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1. Supreme Court confirms National Appellate Court's principle: offsetting tax losses is not a tax option

In a judgment delivered on November 30, 2021, the Supreme Court examines whether it is allowed to offset tax losses on a corporate income tax self-assessment filed outside the time limit and concludes that it is. Moreover, according to a judgment on October 29, 2021 by the National Appellate Court, if this gives rise to an incorrect payment, the incorrectly paid tax must be refunded with late-payment interest calculated from when that payment was made (including prepayments).

Article 119 of the General Taxation Law (LGT) states that options which the tax legislation requires to be elected, requested or waived with the filing of a return may not be modified after this point, unless the correction occurs in the statutory filing period. On the basis of that article, tax auditors and economic-administrative tribunals have not been allowing taxpayers to offset their tax losses outside the ordinary time limit for filing corporate income tax self-assessments; and this is because, in their opinion, where a taxpayer fails to offset a tax loss on its self-assessment, it is electing an option which therefore cannot later be modified.

The National Appellate Court had already rejected this interpretation in a judgment delivered on December 11, 2020 (discussed in our alert on January 15, 2021 and our blog post on February 23, 2021). It has since reiterated this interpretation clearly and plainly in its recent judgment on October 29, 2021. According to this court, offsetting tax losses is not a tax option, instead a taxpayers right linked to the principle of economic capacity recognized in article 31 of the Constitution.

Lastly, in a judgment on November 30, 2021 (appeal 4464/2020), the Supreme Court reached the same conclusion as the National Appellate Court, when examining whether tax losses are allowed to be offset on a self-assessment filed outside the time limit. In its judgment, the court shared the following thoughts:

(a) The General Taxation Law and its implementing regulations are not clear in this respect, because they do not define the legal concept of a tax option, and it is not consistent for unfavorable legal and economic consequences to arise for the taxpayer on the basis of the absence of that definition. This lack of conceptual clarity creates effects with systemic proportions when it comes to interpreting principles governing the tax system such as the principle of economic capacity, the principle of equitable distribution of the tax burden or the principle of proportionality.

(b) Article 119.3 of the General Taxation Law only refers to options which, under tax law, must be elected, requested or waived when filing a return. Therefore, for a tax option falling under that article to exist, it will be necessary for it have been defined as such in tax law.

For this to happen two requirements must be met: an objective requirement, consisting of embodiment in the law of an alternative choice between different and exclusive tax arrangements; and another volitional requirement, consisting of a free act by the taxpayer which will be reflected on the taxpayer's return or self-assessment. Therefore, there is no option if the taxpayer exercises an independent right, set out in the law without any alternatives.

Moreover, all options must be able to be elected, requested or waived only on a return. For these purposes, returns must be explicit or implicit, but unambiguous.

(c) On the subject of offsetting tax losses, the corporate income tax law states that tax losses "may be offset" against income in later periods, which means that the taxable person can choose whether they offset them or not, and determine (within the statutory limits) the period in which they will offset them and their amount. In other words, this is not technically a tax option, because no alternative is described consisting in choosing between two different and exclusive tax regimes.

The offset of tax losses is instead an independent right of the taxpayer which serves the principle of economic capacity and, due to being a right of this kind, it cannot be restricted, except for the reasons set out in the law. Moreover, added the court, "a taxpayer who fulfills its obligation to report its tax losses to be carried forward, while informing the tax authorities of the existence itself of the tax losses, is also giving them notice that it will exercise that right in the future".

Elsewhere, in the most recent of the national appellate court judgments mentioned above (delivered on October 29, 2021), the court affirmed that a refund arising from the offset of tax losses which was not done in the voluntary period amounts to a refund of tax incorrectly paid and therefore must include interest calculated from the date on which the incorrect payment was made (therefore, if prepayments were incorrectly made because the tax losses had not been offset, late-payment interest must be calculated from when those payments were made).

TEAC ruled recently on this same subject of tax incorrectly paid in prepayments in a decision on September 22, 2021. In this decision it examined the case of a taxpayer who, after requesting correction of its corporate income tax self-assessment, obtained a refund of the amounts incorrectly paid, although with late-payment interest calculated only on the excess determined in its self-assessment of the tax.

TEAC affirmed in its decision that the tax authorities clearly obtained amounts of tax incorrectly from the time they were paid when the prepayments were made; because, in this case, the cause of the excess amount in the prepayments is not the mechanics of the tax, instead an incorrect determination of the basis for calculating those payments. Therefore, late-payment interest must be calculated from when each prepayment was made, on the excess paid in each of them.

This conclusion is similar to that determined by the Supreme Court in a judgment on January 28, 2021, summarized in our February 2021 Newsletter.

2. Judgments

2.1 Corporate income tax. – Accounting errors have tax effect in taxable period they are identified, even if the financial statements are restated

Supreme Court. Judgment of October 25, 2021

A company found out in 2010 that it had made an error in the preparation of its 2004 financial statements, because it had not recorded in this fiscal year a material impairment allowance for its investment securities. After becoming aware of the error, it restated the 2004 financial statements in 2010 and filed them with the commercial registry. It moreover requested correction of its 2005 corporate income tax self-assessment to adjust the effect of the error on that return. Fiscal year 2004 had not become statute-barred because the statute of limitations had been tolled earlier.

Under standard number 22 in the Spanish Chart of Accounts on errors and changes in accounting principles, the Supreme Court concluded that (in this case) the period in which the effect of the accounting error arises is the fiscal year in which the error is identified (2010) not the fiscal year in which the error was made (2004). It underlined, in any event, that one of the reasons for this conclusion is that the taxpayer did not substantiate the reason why the error was identified so many years later.

The court added, moreover, that:

(a) The presumptive and probative value of the registry's assessment of the new financial statements is confined to elements that are binding for that assessment under the commercial registry regulations. In other words, (i) that the documents filed with the registry are the ones required by the law, (ii) that they have been properly approved by the shareholders' meeting or by the shareholders, and (iii) that the stipulated mandatory signatures appear on them.

In relation to that verification and assessment by the registry, related to those elements, the tax authorities cannot object that there was an error or irregularity.

(b) The filing of the (original or restated) financial statements does not confer any presumption of truth or validity on those financial statements, or that they are consistent with the reality reflected for accounting purposes.

(c) The tax authorities may and have to decide based on the accounting and tax rules as to the taxable period in which the effects of the change made must be recognized, and the commercial registrar's assessment cannot condition that power held by the authorities.

2.2 Inheritance and gift tax. - It is not necessary to continue an economic activity to claim the 95% reduction for "mortis causa" acquisitions of a family business

Supreme Court. Judgment of June 2, 2021

The Supreme Court analyzed in this judgment the necessary holding requirement so as not to forfeit the reduction for transfer upon death (*mortis causa)* of a family business and concluded that it is sufficient to hold the "value of the acquired property" for 10 years for the fulfillment of this statutory requirement to be confirmed.

The judgment, delivered on an appeal handled by Garrigues lawyers, was analyzed in detail in our alert on June 9, 2021.

2.3 Transfer and stamp tax. – Examination of how taxable amount for administrative concessions is determined

Supreme Court. Judgment of October 26, 2021

The transfer and stamp tax legislation contains three possible rules for determining the taxable amount for administrative concessions, which apply based on the nature of the obligations imposed on the concession holder:

(a) If a specific amount is specified in respect of a price or fee, the taxable amount must be that figure.

(b) If a fee is specified that the concession holder must pay periodically, the taxable amount must be the correctly updated sum of all periodical amounts or fees.

(c) Where the concession holder is required to revert given assets to the authorities, the taxable amount must be equal to the estimated net carrying amount of those assets as of the date on which that reversion occurs.

At issue in the case examined in this judgment was the taxable amount under a concession agreement in which an obligation is imposed on the concession holder to pay a variable annual fee based on operating income, a fixed fee in kind and a fixed fee in cash (in other words, the scenarios in letters a) and b) above occurred).

The autonomous community authorities took the view that, to determine the taxable amount, because there were different types of fees, all the amounts had to be added together (including the values of payments in kind). The appellant argued that the circumstances in a) and b) are mutually exclusive by definition because they relate to different methods of determining and paying the fee.

The Supreme Court interpreted that there is no incompatibility of any type among the three rules on determining the taxable amount and that therefore the amounts obtained by applying each of them may be added together where the circumstances of the case so require.

2.4 Tax on increase in urban land value. – Articles on system for determining taxable amount for the tax on increase in urban land value held unconstitutional

Constitutional Court. Judgment of October 26, 2021

The Official State Gazette of November 25, 2021 published a judgment by the Constitutional Court on October 26, 2021, holding to be unconstitutional and null and void several articles of the revised Local Finances Law, related to the system for determining the taxable amount for the tax on increase in urban land value.

See our alert dated November 3, 2021 in which we discuss this judgment briefly.

2.5 Tax on economic activities. - Two contradicting judgments delivered on option of reduction to tax on economic activities due to temporary closure of businesses during the pandemic

Alicante Judicial Review Court number 3 and Aragon Regional Administrative-Economic Tribunal. Decision of June 5 and decision of July 22 2021

The legislation on the tax on economic activities allows a reduction to the tax liability where a business stops operating for a number of reasons which the law itself defines (prohibition order by a court, fires or floods, among others).

In these two decisions, Alicante Judicial Review Court and Aragon Regional Economic-Administrative Tribunal have ruled as to whether this reduction to the tax on economic activities liability for 2020 applies, as a result of the halting of economic activity due to the pandemic, and they reached contradicting conclusions:

(a) In one case, the court noted that, although the law on the tax on economic activities does not expressly allow this reduction in the specific case of a health crisis, a halting of economic activity ordered by the authorities due to the pandemic is closely linked to the cases set out in that law. Therefore, a proportional reduction to the tax on economic activities liability for 2020 is allowable in respect of the period of time in which the appellant's premises were forced to close under a mandatory obligation imposed by law.

(b) Taking the opposite view, Aragon TEAR held that the reduction did not apply, because the law on the tax does not contemplate health crises as one of the reasons allowing it to be claimed.

2.6 Review procedure. – The time period for requesting expert appraisal at taxpayer's instance starts when the decision ending administrative jurisdiction is delivered.

Supreme Court. Judgment of October 21, 2021

To contest the assessment ending an audit of reported values by the tax authorities, the taxpayer may (i) request an expert appraisal made at the instance of the taxpayer within the time limit for the first appeal or claim allowed against the assessment, or (b) appeal against the assessment with reservation of the right to request an expert appraisal made at the instance of the taxpayer when a decision has been delivered on the appeal. In this latter case, the interested party may exercise the right it reserved to request an expert appraisal made at the instance of the taxpayer in the same time period, although running from the date on which the decision in the administrative jurisdiction or the date on which decision on the claim lodged against the assessment becomes final.

Additionally, to contest the decisions of economic-administrative tribunals the option exists (in very restricted cases) to lodge, within fifteen days, an appeal known as *recurso de anulación* or action for annulment.

In the case examined in this judgment, the taxpayer filed a claim against the tax authorities' assessment, and reserved the right to request an expert appraisal made at the instance of the taxpayer. The decision on that claim was notified to it on August 4, 2015, and on September 9, 2015, the taxpayer submitted its request for an expert appraisal made at the instance of the taxpayer which was not admitted due to being outside the time limit.

The issue raised was whether the time period for requesting the expert appraisal made at the instance of the taxpayer runs from the decision on the appeal (decision by the authorities ending the administrative jurisdiction), or after the end of the fifteen business days in which the interested party could bring action for annulment against that decision.

The Supreme Court concluded that the time period for requesting an expert appraisal made at the instance of the taxpayer, where that right was reserved on filing the administrative claim against a tax assessment, starts when the act or decision bringing the administrative jurisdiction to an end is notified, not from the end of the time period for bringing action for annulment. It therefore confirmed that in this case the request for an expert appraisal was outside the time limit.

2.7 Extension of liability. – Liability for a penalty that has not become final may be extended, although it cannot be claimed from the liable person while it is stayed.

Supreme Court. Judgment of October 5, 2021

The Supreme Court concluded in this judgment (by applying the principles in its earlier judgment on April 8, 2021) that, in cases where joint and several liability is declared under article 42.2.a) of the General Taxation Law (in other words, due to collaborating in the concealment or transfer of assets or rights belonging to the person holding the payment obligation so as to prevent the tax authorities from using them in their work), liability may be extended to the person held jointly and severally liable for a penalty which has not become final in the administrative jurisdiction due to having been challenged by the main debtor.

The court added, however, that if that penalty has been stayed (which occurs automatically when an appeal is filed in the administrative jurisdiction), it cannot be claimed from the person held liable until it has become final, at which point the enforcement period will start running.

2.8 Penalty procedure. – Unjustified and disproportionate inaction by the tax authorities breaches principle of good administration

Supreme Court. Judgment of November 4, 2021

The time limit for a decision on penalty procedures (six months) starts to run on the date on which the decision commencing the procedure is notified and ends on the date the penalty decision is notified.

In the case examined in this judgment, relating to contraband:

(a) The tobacco products were seized and the police report was issued on September 8, 2014.

(b) The decision commencing the penalty procedure was notified on December 18, 2015.

(c) The notification date of the penalty decision was May 29, 2016, namely, before six months had run from notification of commencement.

The lower court concluded, however, that the time period for the procedure had ended because, in its opinion, the penalty procedure should be held to have commenced on the earliest of the dates mentioned, namely, when the tobacco products were seized and the police report was issued.

The Supreme Court recalled that steps taken before commencement of the penalty procedure cannot be included for the purpose of calculating the time period for the tax authorities to deliver a decision. However, this is so if those prior steps were not performed with a fraudulent intention to obtain an advantage by preventing the time period for the procedure from running or prolonging it without due cause.

For that reason, although it held that in this case the date of commencement of the penalty procedure is the date of notification of commencement of the procedure not the date on which the prior steps commenced, it set aside the penalty, because there had been "objective, unjustified and disproportionate inaction by the tax authorities", which goes against the "citizen's right to good administration".

2.9 Penalty procedure. – A penalty for reporting a debt outside the time limit without identifying the periods to which the return relates is not contrary to the principle of proportionality

Supreme Court. Judgment of October 13 and judgment of October 26 2021

These judgments examined the consequences in relation to penalties for conduct consisting of self-assessing a tax in a period differing from or later than the period in which the tax debt should have been reported, without specifying the period to which the debt relates. The examined case relates to a VAT taxable person who included the VAT charged in the first three quarters of a year on the return for the fourth quarter, without identifying that they related to earlier assessment periods.

In these cases the late-filing surcharges (article 27.4 of the General Taxation Law) do not apply because, even though it was a late return filed spontaneously, the taxable period to which the assessment relates was not expressly identified. In these circumstances, a penalty is required to be imposed under article 191.6 of the General Taxation Law, which imposes a penalty equal to 50% of the tax debt not paid within the time limit but instead in a later self-assessment without fulfilling the requirements specified in that article 27.4.

The issue examined in this judgment was whether that penalty fulfills the proportionality principle.

The Supreme Court concluded as follows:

(a) To determine whether a penalty is proportionate it cannot be compared with a surcharge, because they are not measures of the same type.

But rather they are alternative and exclusive measures and the requirement to impose one or the other depends exclusively on the taxpayer's voluntary actions.

(b) The comparison must be made between that penalty and the penalty under article 191.1 of the General Taxation Law for a practice consisting of not paying over tax.

The court therefore concluded that the penalty under article 191.6 of the General Taxation Law is not contrary to the principle of proportionality because its purpose is to punish both a failure to pay the tax within the time limit and a failure to provide information that the taxpayer incurred knowingly for the purpose of avoiding the imposition of a surcharge.

2.10 Penalty procedure. – Acceptance of an adjustment may be an indication that taxable person wishes to comply and therefore is not at fault

National Appellate Court. Judgment of October 6, 2021

An entity provided a director with two vehicles and failed to recognize compensation in kind. In the company's judgment, the vehicles had been provided for professional use not for private use. It so happened that it did recognize compensation in kind in respect of vehicles provided to other workers.

The auditors, however, found that it should have recognized compensation in kind equal to 100% of the vehicle's value. This value was calculated by reference to the standard rules on the valuation of company-owned vehicles, namely, at 20% of their acquisition cost. The notice of assessment was signed with acceptance.

A penalty was also imposed. The auditors found the existence of fault because the entity should have known the law which had not recently been changed.

The National Appellate Court concluded as follows:

(a) The existence of an infringement cannot be founded purely on the result of the adjustment made or the absence of payment.

(b) Although the law is clear, this case involves a reasonable discrepancy over a legal reality. If the company recognized compensation in kind in respect of some vehicles and not for others, it is because it believed it reasonable to conclude that, in the director's case, the vehicle was only provided for professional use. Although the auditors disagreed with that interpretation, they should not have imposed penalties because both interpretations are reasonable.

(c) This view is supported further by the fact that the adjustment was accepted, which shows the taxpayer's intention to fulfill its tax obligations.

2.11 Collection or enforced collection procedure. - Tax authorities cannot issue an interlocutory order initiating enforced collection proceedings before deciding on a repeated request for deferred or split payment filed by the taxpayer

Supreme Court. Judgment of October 28, 2021

The appellant company requested deferred payment of two tax debts, which it offered to secure with a mortgage. AEAT denied the request for deferred payment, which triggered the commencement of a new voluntary payment period. Before the end of the new voluntary payment period, the appellant submitted new requests for deferred payment with certain material changes with respect to the previous ones. No express decision was delivered on the new requests for deferred payment and an enforced collection proceeding was started.

Before the reform of article 161.2 of the General Taxation Law, made by Law 11/2021, of July 9, 2021, on measures to prevent and combat tax fraud – Anti-Fraud Law - (commentary dated July 10, 2021) the law provided as follows:

(a) At the end of the voluntary payment period the enforcement period started.

(b) Deferred or split payment of the tax debt could be requested in the voluntary period and after commencement of the enforcement period.

(c) In both cases, the request for deferred or split payment could be repeated if the previous request had been denied.

(d) A request in the voluntary period prevented the enforcement period from commencing while the request procedure was in progress. And after the request has been denied, the taxpayer must be granted a new period for voluntary payment.

The Supreme Court therefore ruled (along the same lines as it did in its judgment of October 15, 2020, analyzed in our Tax Newsletter - November 2020) that the principle of good administration prevents the tax authorities from initiating enforced collection proceedings in relation to a tax debt without analyzing and replying with reasons to a request for deferred or split payments filed by the taxpayer in relation to the same debt, even if the request was made after the debt had entered the enforcement period. In other words, a repeated request for deferred or split payment in the voluntary period must be decided on by the tax authorities before they start enforced collection proceedings.

Lastly, the court drew attention to the fact that the Anti-Fraud Law has amended the General Taxation Law, by providing that a repetition of the denied request does not prevent commencement of the enforcement period. It underlined, however, that although this reform was found to be applicable to the case under examination, it does not impact the case law described above, because in any event the fact of having decided on the repeated request for deferred payment is a necessary requirement for issuing the interlocutory order initiating enforced collection proceedings.

2.12 Contesting regulations. – If a court holds that a provision in the regulations is illegal, it must make a declaration of its own motion, even if the taxpayer has not requested it when appealing against its assessment

Supreme Court. Judgment of October 26 (appeal 6880/2019) and judgment of November 3 2021 (appeal 3913/2020)

The Castilla y León autonomous community allowed an autonomous community personal income tax credit, which could be applied for within three months following the approval of an autonomous community government order setting out the procedure for making that payment. After the end of that three-month period, a taxpayer requested correction of its personal income tax self-assessment to include that tax credit. The correction was upheld by AEAT, but rejected by the Castilla y León autonomous community government for the reason that it had been filed outside the three-month period determined in the order. The taxpayer appealed against the denial of its request, but did not indirectly appeal against the order.

Castilla y León High Court concluded that the three-month period determined in the order was contrary to the law and therefore upheld the appeal by recognizing entitlement to the tax credit. It was raised whether Castilla y León High Court should also have held the autonomous community government order to be null and void with *erga omnes* effect, making use of the power under article 27 of the Law on the Judicial Review Jurisdiction, even if the appellant had not expressly so requested.

The Supreme Court concluded that, rightly so, where a court holds that the general provision applicable to the decision on a case is contrary to the law, it has an obligation to hold it null and void with *erga omnes* effect, namely with effect for any other case in which its application may be questioned. In this regard, the Supreme Court ruled that the lower court should not have confined itself to not applying the order to the analyzed case, instead it should have identified the determinations in the order that were contrary to the law and held it null and void as a whole.

3. Decisions by economic-administrative tribunals

3.1 Corporate income tax. – In each prepayment up to €1 million in tax losses may be offset

Cantabria Regional Economic-Administrative Tribunal. Decision of November 24, 2021.

Article 26 of the Corporate Income Tax Law places a limit on the offset of tax losses, although it provides that, in all cases, up to €1 million may be offset in the period.

In the case examined in this judgment, the auditors found that, when calculating prepayments, that €1 million must be distributed by reference to the proportion between (i) the length of the taxable period for each prepayment (for example, in the first prepayment for the fiscal year, where it is a calendar year, that calculated between January 1 and March 31) and (ii) the calendar year.

Cantabria TEAR, by contrast, concluded as follows:

(a) The €1 million limit for offsetting tax losses must be distributed proportionally where the taxable period is shorter than a year.

(b) The taxable period should not be confused with the payment period, however. There is only one taxable period, even if part of the tax must be paid when the prepayments are made.

(c) In short, that €1 million limit is a limit on the amount that may be offset in a taxable period" and the entity may distribute the figure as it sees fit among the various prepayments to be made towards the tax".

3.2 Corporate income tax. – A tax credit for gifts not claimed in one period due to insufficient tax liability may be claimed in the following ten years limited only by the gross tax liability in the year they are claimed

Valencian Regional Economic-Administrative Tribunal. Decision of October 15, 2021.

Article 20 of Law 49/2002, of December 23, 2002, allows a 35% corporate income tax credit for gifts made in the fiscal year, and also stipulates that any amounts not deducted may be deducted in assessments for any taxable periods ending in the immediately following ten consecutive years. Additionally, the tax credit base may not exceed 10% of tax base for the fiscal year.

In this claim it was discussed whether in the fiscal year in which tax credits from prior years are used, the limit on the tax credit is only the gross tax liability for that fiscal year (as the taxpayer had argued) or whether, the limit equal to 10% of the tax base for that fiscal year also applies.

The Valencian TEAR accepted the taxpayer's arguments and concluded that the excess tax credit not used in a given period due to insufficient tax liability may be used in the assessments for the taxable periods ending in the immediately following ten consecutive years, and the only limit is the amount of the gross tax liability for the fiscal year in which they are claimed.

3.3 Corporate income tax. – Capital gain arising on transfer of real estate must be recognized for tax purposes in the fiscal year when the deed is executed.

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

At issue in this decision was when to recognize the capital gain arising on the winding up of a legal entity in which the real estate in its assets was awarded to its shareholder: when the deed is executed or when it is registered with the commercial registry.

TEAC concluded that the timing of recognition of the income arising on the transfer of real estate pivots for tax purposes on the time when that transfer of property is deemed to have taken place for civil law purposes; an issue which is not in any way conditioned by registration with the commercial registry or by termination of the legal entity. Therefore, it will have to be recognized in the fiscal year in which the public deed is executed, because it is on execution of that deed that the acquisition by shareholders and therefore the transfer by the company to them takes place.

3.4 Corporate income tax. – Taxpayer may decide order for claiming unused amounts of reduction for capitalization reserve

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

At issue was determining the order for claiming the reduction in respect of the capitalization reserve for corporate income tax purposes, where there are unused amounts from prior periods, together with the reduction arising in the taxable period relating to the return.

TEAC concluded that the taxable person may claim them in whatever order it wants, because there is no provision in the law specifying that either of them must be claimed first.

3.5 Corporate income tax / management procedure. – Payment in respect of a refund of the Spanish health tax must be recognized in the period when incorrect payment took place.

Galician Regional Economic-Administrative Tribunal. Decision of October 15, 2021.

A taxpayer obtained a refund of amounts of tax paid in respect of retail sales of certain oil and gas products ("the Spanish health tax"). They originally calculated the payment on the taxable amount for the periods in which the refund was obtained (2014 and 2016), but later they requested (in a self-assessment correction procedure) for the refunded amounts to be recognized in the periods in which the incorrect payment took place.

Galicia TEAR accepted the taxpayer's arguments. In its opinion, the CJEU judgment that held that the tax on retain sales of certain oil and gas products was contrary to EU law has *ex tunc* effects, which means that the recognition of the refunds for corporate income tax purposes should be made in the periods in which the incorrect payment took place.

3.6 Personal income tax. – Penalty cannot be imposed for not reporting assets acquired in statute-barred years on the return for assets abroad

Balearic Islands Regional Economic-Administrative Tribunal. **Decision of June 29, 2021**

A taxpayer filed the return for assets abroad (form 720) within the time limit, although it failed to report information relating to shares in a company and to real estate. The tax authorities took the view that an unjustified capital gain had to be recognized in respect of those assets (under article 39.2 of the Personal Income Tax Law) and imposed a penalty equal to 150% of the resulting tax liability.

Balearic Islands TEAR confirmed the adjustment because the taxpayer had not confirmed that the assets had been acquired with income reported or obtained in periods in which it was not a personal income taxpayer.

However, although it considered that fault had been sufficiently substantiated and evidenced, it set aside the penalty because proof had been provided that the assets and rights had come from statute-barred periods. It therefore adopted TEAC's view confirmed in its decisions of December 3, 2019 and November 22, 2019 (both summarized in our tax newsletter for March 2020).

3.7 Excise and special taxes. – Claiming of exemption cannot be denied on the ground of simply procedural breach

Central Economic-Administrative Tribunal. **Decision of October 20, 2021**

Following an audit an entity's right to claim an excise tax exemption for partially denatured alcohol was denied. The reason for denying the exemption was failure to update the report describing the products having this component.

Applying the principle determined by the Supreme Court in a judgment on September 30, 2020 and by the CJEU in judgments on June 2, 2016 and on July 13, 2017, TEAC concluded that a straightforward procedural infringement cannot cause automatic forfeiture of the exemption or of the reduced rate for the tax concerned, whenever it can be evidenced that the taxable products have been used for the purposes that give entitlement to the tax benefit.

3.8 VAT / administrative procedure. - Complete adjustment principle also applies in management procedures

Central Economic-Administrative Tribunal. **Decision of October 20, 2021**

An entity had deducted on its VAT self-assessments the tax charged by its suppliers on the construction of a few structures. The deduction of those charges was denied in a management procedure for the reason that the reverse-charge mechanism applied to the transactions and therefore the suppliers should not have charged VAT.

The tax authorities did not accept, in opposition to the request made by the taxable person, that simultaneously with denying the deduction of input VAT they should decide to approve a refund of incorrect payments, based on the VAT having been charged and paid over to the finance authority. According to the tax authorities, they could not allow this request in a management procedure, and therefore if the taxable person wanted to recover incorrectly paid input VAT, it had to apply in a separate procedure for a refund of incorrectly paid tax.

TEAC accepted the entity's request and changed the principle adopted in earlier decisions on the basis of the Supreme Court's conclusion in its judgment on May 26, 2021 (appeal number 574/2020). According to TEAC, the complete adjustment principle must be observed in management procedures also (with the necessary adaptations to preserve the procedural rights and guaranteed of all interested parties), so as to prevent the taxpayer having to bear the burden of applying, in these cases, for a separate refund procedure.

3.9 Administrative procedure. – Breach of time period for expert appraisal at taxpayer's instance due to inaction by the authorities must trigger removal of the stay and resumption of time period for completion of the audit

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

In this decision, TEAC adopted the principle determined by the Supreme Court in its judgment of March 17, 2021 and concluded that, where an expert appraisal at the instance of the taxpayer takes longer than the six month time period stipulated for processing and obtaining it and the responsibility for that overrun lies with the tax authorities, the automatic consequence is that the stay is deemed to be removed and the time period for completion of the main proceeding starts running again.

Moreover, the court recalled that if this results in the time period for completion of audits is breached, the related effects would arise (i.e. the statute of limitations not being tolled, the payments made since the start of the audit being treated as spontaneous and no late-payment interest accruing from when the breach occurs).

3.10 Audit procedure. – A general audit cannot be commenced following limited review on same item and taxable period

Central Economic-Administrative Tribunal. Decision of October 20, 2021

In a limited review, the tax authorities limited their review to the procedural requirements for a request for refund in respect of a given item and taxable period.

Later, a second procedure was commenced, an audit this time, on the same item and taxable period for the purpose of requesting a number of documents that had not been requested in the earlier procedure.

Applying the principle determined by the Supreme Court in its judgments of November 26, 2020 and of March 4, 2021, TEAC concluded that if both types of procedures share the same subject-matter (as occurred in the examined case), the later audit is only validly commenced if new facts are discovered as a result of different work from that performed in a limited review.

In this regard, TEAC underlined the following:

(a) If the tax authorities confined themselves in the first review to conducting a simply procedural review that "self-imposed restriction" cannot justify the commencement of a second procedure on the same item and taxable period to request different documents from those requested in the first procedure.

(b) As an exception, an audit may be commenced if new facts or information exist that were not accessible to the tax authorities or which the tax authorities were unable to request from the taxpayer in the first review they conducted.

3.11 Collection procedure. – TEAC analyzes a few rules on stay of enforcement of decisions challenged in economic-administrative jurisdiction

Central Economic-Administrative Tribunal. Decisions of September 16 (4155/2018 and 0926/2019) and of October 18 2021 (5247/2018, 5836/2021 and 5879/2021)

In these decisions, TEAC ruled on various elements related to the stay of enforcement of decisions challenged in the economic-administrative jurisdiction, as defined article 233 of the General Taxation Law.

Firstly, it recalled that the Anti-Fraud Law amended the stay rules and that, because that law does not set out any transitional rules, the applicable rules are any in force on the filing of the request for a stay, as transpires from the case law determined by the Supreme Court in its judgment of December 21, 2017.

In relation to other elements of the stay, it affirmed as follows:

(a) According to the Supreme Court, in its judgment of October 15, 2020, a failure to notify the tax authorities that an application for judicial review has been filed applying for the stay to continue is not a valid reason for commencing enforcement, when that stay is ultimately granted by the National Appellate Court after security has been provided.

Besides which, while waiting for the decision on an application for a stay, the tax authorities cannot serve notice of an interlocutory order initiating enforced collection proceedings, or assess late-payment interest on the stayed tax liability.

(b) It is allowed not to admit applications for stay of decisions in the economic-administrative jurisdiction with full or partial exemption from the provision of security where, from the documents produced in the application or existing in the administrative proceeding, losses that are impossible or difficult to remedy are not inferable or the existence of material arithmetical errors.

These circumstances must be evidenced by the taxpayer, and the court cannot make allowances for any deficiencies in the substance of the written applications or the absence of tangible evidence.

3.12 Collection procedure. – Limits on wage, salary and pension attachments do not apply to pension plan rights

Central Economic-Administrative Tribunal. Decision of October 18, 2021

TEAC concludes in this decision that the limits provided in the legislation regarding the attachment of wages, salaries and pensions do not apply to the attachment of pension plan rights.

It underlined the following:

(a) The fact that one of the events triggering the right to receive a pension plan is retirement, disability or long-term unemployment does make the received amounts able to be treated as wage, salary or pension; and

(b) The attachment of pension plan rights is governed by the General Collection Regulations as an attachment of collection rights payable in the long term, not as an attachment of wages, salaries and pensions, regardless of how the benefit is taxed.

3.13 Collection procedure. – Post-insolvency order claims may be netted ex officio after commencement of liquidation phase in insolvency proceeding

Central Economic-Administrative Tribunal. Decision of October 18, 2021

TEAC previously been finding that debts classified as post-insolvency order claims could not be netted ex officio after the liquidation phase had been commenced in an insolvency proceeding. That interpretation was based on the prohibition of enforcements under the insolvency rules.

However, in view of the case law contained in the supreme court judgments on March 13, 2017, July 17, 2019 and December 15, 2020, TEAC changed from its adopted principle and concluded that the prohibition of enforcements only applies to pre-insolvency order claims and is not applicable in relation to post-insolvency order claims. In short, it is allowed for post-insolvency order claims to be enforced individually and therefore to be netted ex officio, after the liquidation phase of the insolvency has commenced, against the claims recognized as being payable to the insolvent debtor.

3.14 Economic-administrative procedure. – It is allowable, in a review proceeding, for proof to be submitted that was not submitted in the audit, if it does not result in additional verification work by the tribunal

Central Economic-Administrative Tribunal. Decision of September 20, 2021

In this decision, TEAC allowed to be submitted in a review proceeding proof that had not been submitted in the audit, in a decision supported by the interpretation made by the Court of Justice of the European Union in its judgment of 9 September 2021.

It qualified this conclusion, however, by noting that any such proof should not mean that the reviewing body has to carry out any verification work that it is not allowed to perform. In other words, it allowed the submission of new documents evidencing the taxpayer's arguments

completely, although it clarified that TEAC's activities (or the activities of the regional economic-administrative tribunal) are restricted to evaluating the proof and cannot involve any additional activities that would have fallen within the chief auditor's tasks.

4. Resolutions by the Directorate General for Taxes

4.1 Personal income tax. – DGT examines tax liability for providing call options to employees and on exercising them

Directorate General for Taxes. Resolution V2463-21 of September 29, 2021

Entity A provided free of charge to an employee of its subsidiary B a call option on a portion of its shares in company B (which the employee could purchase at a price below market value). The option was not transferable and the employee exercised it in 2021.

In this resolution the DGT examined how stock options are taxed:

(a) The grant of an option to purchase shares does not trigger any type of income where the option is not transferable.

(b) An amount of income is obtained when the option is exercised and the shares are received, equal to the difference between the market value of these shares and the price paid on exercising the option. This income will be treated as salary income because it is paid in respect of services provided by the worker.

(c) The market value of the company's shares will be the price that would be agreed between independent parties.

(d) That market value will be the amount treated as the acquisition cost of the shares, for the purposes determining the capital gain or loss obtained on a potential future transfer of the shares.

4.2 Nonresident income tax / VAT – Rental of warehouse in Spain from where goods are delivered which are sold to customers before they enter Spain entails existence of a fixed / permanent establishment for VAT purposes although not for nonresident income tax purposes

Directorate General for Taxes. Resolution V2411-21 of September 14, 2021

A company resident in Turkey and engaged in manufacturing components for the automotive industry intends to start operating in Spain. Its business activity in Spain will consist of importing components manufactured to order by the company in Turkey for its end customers. To carry on its business activity in Spain it will rent a warehouse in its own name. It will not have any employees, and will instead hire a third party to manage the tasks involved in delivering the products to customers.

In relation nonresident income tax, the DGT noted the following:

(a) The lease of a warehouse located in Spain means that it has a fixed place of business in Spain, a conclusion that is not changed by the fact that it has no employees in Spain and that the business activity is carried out physically by a subcontracted company.

(b) However, a permanent establishment for nonresident income tax purposes will not been deemed to exist where auxiliary or preparatory activities are carried on through that fixed place of business, which is what happens in this case, in which the Turkish entity's activity in Spain is confined to storing goods manufactured by it in Turkey which have already been sold to Spanish customers when they are imported. Therefore, in this case a permanent establishment does not exist in Spain for nonresident income tax purposes as a result of having a fixed place of business.

The DGT based its conclusion on the Commentaries on the OECD Model Tax Convention 2017. The DGT noted in relation to this that the changes introduced by this version are only intended to be prospective, and therefore will not alter the interpretation of treaties signed earlier (to which the commentaries on the 2014 version will be applicable).

(c) Moreover, the subcontracted company will not be treated as a dependent agent for the purpose of amounting to a permanent establishment if it does not participate in the conclusion of contracts with the manufacturers to which the parts are sold and its activity is restricted to storing and delivering the goods.

By contrast, a fixed establishment for VAT purposes in Spain does exist. According to the DGT:

(a) The simple fact of leaving or storing goods at the premises of a third entity does not determine the existence of a fixed establishment for VAT purposes.

(b) A fixed establishment does exist, however, if a warehouse is used as owner, holder of a right of use in real property or lessor of an entire warehouse or, at least, of a fixed and specific portion of it.

(c) In this case, insofar as the Turkish company appears to have a right of use relating to at least part of a warehouse located in the Spanish VAT area and additionally subcontracts from a third party the performance of any transactions needed for the physical delivery of the goods to customers, there is a fixed establishment for VAT purposes.

4.3 Inheritance tax. – Detailed analysis of requirement to hold value of inherited shares in family businesses

Directorate General for Taxes. Resolution V2491-21 of September 30, 2021

The requester inherited shares in family businesses and claimed on their corporate income tax self-assessment the family business reduction in respect of the whole value of the shares. Later they are going to sell the shares to a third party, reinvest the proceeds on various assets, and hold the new investment for at least ten years.

The reduction to the tax on an acquisition upon death requires the acquired property to be held for ten years following the death. The DGT confirmed the following points in relation to this holding requirement:

(a) If the inherited property is transferred, the right to the reduction will only be kept if the proceeds are reinvested immediately in other assets. For these purposes:

- The only requirement is that the value in respect of which the reduction was claimed is held.

- Therefore, the reinvestment may be made in real estate, shares investment funds, bank deposits or other assets or financial products as the person sees fits, as long as their acquisition cost is at least equal to that value, for which it will be necessary to have the necessary documents supporting the reinvestment and the holding of the value.

(b) If the reinvestment is made in investment funds, making transfers between funds is allowed, as well as selling shares from one investment fund and investing the whole amount of the proceeds in other financial assets, without forfeiting the tax benefit. If, however, the proceeds are reinvested in a portfolio of funds, the holding of the investment will have to be analyzed with respect to each of the investment funds individually and not by reference to the whole portfolio.

Any potential losses of value due to fluctuations in the market values of any products in which the proceeds of the transfer of the shares were reinvested will not affect the requirement to hold them for the stipulated period.

5. Legislation

5.1 Losses generated in 2021 will not be taken into account when determining the cause of dissolution

Among the measures approved by Royal Decree-Law 16/2020, of April 28 (see our Alert on April 29, 2020) and later set out in Law 3/2020 of September 18, 2020, it was allowed leave out the losses generated in 2020 from the calculation to determine the existence of the ground for winding up under article 363.1.e) of the revised Capital Companies Law, approved by Legislative Royal Decree 1/2010, of July 2, 2010.

As we summarized in our alert on November 24, 2021, Royal Decree-Law 27/2021, of November 23, 2021 (published in the Official State Gazette on November 24, 2021) amended article 13 of that Law 3/2020 to extend the option of leaving out economic losses for the purpose of calculating the statutory ground for winding up under that article 363.1.e) of the Capital Companies Law, until the end of the fiscal year in 2022.

In other words, whereas the previous wording allowed losses for 2020 to be excluded, under this new wording losses for 2021 do not have to be included either.

5.2 Royal decree-law published which includes new system for determining the taxable amount for tax on increase in urban land value

On November 9, 2021 the Official State Gazette published Royal Decree-Law 26/2021, adopting the revised Local Finances Law to the recent case law of the Constitutional Court in relation to the tax on increase in urban land value.

In our alert on November 9, 2021 we summarized the main amendments introduced by the new law.

5.3 Spanish finance authority communicates publication date for list of its debtors and jointly and severally liable parties

The Anti-Fraud Law made various amendments to article 95 bis of the General Taxation Law, regulating the periodical publication of lists of the public finance authority's debtors.

On November 6, 2021, the Official State Gazette published Order HFP/1202/2021, of November 4, 2021, which determines:

(a) That the reference date for the list of debtors under transitional provision two of the Anti-Fraud Law will be August 31, 2021.

(b) That the list will be published before December 31, 2021 on AEAT's website.

However, Order HAP/364/2016, of March 11, 2016, determining, for 2016 and following years, the publication dates and the relevant files and registers for that list, will remain in force and applicable for the publication of subsequent lists which are regulated in the order that has now been published.

5.4 Government support paid to repair damage caused by natural disasters is held to be exempt

On November 9, 2021 the Official State Gazette published Royal Decree-Law 25/2021, of November 8, 2021, on measures relating to social security and other tax measures to support businesses.

In the tax field, it expressly includes among the items allowed not to be included in taxable income for personal income tax purposes and the corporate income tax base, any government support received to repair the destruction of property by fire, floods, subsidence, volcanic eruptions or other natural causes.

5.5 VAT and transfer and stamp tax amendments introduced as a result of transposition of certain directives

On November 3, 2021 the Official State Gazette published Royal Decree-Law 24/2021, of November 2, 2021, transposing various EU directives on covered bonds, cross-border distribution of collective investment undertakings, open data and the re-use of public sector information, exercise of copyright and related rights applicable to certain online transmissions and retransmissions of television and radio programmes, temporary exemptions on importations and on certain supplies, on consumers and on the promotion of clean and energy-efficient road transport vehicles.

This royal decree-law introduces various amendments relating to VAT and transfer and stamp tax. The main ones are summarized below:

(a) In relation to VAT:

It transposes Council Directive (EU) 2021/1159 of 13 July 2021 amending Directive 2006/112/EC as regards temporary exemptions on importations and on certain supplies, in response to the COVID-19 pandemic. The main new pieces of legislation in this respect were discussed in our alert on November 5, 2021.

(b) In relation to transfer and stamp tax:

Two new cases of exemption have been added:

- The issuance, transfer, redemption and reimbursement of covered bonds and mortgage units and mortgage transfer units as defined in the royal decree-law itself.

- For asset transfers to amount to a separate set of assets as defined in relation to an insolvency proceeding on the issuing entity and the transfer of loans to another credit institution for jointly funding issuances, as set out in article 14 of the royal decree-law.

These exemptions came into force on November 4, 2021.

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