the principles of effectiveness, coordination, cooperation and good administration required of a public authority, any step taken for collection from the debtor where there is already evidence of the debtor's total insolvency (due to the declaration of default) is unjustified and unnecessary.

  Therefore, enforced collection orders delivered by AEAT after the declaration of default cannot toll the statute of limitations for claiming payment from the person with secondary liability.

(ii) In its February 17 judgment it examined a case involving a chain of liability. Specifically, the sole director of a company was held secondarily liable for debts related to the corporate income tax owed by the company (main debtor). Later, her spouse and two children were held secondarily liable for the debts in respect of which the sole director had been held secondarily liable.

At issue was at what point the statute of limitations starts to run for action to extend liability to persons with secondary liability, whether (i) from the end of the main debtor's voluntary payment period for the tax debt or, conversely, (ii) from the end of the voluntary payment period for the person with secondary liability which followed the decision holding that person liable.

The court held that both the spouse and the children had been held secondarily liable for the sole director's debt, not for the company's debt. Therefore the starting point is the end of the voluntary payment period for the holder of the transferred debt (in this case, the debt of the person with secondary liability) and not from the date of the end of the payment period granted to the main debtor (the company).

2.15 Appraisal procedure. – If the procedure for appraisal at the taxpayer's instance takes longer than six months, the time period for the procedure containing it must resume

Supreme Court. Judgment of February 15, 2022

Following an audit of reported values, an assessment was notified to taxpayers. The taxpayers requested an expert appraisal in May 2011. The appraisal process did not end until June 2012, even though the time period allowed in the law for this process is six months.

The Supreme Court confirmed the method adopted in an earlier judgment and held that the authorities' right to make an assessment in that audit of reported values had become statute-barred. According to the court, although in principle the expert appraisal process tolls the running of the time period for the procedure in which it is carried out, if the expert appraisal

has not been completed after six months, the time period must resume with the related consequences if the procedure exceeds the specified length (as a general rule, the procedure becomes statute-barred and it is considered that nothing that has been carried out has tolled the statute of limitations).

2.16 Data protection. - European data protection legislation does not bar public authorities from asking a provider of Internet advertising services to provide information on taxable persons that place those advertisements

Court of Justice of the European Union. Judgment of February 24, 2022. Case C-175/20

The CJEU concluded in this judgment that:

(i) Collection by the tax authorities of information containing a considerable amount of personal data on an economic operator is generally subject to the European regulation on the protection of individuals with regard to the processing of personal data and the free movement of such data (GDPR).

(ii) A member state's tax authorities cannot adopt exceptions to the provisions in the GDPR where they have not been granted permission to do so in a legislative measure falling under the GDPR. The CJEU recalled in this regard that the regulation allows the scope of the rights and obligations it specifies to be restricted as long as the restriction respects fundamental rights and freedoms and is a necessary and proportionate measure to safeguard, among others, important objectives of economic or financial interest, including in the field of tax.

(iii) It is not precluded by the GDPR for the public authorities of a member state to ask a provider of Internet advertising services to provide information on taxpayers that place advertisements on its Internet portal, if the data are necessary for the specific purposes for which they are collected and if the collection period does not exceed the length of time strictly necessary to achieve the sought objective of general public interest.

3. Decisions

3.1 Corporate income tax. – Recognition of a tax asset for tax credits that have been carried forward raise income for the year and the maximum amount that can be allocated to reserve for investment in the Canary Islands (RIC)

Canary Islands Regional Economic-Administrative Tribunal. Decision of October 28, 2021

Under article 27 of Law 19/1994, of July 6, 1994, amending the Canary Islands Economic and Tax Regime (LREF), entities subject to corporate income tax are entitled to a reduction to their tax bases in respect of the income of their establishments located on the Canary Islands that is allocated to the reserve for investment in the Canary Islands (RIC).

This reduction applies to amounts allocated to the RIC in each taxable period, subject to a cap equal to 90% of the income obtained in the same period that is not distributed and comes from establishments located in the Canary Islands.

In this decision it was concluded that the calculation of the legal cap on amounts allocated to the RIC must include the tax asset associated with credits carried forward from earlier periods, instead of being confined to the credits used in the period, insofar as that tax asset increases the income figure on the income statement, and with it, the basis for allocating amounts to the RIC.

The court underlined that in the period when the deferred tax asset is generated (and allows, as we have mentioned, a greater basis to be taken for allocating amounts to the RIC) the effect is the exact opposite to that arising in the periods when the tax credits are used.

3.2 Form 720. - The taxpayer has to prove that income used to purchase assets located abroad comes from statute-barred periods

Central Economic-Administrative Tribunal. Decisions of March 4, 2022 (5375/2020, Principle 1, Principle 2 and Principle 3) and (5904/2020, Principle 1, Principle 2 and Principle 3)

The judgment by the CJEU on January 27, 2022 (analyzed in our alert on the same date) concluded that the penalty rules associated with breaches in relation to the information return on goods and rights abroad (Form 720) was disproportionate and that the recognition of unjustified gains for personal income tax purposes or unreported gains for corporate income tax purposes was not allowable, because in practice it did not allow expiry of the statute of limitations to be pleaded.

In these decisions, TEAC analyzed this judgment and concluded, based on a questionable interpretation, that the CJEU has validated the rules on the recognition of unjustified capital gains for personal income tax purposes, except where the taxpayer cannot rely on expiry of the statute of limitations. Therefore, in TEAC's opinion, for these rules not to be applicable, the taxpayer has to prove that the income used to purchase the assets located abroad was obtained in statute-barred periods.

Therefore, following the CJEU's judgment, any taxpayer who has challenged their personal income tax self-assessment by pleading expiry of the statute of limitations period will be entitled to reformulate and complete the proof produced in this respect. To this end, the case file must be returned to the management office so that it may offer the taxpayer the option of producing additional items of proof regarding the pleaded expiry of the statute of limitations and, after assessing and examining that evidence, it may decide whether sufficient evidence has been produced of expiry of the statute of limitations.

3.3 Personal income tax. - Severance payments to senior managers for unjustified dismissal are exempt in amounts up to 20 days of salary per year worked, subject to a cap equal to twelve monthly payments

Central Economic-Administrative Tribunal. Decisions of February 25, 2022 (2766/2019 and 7269/2018)

In its judgment on November 5, 2019 (appeal 2727/2017), the Supreme Court concluded that, in scenarios where a senior management employment relationship is terminated on the ground of withdrawal by the employer, the received severance payment is exempt to the

extent of the amount stipulated in Royal Decree 1382/1985, of August 1, 1985, on the special employment relationship of senior management personnel, in other words, up to seven days per year worked subject to a cap equal to six monthly payments (see our alert dated December 10, 2019).

TEAC has now recognized that the same principle applies in unjustified dismissal scenarios, in other words, up to twenty days per year worked subject to a cap equal to twelve monthly payments. It based this conclusion on the National Appellate Court's recent ruling in its judgment on October 21, 2021.

It must be remembered that there is a €180,000 cap on the exemption in all cases.

3.4 Personal income tax. - Incoming expatriate rules cannot be applied by senior managers who were also directors and became resident in Spain before January 1, 2015

Central Economic-Administrative Tribunal. Decisions of November 23, 2021 (3226/2019) and January 25, 2022 (6631/2019)

The special rules applicable to workers sent to Spain as provided in article 93 of the Personal Income Tax Law ("incoming expatriate rules") originally only applied where the workers were sent as a consequence of an employment contract. Since January 1, 2015, however, these rules have also applied to anyone becoming resident in Spain as a result of acquiring director status at a company.

In the cases examined by TEAC, relocation to Spain occurred before 2015 as a consequence of senior management employment contracts. The tribunal denied entitlement to apply the rules, however, because the senior managers belonged to the managing bodies of the employer company. In these cases, under the relationship theory, the contract for services absorbs the special senior management employment relationship and therefore it cannot be interpreted (according to the tribunal) that the reason for sending them to Spain was an employment contract.

3.5 Personal income tax. – New rulings on exemption for work performed abroad

Central Economic-Administrative Tribunal. Decision of December 20, 2021 (Principle 1 and Principle 2). Valencian Regional Economic-Administrative Tribunal. Decision of September 28, 2021

In these decisions, TEAC and the Valencian TEAR determined the following principles in relation to the exemption for work performed abroad:

(i) TEAC affirmed, first, that the law does not lay down any requirement for the sending of employees to work abroad to be done "for" a Spanish-resident employer.

(ii) Secondly, it concluded that the directors cannot apply the exemption, based on the interpretation made by the Supreme Court in its judgment on March 22, 2021 (appeal 5596/2019). It must be remembered, however, that this supreme court judgment related only to income in respect of sitting on boards of nonresident subsidiaries.

(iii) The Valencian TEAR concluded (by drawing on the principle determined by the Supreme Court in a judgment on February 25, 2021, summarized in our March 2021 Newsletter), that the days in the assignment period will be included in the number of days spent abroad.

(iv) Lastly, this regional tribunal affirmed that if the employee has not worked at the company for a full year (in the examined case the employee's contract started on September 3, 2018), the exemption must be calculated by multiplying the income by the days spent abroad divided by the days actually worked at the company (rather than the total number of days in the year).

3.6 Personal income tax. – Contribution of line of business by an individual to a company includes outstanding tax obligations in relation to the reserve for investment in the Canary Islands (RIC)

Canary Islands Regional Economic-Administrative Tribunal. Decision of November 30, 2021

In this decision it was examined whether in a case involving contribution of a line of business (subject to the tax neutrality regime) by an individual (who will cease to operate in that business) to a company, the outstanding tax obligations in relation to the unused amounts allocated to the reserve for investment in the Canary Islands by the individual may be transferred, in other words, whether the unused amounts and other requirements may be fulfilled and used at the recipient company.

The auditors concluded that contributions of a line of business do not allow the beneficiary of the contribution to be subrogated (by universal succession) in respect of the transferor's rights and obligations.

The Canary Islands TEAR concluded, conversely, that in a contribution of a line of business made by an individual to a legal entity, all outstanding tax obligations are transferred, including any related to the RIC.

3.7 Personal income tax. – Various issues are examined in relation to the effects for personal income tax purposes of a confirmation of disability

Catalan Regional Economic-Administrative Tribunal. Decision of November 29, 2021; and La Rioja Regional Economic-Administrative Tribunal. Decision of August 31, 2021

In these decisions, a number of issues were reviewed relating to the date of recognition of a disability for the purposes of applying certain personal income tax rules:

(i) Article 19.2 of the Personal Income Tax Law allows a €3,500 reduction (on top of the €2,000 general reduction allowed in that same article) for individuals with disabilities who obtain salary income as active workers.

In the case examined by the Catalan TEAR, the taxpayer obtained recognition of a degree of disability on December 19, 2017 and the tax authorities considered that the reduction had to be prorated by reference to the period between that date and the end of fiscal year 2017. The Catalan TEAR concluded, however, that the reduction may be applied in full, after the disability has been confirmed, because the law does

not specify any type of pro rata. This same interpretation had already been adopted in a decision on June 23, 2020.

(ii) Moreover, article 60 of the Personal Income Tax Law contains an annual €9,000 disability tax free allowance for individuals with disabilities who can substantiate a degree of disability equal to or higher than 65 percent.

The La Rioja TEAR concluded that confirmation of the disability may be retroactively valid from the filing date of the request for confirmation of disability. The tribunal took into account that the claim was accompanied by a medical report indicating that on the date of the claim the individual had severe cognitive impairment which was confirmed by the tests carried out in the disability identification process.

3.8 Personal income tax. – Election of cash basis is considered tacitly renewed for a minimum three year period, unless expressly withdrawn by the taxpayer

La Rioja Regional Economic-Administrative Tribunal. Decision of May 31, 2021

Under the personal income tax legislation, income from economic activities must be recognized on an accrual basis, unless the taxpayer elects cash basis. The Personal Income Tax Regulations state that cash basis is considered to be approved by the tax authorities simply as a result of the taxpayer electing this method on a self-assessment return for the tax, in which case it will be considered to be retained for a minimum three year period.

In the case examined in this decision, the taxpayer had expressly elected cash basis in fiscal years 2014, 2015 and 2016, but in fiscal year 2017 the taxpayer did not tick the box for that option, which the tax authorities took to mean that in 2017 the taxpayer should have applied the accrual method.

The La Rioja TEAR concluded, however, that the law is not sufficiently clear. The three year period in the law is a “minimum” and therefore it cannot be considered to exclude the option of a longer period. This is compounded by the fact that the law does not define how to extend the initial three year period or how to withdraw the initial election and change to accrual basis.

Therefore, if at the end of the “minimum” three year period the cash basis box is not ticked again, there are two possible interpretations: that the initial election has been withdrawn or conversely that it has been tacitly renewed.

In short:

(i) If the taxpayer wishes to apply the accrual basis after the end of three years from the fiscal year in which cash basis was elected, there is no law clarifying how to withdraw election of cash basis, so it may be interpreted that the change is made simply by not ticking on the self-assessment return the box relating to recognition on a cash basis.

(ii) From the opposite angle, however, and precisely because no procedure exists for withdrawing or extending the election, it may reasonably be considered also that, although no box has been ticked, it has been tacitly elected to retain the initial election of cash basis.

In other words, because the taxpayer stated its election of cash basis for three years running, the fact that the election was not stated in the fourth year is not a reason for considering that the taxpayer tacitly continued electing the cash basis.

3.9 Nonresident income tax. - A second request for a refund of withholding tax is not necessary if the assessment resulting from the first request has become final

Central Economic-Administrative Tribunal. Decisions of December 20, 2021 (5462/2017) and (5829/2017)

A U.S. resident investment fund requested a refund of nonresident income tax (NRIT) withholdings on dividends from its investments in Spanish shares. The tax authorities commenced a limited review procedure which ended with a provisional assessment decision denying the requested refund. The taxpayer appealed against that decision, but the claim was not admitted due to being outside the time limit.

Later, the fund filed a second request for a refund in respect of the same amounts of income and period, which was rejected by the tax authorities because it was simply a repetition of the previous request.

The Supreme Court, in a judgment on February 4, 2021 (appeal 3816/2019), held that a simple negative reply to a request for a refund is not akin to a tax assessment. Therefore, every taxpayer is entitled to make a second request for the same refund and obtain a detailed reply from the tax authorities.

However, TEAC concluded in this decision that in this case a genuine tax assessment has been issued, insofar as a limited review procedure was carried out on the first request for a refund, ending with an administrative decision which contained a different assessment from that submitted by the taxpayer and which became final. Therefore, a second request for a refund does not have to be admitted for consideration (even if it is based on new arguments). Taking the opposite view would be tantamount to voiding a final assessment without implementing the exceptional procedures required for this purpose.

3.10 Inheritance and gift tax. – Existence of handwritten will is not an event triggering suspension of the time period for filing tax return

Madrid Regional Economic-Administrative Tribunal. Decision of November 30, 2021

The inheritance and gift tax legislation stipulates a six month period from the date of death, in which to file the relevant return.

In the case examined in this decision, death occurred on August 26, 2014, so the filing period ended on February 26, 2015. However, the self-assessment (accompanied by the deed for division of the estate) was filed on March 2, 2018, for which reason the tax authorities issued the relevant surcharge.

The interested party argued that the tax return had been filed within the time limit because there was a handwritten will which had not been formalized until September 5, 2017, and therefore the voluntary filing period had to run from that date.

The Madrid TEAR concluded, however, that the existence of a handwritten will is not an event triggering suspension of the filing period, and it makes no difference for the purposes of the surcharge whether the reasons for filing of the return outside the time limit were beyond the interested parties' control.

3.11 Collection procedure. - TEAC determines new principles in relation to events triggering ability to enforce joint and several or secondary liability

Central Economic-Administrative Tribunal. Decisions of January 18, 2022 (746/2019 and 2002/2019) and of February 17, 2022 (7129/2021 and 8158/2021)

In these decisions, TEAC examined a range of cases relating to enforcement of joint and several and secondary liability, and it determined principles.

(i) In relation to the secondary liability scenarios defined in article 43.1 of the General Taxation Law, it determined the following:

- Directors' liability for tax debts of companies which have ceased operating: The only requirement for the enforcement of liability in these cases is that the tax authorities must determine, and substantiate sufficiently, the approximate date of cessation, for which it is not necessary to substantiate an exact date.

- Liability of individuals or entities over which tax debtors have effective control or which share the same decision makers: All the requirements that need to be fulfilled to be able to enforce liability in these cases are:

  - There must be single management, at least partially, in other words, there must be an absolute and single decision-making power over everyone involved or else that decision-making power must be significant enough to be used to funnel creditor fraud.

  - The liable individuals or entities must have been created or used to evade compliance or payment of tax debts.

  - There must be a oneness and sameness of persons or economic spheres, or a confusion or diversion of assets.

(ii) In relation to the joint and several liability scenarios in article 42.2.a) of the General Taxation Law, in other words, liability held by anyone who causes or cooperates 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: In these cases, the jointly and severally liable person may challenge the overall scope of liability, and therefore the case file sent to the economic-administrative tribunal must contain all the documents substantiating the tax debt included in the decision to extend liability.

(iii) TEAC clarified lastly that the extension of liability scenarios set out in article 42.2 of the General Taxation Law are not applicable in relation to the collection by the tax authorities of debts in respect of civil liability and fines arising from a public finance offense.

3.12 Collection procedure. - Enforced collection order cannot be issued before decision on requests for suspension or deferred or split payment of tax debts

Central Economic-Administrative Tribunal. Decision of February 17, 2022

TEAC modified a principle adopted in earlier decisions, by finding that:

(i) An enforced collection order cannot be issued before notification of the failure to admit a request for suspension by a TEAR or by TEAC.

(ii) Based on the principle determined by the Supreme Court in its judgment on October 28, 2021 (appeal 4743/2020), nor can an enforced collection order be issued before a decision has been delivered on a second request for deferred or split payment made within the payment period granted after denial of the first request for deferred/split payment.

However, this principle is not applicable following the entry into force of Law 11/2021, of July 9, 2021, (Anti-Fraud Law), because this law laid down that a repetition of previously denied requests for deferred or split payment or offset (before the relevant payment has been made), does not stop the enforcement period starting.

3.13 Review procedure. - The CJEU's judgments on requests for preliminary rulings are binding on both the judiciary and administrative tribunals from their pronouncement date

Central Economic-Administrative Tribunal. Decision of February 22, 2022

TEAC found in this decision that the CJEU's judgments on requests for preliminary rulings are binding and final from the date they are delivered. Their principles must therefore be applied by all legal operators with the meaning conferred by the European judge.

In other words, both the national judge submitting the request for a preliminary ruling and any other court hearing a similar case are bound by the CJEU's judgment on a preliminary ruling, and have to apply EU law exactly as it has been interpreted, without altering it, or failing to apply it if the CJEU has held it valid. None of this precludes the option of submitting a new request for a preliminary ruling.

3.14 Audit procedure. – The suspension of time periods required during the pandemic must be taken into account in relation to tacit notifications of accepted notices of assessments

Canary Islands Regional Economic-Administrative Tribunal. Decision of October 28, 2021

On March 2, 2020 an accepted notice of assessment was signed. Under normal conditions, the assessment contained in the notice would have been considered to have occurred on April 2, 2020. Due to the pandemic, however, on March 18, 2020 the Official State Gazette published Royal Decree-Law 8/2020, of March 17, 2020, which stated that the period between March 18 and May 30 2020 would not be included for the purpose of determining the maximum time period for settling procedures.

For that reason, the taxpayer interpreted that the assessment was not considered to occur until the end of that suspension period, and the payment period for the assessed debt ran from the end of that period. The debt was ultimately paid on June 6, 2020.

The tax authorities interpreted conversely that notification of the assessment should be considered to have taken place on April 2, 2020. Accordingly, the payment should have been made not later than May 20, 2020.

The Canary Islands TEAR found in favor of the taxpayer and concluded that, on the basis of Royal Decree 8/2020, notification of the assessment could not take place before May 30, 2020, and that therefore, because the debt was paid on June 6, 2020, that payment was made within the voluntary payment period.

4. Resolutions

4.1 Corporate income tax. - Treatment in Spain of the licensing of optic fiber to Morocco

Directorate General for Taxes. Resolution V0064-22 of January 17, 2022

A Spanish telecommunications operator was going to sign an irrevocable licensing agreement for long term use of two fiber optic lines in a section of the network in the Strait of Gibraltar with a Moroccan company (which does not carry on any activity and does not have a permanent establishment in Spain). Its remuneration includes an amount in respect of the license and another (annual) amount for maintenance of the networks.

The issue submitted for resolution was whether those payments could be characterized as royalties, in which case they would be subject to a 10% withholding, under the Morocco-Spain tax treaty.

Basing its comments on that tax treaty and the Commentaries to the OECD Model Convention, the DGT underlined that the provision of a transmission service through optic fiber owned by the Spanish company and managed by it should not be confused with the possession or control of the assets involved in the provision of those services (optic fiber, in this case).

For a royalty to arise that transfer of possession and control must exist; otherwise, it will be a provision of services which will be characterized as a business profit.

Consequently, there are two alternative scenarios:

(a) The income fulfills the requirements to be characterized as a royalty, in which case a 10% withholding could be made in Morocco under the tax treaty.

In that case, the Spanish company would have to include in its corporate income tax base the income obtained and taxed abroad together with the tax paid there.

It will additionally be entitled to deduct the tax actually paid abroad, subject to the conditions and requirements set out in article 31 of the law on the tax. In other words:

- The deduction may not exceed the amount of tax specified in the tax treaty (10%).

- The deduction is also be subject to a limit equal to the gross tax liability that would arise in respect of the income received, under the corporate income tax legislation.

(b) The income cannot be characterized as a royalty, and therefore any withholding that might be made in Morocco would not be in conformity with the tax treaty and therefore could not be deduced in Spain.

Any excess tax withheld would have to be recovered in Morocco by applying for a refund of incorrectly paid tax. If Morocco denied the refund and the requesting party considers that this step is not in conformity with the tax treaty, it may request a mutual agreement procedure, as specified in article 25.1 of the treaty.

4.2 Personal income tax. - Providing mobile phones to employees for professional use is not compensation in kind

Directorate General for Taxes. Resolution V0150-22 of January 31, 2022

An entity provides employees with the use of mobile phones and accessories (charger, cable, batteries, multi-SIM cards, case, among others), and other elements with similar or the same characteristics, owned by the company, for the performance of their work. The company's code of conduct prohibits private use of those work tools. That prohibition is laid down as a general obligation in the policy on professional use of company phones and, as an individual obligation, in employees' employment contracts.

In a broad comment made before entering into an analysis of the specific case concerned, the DGT recalled that there is no compensation in kind where the company makes available to employees machinery, utensils or tools owned by the company for them to use in performing their work. The absence of salary income must be found regardless of whether those resources are made available to employees on the company's premises, or when employees are providing services outside those premises, as happens where employees work from home in remote work scenarios, or at the offices of the company's clients.

Moreover, and again in broad terms, using, consuming or obtaining those resources for private purposes may amount to salary income in kind.

And in relation to the specific case described, the DGT concluded from its earlier comments that, in view of the nature of the tool provided by the company to its employees and its undeniable connection to their work, bearing in mind the circumstances in which they are used as described in the facts, no salary income in kind arises.

4.3 Nonresident income tax. - Presence of a remote worker in Spain does not create a permanent establishment in and of itself if, among other requirements, the arrangement was the employee's decision

Directorate General for Taxes. Resolution V0066-22 of January 18, 2022

A UK resident entity received until February 2021 the services of one of its employees who was a UK national and was temporarily retained in Spain in March 2020.

After lockdown had ended, the employee decided, unilaterally and for personal reasons, to stay in Spain, as a result of which that individual spent more than 183 days in Spain in 2020, working remotely for the UK company. In that period, the company did not pay any expenses

related to accommodation in Spain, or pay the employee any additional compensation for working in Spain; and ultimately the relationship was terminated because the employee did not want to return to work in the UK.

It was analyzed whether the company may have a permanent establishment in Spain, under the definition of permanent establishment in the Spain-UK tax treaty. This circumstance could arise in either of two ways:

(i) Due to having in Spain a fixed place of business through which the business of an enterprise is wholly or partly carried on.

According to the DGT:

- In this case, the place where the company's business is carried on is a home owned by the employee and the factor needing to be analyzed is whether it is "at the disposal" of the company.

  The DGT recalled that the OECD issued a report on this issue on April 3, 2020 by reason of the pandemic (*OECD Secretariat Analysis of Tax Treaties and the Impact of the Covid-19 Crisis*), which was updated on January 21, 2021 (*Updated guidance on tax treaties and the impact of the COVID-19 pandemic*). This report contains non-binding guidance that governments may adopt in relation to exceptional circumstances experienced by a taxpayer as a result of the pandemic.

  According to this guidance, working remotely from home by an individual (home office) as a public health measure imposed or recommended by at least one of the jurisdictions involved to prevent the spread of the virus does not create a fixed place of business for the company.

- However, in this case, the employee spent longer in the UK than the circumstances caused by the pandemic required, which makes it necessary to analyze the specific circumstances determining whether the employee's home office is at the disposal of the company.

  In this case a permanent change occurred to the way in which the employee provided services to the company, because it was specified that it was the employee's wishes (which were not accepted by the company) that gave rise to termination of the employment relationship between them. Moreover, there were a number of circumstances from which it could be concluded that the office was not at the company's disposal:

  - The employee unilaterally decided to continue in Spain, after the measures preventing him from leaving the country had disappeared.

  - The company had at the employee's disposal a place from where he could work in person in the United Kingdom, and therefore he was not required to work at home.

  - The company did not pay any expense, or provide any special compensation to the employee in relation to use of his home to perform his work.

To conclude, an employee who worked from a home office in the three month period in which public health measures were imposed or recommended by the government concerned to prevent the spread of the virus would not of or in itself create a fixed place of business for the company in Spain.

If that presence continued it would be necessary to analyze the specific facts and circumstances from the standpoint that the place where the company's business is carried on must have a certain degree of permanence.

(ii) Due to carrying on its business in Spain through an agent who acts for the company and has and habitually exercises authority to conclude contracts on the company's behalf.

Since in this case the general idea is that before the measures imposed to stop the spread of the virus the company did not have an agent with these characteristics in Spain, it is unlikely that this conclusion will change as a result of the imposed restrictions on movement.

The Spain-UK tax treaty must be analyzed in any event. This treaty is not based on the 2017 OECD Model Convention, so the analysis must be based on the commentaries to the 2014 version, which included in the definition of dependent agent not only anyone who literally signs contracts on behalf of the company, but also anyone who concludes contracts which are binding for the company, even if they are not established on behalf of the company.

In the submitted case, the employee did not have authority to conclude contracts, but it was not specified whether contracts were concluded as a result of his activities, and therefore it cannot be concluded whether the activities carried on by the employee may be classed as an agent's activities.

4.4 Wealth tax. - If an employee managing leases dedicates a portion of working hours to another activity, even on an occasional basis, the family business exemption cannot be applied

Directorate General for Taxes. Resolution V0100-22 of January 21, 2022

An individual owns slightly more than 19% of a company engaging solely in property leasing. A portion of these properties are leased in the form of individual rooms, without providing hospitality services. For management of the business, the company has two workers under full-time contracts (subject to the general social security regime), an office used only for management of this business and a website.

The company is considering managing with its own personal and material resource the leasing of properties owned by others, in exchange for a fee for its services, as well as renting out other residences owned by investors and subleasing them to individuals. One of the two workers will dedicate a portion of her working hours to these new activities, whereas the other will continue dedicating all of her working hours to the existing leasing business for the company's own properties. However, the worker dedicating all of her hours to the existing leasing business for the company's own properties might occasionally have to stand in for the other worker.

In relation to characterization of the activities carried on as economic activities for the purpose of the family business exemption, the DGT noted the following:

(i) Regarding the property leasing business, the requirement that the lessor must have at least one individual employed full-time under a employment contract will only be found to be fulfilled if that contract is characterized as an employment contract under the labor legislation in force (which falls outside the scope of tax matters) and is for full-time work. The employee must be hired by the lessor and dedicate all of their hours exclusively to the property leasing business.

(ii) In the examined case, the employees who currently work exclusively on management of the property leasing business might spend a portion of their working hours on the company's new activities, in other words, subleasing properties and managing properties belonging to third parties. Therefore, the described requirement would not be fulfilled and the property leasing business could not be treated as an economic activity for the purposes of the wealth tax exemption.

(iii) The new activities involving subleasing properties and managing properties belonging to third parties will be treated as an economic activity if they entail organization on the company's own behalf of means of production and human resources for the purpose of participating in the production or distribution of products or services. Because this is a matter of fact, the body in charge of managing the tax must, by reference to the existing circumstances, carry out a specific appraisal and assessment as to whether the necessary elements exist for the activity carried on by these entities to be considered an economic activity.

4.5 Wealth tax. - Exemption does not apply to acquisitions of family businesses under living inheritance agreements

Directorate General for Taxes. Resolution V0102-22 of January 21, 2022

Parents are considering transferring during their lifetime to their children all or most of their shares under a living inheritance agreement as defined in Title II of Legislative Decree 1/2011 of the autonomous community of Aragon.

After the inheritance agreement has been performed, they intend to keep the acquired shares and not carry out any corporate transaction at that company that could substantially lower its acquisition value. They do not deny, however, that, within five years following the execution of the inheritance agreement, the company may transfer part of its assets used in its business or shares in subsidiaries, and reinvest the proceeds in other assets.

In relation to applying the exemption for acquisition of a family business, the DGT noted the following:

(i) Inheritance agreements are a means of inheritance and therefore amount to an acquisition upon death (*mortis causa*). Therefore, the acquisition of the shares mentioned in the request will be subject to inheritance tax due to being an “acquisition of goods or rights by inheritance, bequest or any other means of inheritance”.

(ii) The requirements laid down to apply the reduction to the taxable amount in the case of a family business acquired under a living inheritance agreement are set out in article 20.2.c) of the law on the tax for acquisition upon death (*mortis causa*).

(iii) However, that reduction cannot be applied in relation to the inheritance agreement described, because the person will not have died when the shares are transferred precisely because there is no requirement for the person to have died.

(iv) Nor does the reduction under article 132.3 of the revised wording of the provisions issued by the autonomous community government of Aragon on devolved taxes appear to be applicable to an acquisition made by the requesters under a living inheritance agreement, because that article relates to *inter vivos* acquisitions of shares and refers to article 20.6 of the law on the tax which, as has been mentioned, is not applicable to living inheritance agreements.

4.6 Transfer and stamp tax. - Reciprocal gifts are taxable as a sale and purchase or an exchange

Directorate General for Taxes. Resolution V0099-22 of January 21, 2022

Father and son each have an apartment located on the same residential estate and both apartments have the same value. They have decided that the father will gift his apartment to his son and the son will gift his to his father.

For inheritance and gift tax, and transfer and stamp tax purposes, transactions and contracts are not taxable by reference to the name given to them by the parties entering into them, but instead according to the real legal nature of the legal transaction they are actually performing. Therefore, to determine the tax liability in respect of the transactions submitted for resolution, the first step is to analyze their legal nature.

This must be done by reference to the definitions of gift, sale and purchase, and exchange in the Civil Code, from which the following conclusions are drawn:

(a) Neither of the two transfers of properties may be characterized as a gift, because for a gift to exist there cannot be any consideration. In this case, the consideration for the father's property is the son's property and the consideration for the son's property is the father's property.

(b) Consequently, the legal transaction to be performed must be characterized as an exchange or, if applicable, as a sale and purchase, according to article 1,446 of the Civil Code, among other provisions.

(c) Bearing in mind that the properties are delivered in exchange for consideration they are transfers for a consideration, and therefore subject to transfer tax (under the transfers for a consideration heading).

5. Legislation

5.1 Reductions and suspensions of taxes on electricity bills and on electricity output have been extended

Royal Decree-Law 6/2022, of March 29, 2022 adopting urgent measures as part of the National Plan in response to the economic and social consequences of the war in Ukraine was adopted on March 30, 2022.

In our alert dated March 30, 2022 we summarized the main new tax provisions, consisting of:

(i) Extension until June 30, 2022 of reduced VAT rates and rates for the excise tax on electricity and on the special tax on electricity and of the suspension of tax on the value of electricity output.

(ii) Adoption of monthly, instead of quarterly, refunds of hydrocarbon tax.

(iii) Adoption of personal income tax exemption for sums received by relatives of victims of the accident of flight GWI9525.

(iv) Option to extend administrative time periods as a result of cyberattacks.

This royal decree-law also contains the other new tax provisions summarized below:

(i) **A charge ("canon") on the use of inland waters for electricity generation:** An amendment is introduced to article 8 of Royal Decree 198/2015, of March 23, 2015, implementing article 112 bis of the revised Waters Law, to adapt the tax rate to that set out in the Waters Law and introduce other technical clarifications.

(ii) **A charge ("canon") on the use of publicly owned water resources for inland aquaculture facilities:** For a six month period, owners of inland aquaculture facilities are to be exempt from the charge for use of publicly owned water resources under article 112 of the revised Waters Law.

(iii) **Public fees**

(a) Ship fee (T-1) and cargo fee (T-3) on shipping routes between mainland Spain and non-mainland ports belonging to the central government: Between April 1, 2022 and June 30, 2022, a reduction will be allowed equal to 80% of the tax liability remaining after applying other reductions (assessed by the port authorities of Ceuta, Melilla, Balearic Islands, Las Palmas and Santa Cruz de Tenerife), for shipping routes and services between the mainland and ports managed by other port authorities.

The reduction will not be applicable on routes between mainland ports of origin and destination, or on routes between the islands, or routes to other countries.

(b) Port fee for fresh fish (T-4): An exemption is allowed for the owner of the fishing vessel and their substitute, where the fresh fish enters the port by sea. This exemption will be applicable for a six month period running from March 31, 2022.

5.2 Publication of the annual equivalent rate for second quarter of 2022, for the purpose of characterizing certain financial assets for tax purposes

The March 28, 2022 edition of the Official State Gazette (BOE) published the decision of March 23, 2022, by the Office of the General Secretary for the Treasury and International Finance, which, as is now the custom, sets out the reference rates that will apply for the calculation of the annual effective interest rate for characterizing certain financial assets for tax purposes, this time for the second calendar quarter of 2022.

The rates are as follows:

- Financial assets with terms of four years or less: 0.274 percent.
- Assets with terms between four and seven years: 0.465 percent.
- Assets with ten-year terms: 1.046 percent.
- Assets with fifteen-year terms: 0.834 percent.

In all other cases, the reference rate for the period closest to the period when the issuance is made will be applicable.

5.3 Tax measures introduced to provide better protection for orphan victims of gender violence

The March 22, 2022 edition of the Official State Gazette published Law 2/2022, of March 21, 2022, on better protection for orphan victims of gender violence, which includes tax changes.

Namely, for transfers benefiting children, minors or people with disabilities subject to natural guardianship, stewardship or with support measures to ensure their legal capacity is exercised properly, where the transfers are made as a result of the death of victims of violence against women, the following new provisions are adopted

(i) A new non-taxable transfer for the purposes of the tax on increase in urban land value for cases where the transfers are made for consideration to benefit the individuals mentioned above and as a result of the death of a mother.

(ii) A new case of exemption under any of the transfer and stamp tax headings in cases of transfers of assets or rights to the beneficiaries mentioned above, by any means, and if they serve to pay amounts of indemnification recognized by a court.

5.4 Approval of the 2021 personal income tax and wealth tax return forms

Orden HFP/2017/2022 of March 16, 2022, approving the forms for 2021 personal income tax returns and wealth tax returns was published in the Official State Gazette (BOE) on March 18, 2022 and notably specifies the following:

(i) Filing periods:

- The tax particulars and draft personal income tax return may be obtained on or after April 6, 2022.
- The filing periods for the returns for both taxes (including confirmation of the draft personal income tax return) start on April 6 and end on June 30, 2022, inclusive.
- However, orders for payment by direct debit can only be made until June 27, 2022 (inclusive); although if only the second installment is made by direct debit, the order may be made until June 30.

(ii) In relation to the personal income tax return:

- Income from immovable capital: A box has been added so that lessors who are not "large owners" can include as a deductible expense the amount of any reduction to rental income that they voluntary agreed to on or after March 14, 2020, relating to the monthly rent falling due in January, February and March 2021 in respect of premises rented to certain types of business owners and subject to fulfillment of the specified requirements.

- In relation to reductions to taxable income for contributions to employee welfare programs, a distinction is made between individual contributions and employer's contributions recognized by the sponsor in tax period between 2016 and 2020, in respect of which a reduction to taxable income was outstanding as of January 1, 2021. This separation is also made in relation to the two types of contributions made in relation to 2021 for application of the new limits laid down in article 52 of the law on the tax.

- The deductions from gross tax liability section includes the tax credit for improvement works for energy efficiency in homes introduced to come into effect on October 6, 2021 by article 1 of Royal Decree-Law 19/2021 of October 5, 2021.

- In relation to tax credits for incentives and stimulus for investment by businesses in economic activities, it gives taxpayers carrying on an economic activity the option to apply, on or after January 1, 2021, tax credits for investments in Spanish productions of feature films and short films and for the production of certain types of live performing arts and musical shows, either as producers or due to providing funding.

- The payment and refund document is modified to allow to be provided, in the case of returns with a refund amount, the number of a bank account in a country or territory not belonging to the Singe Euro Payments Area (SEPA).

(iii) In relation to the wealth tax return:

- A specific section is introduced for identifying balances in virtual currencies which to date had to be included in a general section for "other assets and rights with economic content".

- The right to apply the legislation approved by the autonomous community governments where their taxable assets and rights with the greatest value are located is extended to include all nonresidents, whether they are resident in a member state of the EU or of the EEA or in a third state.

- For life insurance policies, where the policyholder does not have the power to exercise the right to surrender the policy, and in cases where temporary or lifelong annuities under a life insurance policy are received, the value of the mathematical provision is included as a possible value.

5.5 Tax measures to support the farming industry have been introduced against the adverse effects of the drought

Royal Decree-Law 4/2022, of March 15, 2022, adopting urgent measures to support the farming industry as a result of the drought was published in the Official State Gazette on March 16, 2022.

Among other tax measures:

(i) It increases from 5% to 20% the reduction contained in additional provision one of Order HAC/1155/2020, of November 25, 2020, implementing for 2021, the objective assessment method for personal income tax purposes and the special simplified VAT scheme, for the activities included in schedule I to that order.

(ii) The person in charge of the Ministry of Finance and Public Service is authorized to allow, for farming operations and activities in which losses have arisen which are a direct consequence of the adverse events described in the royal decree-law, a reduction to be established, on an exceptional basis, to the net income indexes referred to in Order HAC/1155/2020, of November 25, 2020, for 2021.

(iii) An exemption from real estate tax for 2022 is allowed for properties owned by the owners of farming or livestock operations and which are used for the activities of those operations, where the losses of revenues specified in the royal decree-law have occurred.

The exemption will apply to the legally authorized surcharges relating to this tax. Any taxpayers entitled to this benefit who have already paid their tax bills for 2007 may claim a refund of the amounts paid.

5.6 Procedure for applications for requests for mutual assistance in relation to collection to be sent to AEAT by other tax authorities

Order HFP/192/2022, of March 8, 2022, determining the requirements and procedure for other tax authorities to send to AEAT applications to send requests for mutual assistance based on Council Directive 2010/24/EU, of March 16, 2010, was published on March 16, 2022.

Among other elements, before sending any application to AEAT, the tax authorities must verify fulfillment of the following requirements:

- The debts must be tax related and must not be challenged or, if they are, the enforced collection procedure must not have been suspended.
- The debtor must not own sufficient assets or rights to enable collection of the debt in Spain. To verify that point, the applicant tax authority must send a declaration certifying that it has conducted the appropriate investigation work and carried out the necessary collection procedures throughout Spain and has not obtained sufficient assets or rights for collection of the outstanding tax debts.
- The debts must not have been outstanding for longer than five years, running from the date the enforced collection order became final, and if they have, their eligibility must be substantiated.

- The aggregate amount of the debts falling under the application for a request for mutual assistance in collection to be sent is €1,500 or greater.

The procedure defined in this order will come into force on June 30, 2022.

5.7 Personal income tax. – The rules removing the penalty rules for form 720 have been published

Law 5/2022, of March 9, 2022 was published in the Official State Gazette on March 10, 2022.

This law adds to the Corporate Income Tax Law and to the Nonresident Income Tax Law the changes made previously by Royal Decree-Law 4/2021, of March 9, 2021, which transposes Council Directive (EU) 2016/1164, of July 12, 2016, as amended by Council Directive (EU) 2017/952, of May 29, 2017 (ATAD II), in relation to "hybrid mismatches". We summarized these changes in an alert dated March 10, 2021.

This law also eliminates the penalty rules relating to Form 720, as summarized in our alert dated March 10, 2022.

5.8 New events of exceptional public interest confirmed along and tax rules applicable to the UEFA Europa League published

On March 2, 2022, the Official State Gazette published Royal Decree-Law 3/2022 of March 1, 2022, containing a slew of tax measures.

(i) It confirms that **Global Mobility Call** is an event of exceptional public interest. The program will start on March 2, 2022 and end on December 31, 2022.

(ii) Additionally, it sets out the applicable **tax rules** for the **2022 UEFA Europa League final**:

- Tax rules applicable to the organizer and to the participating teams:
  - Legal entities and permanent establishments resident in Spain formed by reason of the final by the organizer or by participating teams will be exempt from corporate income tax and nonresident income tax on income obtained while the event is held, insofar as they are directly related to their participation in it.
  - Also exempt is the income obtained without a permanent establishment by the organizer or by the participating teams, arising by reason of the holding of the final and insofar as it is directly related to their participation in it.
- Tax rules applicable to individuals providing services to the organizer or to the participating teams:
  - Income received by individuals not resident in Spain for services they provide to the organizer or to the participating teams will not be considered to be obtained in Spain, insofar as it is related to their participation in the final.
  - Any individuals acquiring Spanish personal income taxpayer status as a result of being sent to Spain by reason of the final may elect to be taxed under nonresident income tax rules, as determined in the terms and

conditions set out in article 93 of the Personal Income Tax Law ("inbound expatriates regime").

- Customs and tax procedures applicable to goods imported in connection with the preparation and holding of the final:

  - As a general rule, the rules determined in Regulation (EU) No 952/2013 of the European Parliament and of the Council, of October 9, 2013 will apply.

  - However, any goods placed under the temporary admission procedure may remain under that procedure for up to 24 months from their placement, which will expire in all cases, at the latest, on December 31 of the year following the year in which the championship ends.

- In relation to VAT:

  - The "reciprocity" requirement does not have to be met for refunds to traders or professionals not established in the European Union who incur or pay VAT as a result of performing transactions related to the final.

  - If traders or professionals are not established in the European Union, the Canary Islands, Ceuta or Melilla, or in a state with which there are mutual assistance arrangements similar to those set up in the European Union, they will not need to appoint a representative.

  - Traders or professionals who are not established in the Spanish VAT area, are taxable persons, and incur or pay VAT as a result of transactions related to the final will be entitled to a refund of those amounts of VAT at the end of each tax period.

    The tax period for these traders or professionals will coincide with the calendar month. These traders or professionals must file their VAT returns for each tax period in the first 20 days of the following month. VAT self-assessment returns relating to the last period of the year must be filed in the first thirty calendar days of January.

Tax Department

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