Tax Newsletter

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Court of Justice of the European Union. Judgment of November 8, 2022. Joined cases C-885/19 P and C-898/19 P

The Luxembourg authorities issued a tax ruling in which they confirmed a transfer pricing agreement (on remuneration of its intragroup financing activity) due to considering it satisfied the arm's length principle under the legislation in Luxembourg. The European Commission held that the tax ruling amounted to illegal State aid because it endorsed a particularly advantageous method for determining profits with respect to the method that would be required if the international arm's length principle had been strictly applied.

The CJEU affirmed that the classification of a national measure as State aid requires certain requirements to be fulfilled, including that it must confer a selective advantage on its beneficiary. For this classification, the reference system has to be identified (meaning the "normal" tax regime applicable in the member state) and it has to be evidenced that the measure means an exception to that reference system, because it introduces differences between economic operators which are in a comparable factual and legal situation.

In its judgment, the court concluded that there had been an error by the Commission when defining the reference system, because it had not taken into account how the arm's length principle had been included in the laws of Luxembourg and therefore when determining the level of taxation considered to be "normal". Since identification of the reference system is the basis of analysis of the existence of a selective advantage, this error necessarily vitiates the whole of the Commission's analysis, which led it to set aside the Commission's decision.

1.2 Corporate income tax. – While the Revised Corporate Income Tax Law (TRLIS) was in force, any portion of foreign tax that could not be included in the double taxation tax credit was a deductible expense

Supreme Court. Judgment of November 14, 2022

Article 31.1 of the Revised Corporate Income Tax Law (TRLIS) determined that, where the taxpayer included income taxed abroad in its tax base, it could deduct from its gross tax liability the amount of tax actually paid abroad, to the extent of the gross tax liability that would have arisen had the income been obtained income in Spain (by reference to net income).

In the case examined in this judgment, an entity had signed technology and know-how transfer agreements with various foreign subsidiaries. The payments under these agreements were subject to withholding tax and the entity applied the international domestic double taxation tax credit in respect of the whole amount of withholding tax paid. The tax authorities considered that the deduction was not correct because the entity had recorded an operating loss in the years under review (in other words, no net income was obtained under the agreements).

The Supreme Court concluded that, in these cases, any withholding tax paid and not deducted from the tax liability gives rise to a deductible expense. It needs to be recalled that, in a decision dated January 25, 2022, TEAC denied the right to deduct this expense (April

2022 Tax Newsletter), and stated that the issue depended on the cassation appeal lodged against the national appellate court judgment dated September 24, 2020 (appeal 288/2017), on which a decision has now been delivered.

1.3 Corporate income tax. – To apply the anti-abuse provision in transactions applying the neutrality regime the burden of proving that the primary objective was fraud or tax evasion lies with the tax authorities

Supreme Court. **Judgment of November 16, 2022**

The Supreme Court examined the anti-abuse provision in the tax neutrality regime, and after reviewing European and national case law on the subject, concluded as follows:

a) The fact of a transaction not being conducted for valid economic reasons may be a ground for presuming that it had fraud or tax evasion as its primary objective.

b) The obtaining of a tax advantage, however, cannot determine, of and in itself, that the aim is to avoid tax. Outside the cases in which a tax advantage is presented as the primary objective, it is a legitimate cost-saving option because obtaining this type of advantage is implicit in the special regime itself, which is characterized by its tax neutrality.

c) An examination is needed of the performed transactions as a whole. In an international reorganization, it is not enough to conduct an isolated examination of the specific transactions that will be conducted in Spain (in the examined case, two successive spin-offs), while leaving out any assessment of the favorable consequences that the transaction has meant for the business activities of the group as a whole.

d) The tax authorities have to evidence fraud or tax evasion and also provide proof that no valid economic reason exists.

1.4 Corporate income tax. – The merger difference relating to cancellation of an interest in the absorbed entity was not taxable either when the Revised Corporate Income Tax Law was in force, even if it exceeded the amount of that entity's express reserves

National Appellate Court. **Judgment of September 12, 2022**

The Revised Corporate Income Tax Law (TRLIS) determined in article 89.1 that, for mergers applying the tax neutrality regime, where the absorbing entity owned at least a 5% interest in the absorbed company's capital, the income obtained from cancellation of the investment would not be included in the tax base, whenever it related to reserves of the absorbed entity.

The current law (Law 27/2014) contains a similar rule, although it does not mention the reserves of the absorbed entity. In other words, it determines that the positive difference relating to cancellation of the interest will not be taxable in any event (if the specified minimum ownership requirement is fulfilled).

In the case giving rise to this judgment the auditors considered that, because the Revised Corporate Income Tax Law was in force, that difference was taxable on the amount by which it exceeded the investee's reserves, in other words, in respect of hidden reserves. The National Appellate Court concluded that that interpretation is precluded by EU law (article 7.1

of Directive 90/434/EEC) and additionally it does not observe the spirit of the law, because it does not meet the neutrality principle, the "*real cornerstone of the special tax regime".* In short, the law allows any merger difference from express and hidden reserves not to be taxable.

1.5 Corporate income tax. – Directors' compensation is deductible if it is evidenced that the shareholders knew about it

National Appellate Court. Judgment of October 3 and judgment of September 21, 2022

The tax authorities have been questioning the deduction of directors' compensation where corporate law is not fulfilled strictly. For these purposes, at unlisted companies, the law requires that the compensation system must be laid down in the bylaws, that the shareholders' meeting must approve the maximum amount of compensation to be paid to all the directors, and that, for directors with executive functions, an agreement must be approved which has to fulfill the content and approval requirements laid down in corporate law. Where companies fail to satisfy these requirements strictly, the tax authorities have been denying deduction of the expense, generally, because they consider that the expense is precluded by the law (and, on other occasions, because they consider it is a free gift).

The National Appellate Court recently delivered two judgments relaxing this interpretation, on the basis of the prohibition of abuse of formal requirements:

a) In its October 3 judgment, it concluded that the compensation was deductible because, even though the bylaws did not state that directors were compensated, the company was able to prove that the shareholders knew about the compensation because it was notified to them at the appropriate time (October 3 judgment). The court recalled that the purpose of corporate law is to protect the shareholders, so if they knew about the compensation its deduction cannot be denied on the basis of a breach of corporate law.

b) In its September 21 judgment, it concluded similarly in a case involving a listed company, whose bylaws did provide for directors' compensation, although not in enough detail to meet the requirements that the tax auditors considered necessary. The court concluded that, since the bylaw clause fulfilled the clarity and precision requirements in the way it specified the compensation system (allowing it to be determined), the breach of corporate law on which the adjustment was based does not apply.

   In this judgment. moreover, the court added that the fact that the bylaw compensation system makes a distinction between directors with executive functions and other directors does not necessarily mean that the amounts of compensation agreed for its directors breach corporate law.

1.6 Personal income tax. – An individual who has never received the child support payments to which they are entitled is allowed to apply the tax credit for a large family for legally separated ascendants with two children

Supreme Court. Judgment of October 25, 2022

Article 81.bis of the Personal Income Tax Law defines the tax credits for large families. Among other cases, a tax credit is provided for legally separated ascendants where they form part of a large family with two children and are not entitled to receive child support payments. In the case examined in this judgment, the taxpayer was a legally separated ascendant with

two children who was entitled to these types of payments, as result of a judgment, although they never received them.

The Supreme Court concluded that the article must be interpreted according to its purpose, from the standpoint of the social nature of the measure. For that reason, the reasonable course of action is to treat the absence of entitlement to child support in the same way as cases where the payment to which they are entitled has not been received.

1.7 Personal income tax - employment terminations. – Termination of senior management contracts on entering the managing body does not remove the initial ordinary employment contract, if it was not expressly terminated

National Appellate Court. Judgment of October 5, 2022

Termination of an employment contract gives entitlement to the exemption under article 7.e) of the Personal Income Tax Law. The exemption may be up to the amount established as mandatory in labor legislation, which is capped at €180,000.

Briefly, that mandatory amount is the figure provided for unjustified dismissal in the Workers' Statute for the termination of an ordinary employment contract (45/33 days' pay per year worked capped at 42/24 monthly payments), or that provided in Royal Decree 1382/1985, of August 1, 1985, on the special employment relationship for senior managers, for terminations relating to senior managers (20 or 7 days' pay per year capped at 12 or 6 monthly payments, according to whether there has been a unjustified dismissal or voluntary withdrawal). By contrast, no exemption is allowed for indemnity payments in respect of the termination of an independent-contractor agreement, which is the type of agreement used for directors, among others.

Where the director entered the company under an ordinary employment contract, but was later promoted to senior manager and then to board member, the view being taken is that:

a) As required by the senior management royal decree, the ordinary employment contract is temporarily suspended when the individual comes under a senior management employment contract, unless the parties agree otherwise.

b) The ordinary or senior management employment contract is terminated when the individual comes to be exclusively under a independent-contractor agreement, unless the parties agree otherwise.

In this innovative judgment, the National Appellate Court concluded that the termination of a senior management employment contract as a result of the individual joining the managing body does not terminate the earlier employment contract, if it had been temporarily suspended. Therefore, if indemnity is paid by reason of the removal of a director, the portion of that indemnity payment that relates to the initial ordinary employment contract (prior to the senior management contract) may benefit from the exemption, even if the senior management employment contract had been terminated when the individual joined the managing body.

1.8 Personal income tax. - The right to offset capital losses derived from shares is allowed to be transferred upon death

Valencia High Court. Judgment of January 20, 2021

The Personal Income Tax Law allows unused capital losses in a given period to be offset in the following periods.

In this judgment, the Valencia High Court considered that the right to offset these losses is transferred to the taxpayer's heirs. In its opinion, if the heir has the obligation to be taxed on the capital gains arising on the shares acquired upon death, the heir also has the right to offset the capital losses associated with these shares which had not been used by the deceased.

1.9 Inheritance and gift tax. – It cannot be presumed that an inheritance was tacitly accepted

Madrid High Court. Judgment of September 30, 2022

The examined case concerned a taxpayer who, together with his sister, was instated as heir by his parents. Twenty-seven years later his sister died without having accepted or expressly disclaimed her inheritance from her parents, and the appellant became the sole heir to all the assets. In the proceeding, the surviving brother provided evidence that his sister had never accepted the inheritance from her parents and that, in fact, he had taken care of managing the assets inherited from their parents while his sister was alive.

For this reason, the Madrid High Court concluded that, on his sister's death, there was a single transfer for the brother's benefit. In other words, conversely to what the tax authorities had said, two transfers did not occur at that point and therefore the liability for inheritance tax that arises is that relating to the direct transfer of the parents' assets to the son. The court underlined, in this respect, that tacit acceptance of an inheritance cannot be presumed, and instead must be evidenced.

1.10 VAT. – A penalty may be imposed if the adjusted period is not specified in the additional return

Supreme Court. Judgment of October 31, 2022

The court examined the case of a taxpayer who included on a VAT return amounts of VAT that had fallen due and been charged in prior periods. In those self-assessments the taxpayer had not identified the taxable period in which the VAT should have been reported.

The rules on late filing surcharges require that returns filed outside the time limit (without a prior request) have to mention the period to which they relate, and therefore in this case those rules were not applicable. The tax authorities therefore imposed a penalty.

Applying its earlier case law, the Supreme Court concluded in this judgment that the penalty is not precluded by either EU law or the principle of proportionality, because an economic loss arises from not paying the surcharge that would have been required if the unreported VAT had been adjusted correctly.

1.11 Transfer and stamp tax. – The taxable amount for stamp tax on the early termination of a finance lease by exercising a call option amounts to the residual value plus the unpaid installments

Supreme Court. Judgment of November 16, 2022

The Supreme Court examined a case concerning early termination of a finance lease by exercising a call option in which a property was acquired.

The court concluded that the taxable amount for stamp tax purposes in this case consisted of the reported value, matching the price set out in the agreement for exercising the call option plus the unpaid installments.

1.12 Transfer and stamp tax. - A pledge with transfer of possession is not a legal transaction subject to stamp tax

Valladolid High Court. **Judgment of June 15, 2022**

The examined case concerned a company which acquired the property that it had leased until that point from a third company. To secure the loan requested for the acquisition the payments to be received under the lease agreement on the property were pledged to the lender.

The tax authorities considered it was a pledge without transfer of possession, in other words, a transaction required to be registered, and therefore, subject to stamp tax. The appellant stated against this that the pledge had not been created on the income from the lease, but on the "funds" in the bank account into which those payments were made, and therefore, from the point when the sums were paid into the account, those amounts were retained by the bank. In short, it was a pledge with transfer of possession which does not fulfill the requirements to be subject to the tax.

The Valladolid High Court accepted the appellant's arguments because from the point when the sums were paid into the bank account they were restricted, which determines an actual transfer of possession.

1.13 Tax on increase in urban land value. – Judgment 59/2017 which held that the tax was unconstitutional in cases where there had not been an increase in value did not restrict its timing effects

Constitutional Court. **Judgment of September 26, 2022**

A taxpayer requested a refund of the tax on increase in urban land value on the basis of constitutional court judgment 59/2017 of May 11, 2017, which held that the tax was unconstitutional because it was chargeable where no increases in value had occurred. The request was rejected by the judicial review court, which considered that, because the appealed decision was an administrative assessment and more than a month had run between its notification and the request for a refund, it was final and consented. Because the local authority rules contained rules on self-assessment and not on assessment, the taxpayer lodged an appeal for protection of constitutional rights on the ground of a breach of the right of an effective remedy.

The Constitutional Court accepted the taxpayer's arguments and ordered the proceedings to be reverted to the point immediately before the court's judgment. According to the court, this court's judgment was manifestly incorrect:

(i) Firstly, because, according to the local authority's tax rules, the reporting rules were for self-assessment not assessment, and therefore the taxpayer had four years rather than a month in which to file a challenge.

(ii) Additionally, because the taxpayer failed to take into account that the constitutional court judgment had not introduced any limitation as to the effects of the law being rendered constitutional or null and void.

1.14 Real estate tax. – Exemption for not-for-profit entities applies even if application of the special regime had not been notified on the due date for the tax

Supreme Court. Judgment of October 4, 2022

A local council issued a real estate tax bill for 2013 to a foundation because, on January 1, 2013, the due date for the tax, it had not yet been registered on the foundations register nor had it notified the local council that it had elected Law 49/2002 of December 23, 2002 on the tax regime for not-for-profit entities.

The Supreme Court recognized, however, its right to exemption from the tax in 2013 because, for a tax that has a taxable period that is the same as the calendar year and which falls due on January 1 every year, the notification of registration of taxpayer status and election of the special tax regime have to take effect for the whole taxable period. In addition to this, it is not an exemption that has to be requested.

1.15 Fees. – Supreme Court rules on compatibility of occupancy fees under letters a) and c) of article 24 of Revised Local Finances Law

Supreme Court. Judgment of October 11, 2022

Article 24.1 of the revised Local Finances Law allows local councils to set fees for occupancy of the local public domain calculated using, among others, the following two methods:

(i) A "general" method (defined in letter a) of that article) based on the value that the benefit derived from occupancy would have on the market if the assets concerned were not in the public domain.

(ii) A "special" method (defined in letter c), determined for occupancy of surface, underground or air rights on municipal public highways by companies operating supply services for utilities in the public interest (and amounting to 1.5% of gross revenues in the municipality). The local council's rules do not require payment of this fee where other fees apply (the "general" fee, among others), if they also relate to occupancy of surface, underground or air rights on municipal public highways (which is not the case for other types of occupancy).

A local council issued to an entity (i) an assessment of the general "fee", for occupancy of countryside land in the public domain for the installment and transportation of high and medium voltage power lines, and (ii) an assessment in respect of the "special" tax for occupancy of the public domain consisting of municipal public highways (surface, underground or air rights).

The Supreme Court confirmed the compatibility of both fees in the specific case it examined, because each of them related to the occupancy of a different public domain.

1.16 Tax management and audit procedures. – The precluding effects of earlier work must be proved by the taxpayer if it pleads them in an economic-administrative claim without having done so in the inspection proceeding

Supreme Court. Judgment of November 03, 2022

In a tax audit the auditors denied the right to apply a few tax credits. The taxpayer argued that it had undergone a partial audit and another limited review (resulting from a request for correction of a self-assessment) in which the tax authorities had sufficient documents to review the tax credits. This argument was made for the first time in the economic-administrative claim filed against the assessment decision.

The Supreme Court concluded as follows:

a) Legal certainty would be compromised if, after a partial review or correction procedure had been conducted on a specific element of the tax obligation, despite having access to all the necessary information, the tax authorities only consider a few elements of that information and later make an adjustment and another assessment in relation to the same element of the tax obligation, although by analyzing information that they failed to examine when they should have done so.

b) Therefore, any potential precluding effects that may arise from earlier tax work also have to be seen as a genuine right that the taxpayer holds against the tax authorities and therefore the authorities have a duty to protect that right in their decisions.

However, in the case examined in this judgment the taxpayer did not mention the potential precluding effects of the earlier work until the economic-administrative claim. Therefore, the court underlined that the burden of proving the material scope of the earlier procedures lay with the claimant.

1.17 Audit procedure. – Entry and search procedures have to be monitored after the event by the judge that granted the warrant, through the court reporting mechanism

Supreme Court. Judgment of November 02, 2022

The Supreme Court concluded in this judgment that home entry and search procedures have to be examined after the event. Accordingly:

a) The principles of adequacy, proportionality and necessity not only have to be recognized when the warrant to enter a constitutionally protected home is requested (or granted by the competent judge), but they also have to be scrupulously observed in the course of the actions themselves.

b) The authorities' actions have to be reviewed by the judge who authorized the entry and search through the court reporting mechanism that the authorities have to complete under article 172 of the regulations on the application of taxes (Royal Decree 1065/2007 of July 27, 2007).

1.18 Audit procedure. – Items of proof found in search of third person's property which has been rendered void or which breached fundamental rights cannot be used to review, assess or impose penalties

Supreme Court. Judgment of October 25, 2022

In this judgment, the Supreme Court reiterates the principle set in its judgment of July 14, 2021 (summarized in our July - September 2021 Tax Newsletter) in relation to items of proof found by chance in a search conducted on a third party and which were held null and void in a criminal judgment.

The Supreme Court concluded that the tax authorities cannot validly conduct reviews, determine assessments or impose penalties on a taxpayer by taking as the factual basis for alleged breaches of tax obligations documents or evidence seized as a result of a search conducted at the home of third parties (even if the entry and search was authorized by a judge), where a final criminal judgment has been delivered concluding that the documents were obtained with a breach of fundamental rights.

The court added that the same conclusion would be drawn even if the irregularity of the search had been formally declared by a criminal court, because in that case the search would be null and void under article 11 of the Judiciary Organic Law, which states that "*evidence obtained, directly or indirectly, with a breach of fundamental rights or freedoms shall not have any effect*".

1.19 Extension of liability procedure. – The statute of limitations for claiming payment of tax debts from the liable parties starts to run from when the transfer or concealment transactions took place

Supreme Court. Judgment of October 14, 2022

Article 42.2.a) of the General Taxation Law lays down joint and several liability for payment of the tax debt for any individuals or legal entities causing or participating in the concealment or transfer of assets and rights of the party with payment obligations for the purpose of preventing the work of the tax authorities.

The Supreme Court concluded that the statute of limitations for the tax authorities' power to claim payment of the tax debt from parties with joint and several liability under this article starts to run when the facts determining fulfillment of the requirement for liability occur, in other words, when the transfer or concealment transactions take place.

The interpretation underlying this case law is limited to the initial version of article 67.2 LGT and to the cases governed by it, and therefore it does not take into account the view that the court could potentially adopt when dealing with the start date in cases governed by the current legislation, after the reform made by Law 7/2012.

1.20 Penalty procedure. - A law that allow penalties to be imposed on a legal entity for a criminal offense committed by its legal representative is precluded by EU law, if the company was not able to challenge the existence of this offense

Court of Justice of the European Union. Judgment of November 10, 2022. Case C-203/21

An individual acting as manager and representative of a Bulgarian company was charged with having evaded payment of VAT debts, an offense provided for and punishable under the Bulgarian Criminal Code. This gave rise to the commencement of a criminal proceeding heard by the country's Regional Court.

The public prosecutor's office proposed to that court the imposition, in a separate proceeding, of a financial penalty on the entity, due to considering that it had obtained an illegal advantage from the purported offense committed by the manager and representative in relation to reporting VAT; all of this was from the standpoint of the law of that country, which provides for and expressly punishes that conduct and does not allow for the commenced proceeding to be suspended until the criminal proceeding has ended.

The CJEU concluded that a law such as that described is precluded by the presumption of innocence and the right of defense as enshrined in article 48 of the Charter of Fundamental Rights of the European Union, because it allows the national judge to impose a financial penalty on a legal entity for an offense for which an individual who has the power to bind or represent that entity is allegedly liable where that liability has not yet been established by means of a final judicial decision and the company has not been able to challenge, in separate proceedings, the reality of the offense concerned.

1.21 Review procedure. – Time limit for AEAT to appeal starts to run from when challenged decision arrives at Office for Court Relations or at any other tax authority department

Supreme Court. Judgment of November 17, 2022

In May 2013, the Regional Audit Bureau attached to the Madrid Special Provincial Office issued a decision holding a taxpayer jointly and severally liable for the tax debts of an entity, pursuant to article 42.2.a) LGT. The taxpayer filed an economic-administrative claim with the Madrid TEAR, which upheld its arguments in October 2014. The decision entered the Office for Court Relations (ORT) in December 2014. The Director of the Financial and Tax Audit Department lodged an appeal against that decision in March 2015, which was upheld by TEAC in June 2017, confirming all elements of the decision declaring liability.

The Supreme Court concluded that in the examined case the appeal was lodged outside the time limit, and therefore the TEAR's decision was final and the decision declaring liability was null and void. The court reiterated its case law (analyzed in our July - September 2021 Tax Newsletter) and affirmed that insofar as the tax authorities have a single legal personality, for the appeal time period to start running it is sufficient for the notification to be received at the ORT or at any other department, bureau or office of the authorities which received it.

1.22 Review procedure. – In the appeal phase against a decision authorizing an entry and search, the appellant has to have all the documents that were accessible to the judge

Supreme Court. Judgment of November 10, 2022

In relation to search warrants for a home, the Supreme Court recalled that they must be connected with the existence of an audit that is ongoing and notice of its commencement must have been given to the audited person.

Lastly, entering a home without giving prior notice to the party concerned can only be done in exceptional circumstances and for special reasons. In these cases, it is further necessary that, in the appeal phase against a decision authorizing the activity, the appellant must have access to all the documents that the judge knew about and assessed, so that they can exercise their right to an effective judicial remedy and not suffer the effects of denial of the right to defense.

1.23 Review procedure. – Supreme Court defines the term "tax nature" for the purposes of extending the effects of final judgments

Supreme Court. Judgment of October 14, 2022

Article 110 of the Judicial Review Jurisdiction Law ("LJCA") provides that "on tax matters", the effects of a final judgment that had recognized a specific legal situation for one or more people may be extended to include others, where certain requirements are fulfilled.

In this judgment it was considered whether the judgments delivered in special proceedings for the protection of fundamental rights which set aside tax assessments or penalties on the ground of a breach of fundamental rights may be considered to be rendered "on tax matters", and if appropriate, whether they qualify for the above-mentioned extension of their effects.

The Supreme Court concluded that a judgment is considered to be rendered "on tax matters" where it is issued to review an administrative decision of a tax nature, regardless of the special or other nature of the judicial review proceeding in which it was delivered. The relevant factor is not the (ordinary, abbreviated or special) proceeding itself, but rather its subject-matter, and in that particular case there did not appear to be many doubts that an assessment and a penalty resulting from an audit were included among "tax matters".

2. Decisions

2.1 Corporate income tax. – While the Revised Corporate Income Tax Law was in force, dividends from preferred shares were deductible

Central Economic-Administrative Tribunal. Decision of February 22, 2021 and decision of October 24, 2022

According to article 14.1.a) of the repealed Revised Corporate Income Tax Law, expenses representing equity income were not tax deductible.

At issue in these decisions was whether preferred shares issued by an entity are an equity instrument, as argued by the auditors (who rejected deduction of the dividends relating to

those shares on the basis of that article), or a liability or compound financial instrument, as supported by the claimant company (which considered that the dividends were borrowing costs in this case).

TEAC applied the findings of the Spanish Accounting and Audit Institute (ICAC) in its ruling dated March 5, 2019 and concluded that the shares at issue had to be classed as compound financial instruments, insofar as, based on their characteristics, they create for the holder the right to receive a dividend as long as the issuer has distributable income or reserves. Therefore, their deduction cannot be rejected on the basis of that article 14.1.a) of the Revised Corporate Income Tax Law.

TEAC recalled, however, that the current Corporate Income Tax Law put an end to this dispute completely, by stating in article 15.1.a) that income from securities representing capital must be treated as equity income (and therefore as a non-deductible expense), regardless of their accounting treatment.

2.2 Corporate income tax. - To allocate revenues under the principle for installment transactions the dates of payments must be precisely defined

Central Economic-Administrative Tribunal. **Decision of September 22, 2022**

For corporate income tax purposes, revenues are recognized on an accrual basis. However, for installment transactions, proportional amounts of income are considered to be obtained as the installments fall due. For these purposes at least a year must run between when the last or single payment period starts and ends.

In this decision, TEAC concluded that, to apply the principle for installment transactions, there must be a payment schedule stating the amount payable on each of the scheduled dates which also have to be defined. Therefore, a transaction cannot be treated as an installment transaction where its price is conditional on future events which may or may not be possible, without predetermining a schedule of due dates and payments.

2.3 Corporate income tax. – A partnership that leases real estate is a corporate income taxpayer, even if it does not have resources for this activity

Central Economic-Administrative Tribunal. **Decision of September 22, 2022**

The current corporate income tax legislation provides that partnerships with a commercial corporate purpose are corporate income taxpayers. Under the Commercial Code, partnerships have a commercial corporate purpose if they engage in conducting an economic activity involving production, exchange or the provision of services, with the exclusion of companies engaging in agricultural, forestry, mining activities and activities of a professional nature.

In this decision the tribunal examined the case of a partnership which, since it was formed, had engaged in agricultural activities, although it also received income from leasing a rural property and business premises owned by it. In view of this, TEAC concluded that conducting a property leasing activity determines that the company has a commercial nature. Therefore, the company is a corporate income taxpayer, even though the property leasing activity is conducted without having the material or human resources and despite not carrying on an economic activity for tax purposes.

2.4 Wealth tax. – The bank accounts in Spain of nonresidents are subject to tax as a nonresident taxpayer if the tax treaty with the country of residence so provides

Balearic Islands Regional Economic-Administrative Tribunal. Decision of September 28, 2022

Under the wealth tax legislation, nonresidents are subject to this tax as nonresident taxpayers on any assets and rights which are located, may be exercised, or have to be fulfilled, in Spain. This decision examined the case of a German resident individual who had opened a bank account in Spain.

The tribunal examined the Germany-Spain tax treaty and recalled that, under article 21.5, all elements of capital not defined in paragraphs 1 through 4 (immovable property, movable property of permanent establishments, ships or aircraft and shares in companies owning immovable property representing more than 50% of their assets), are only taxable in the state of residence. Therefore, the examined bank account opened in Spain could not be included in the tax base of a German resident.

2.5 Management procedure. - A visual inspection of the reviewed asset is needed to value a lease agreement on real estate

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

In its judgment dated January 21, 2021 (appeal 5352/2019- (analyzed in our February 2021 Newsletter), the Supreme Court concluded that to conduct an administrative valuation of real estate, the expert must examine the property directly in person. This formality may be dispensed with exceptionally if adequate reasons are substantiated.

In this decision, TEAC extended the principle determined by the Supreme Court to include a valuation of the price of a lease agreement on real estate. According to the court, these types of valuations are influenced considerably by elements such as the state of repair of the properties or the quality of the materials used. The Supreme Court attached particular importance to these elements in its judgment.

For this reason, the court set aside an administrative valuation in which the report prepared by the expert was based on a study of the market value of business premises in the area, without having visited the property.

2.6 Penalty procedure. - The suspension of a penalty in a judicial review proceeding is not kept in place simply by reason of an appeal being lodged

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

Implementing the case law determined in earlier decisions, TEAC concluded that the suspension by law of penalties that occurs when they are challenged in a judicial review or economic-administrative proceeding is not kept in place during a judicial review proceeding for longer than the time determined for lodging the relevant appeal in this jurisdiction.

The necessary requirements for the suspension to be kept during a judicial review proceeding are: (i) the interested party must apply to the court for the suspension when the appeal is lodged, and (ii) must notify the tax authorities that they have lodged that appeal and applied

for the suspension. Any suspension kept in place during a judicial review proceeding due to the fulfillment of those requirements will continue until the court adopts the necessary decision in relation to the requested suspension.

2.7 Penalty procedure. – If a request is not fulfilled completely, a penalty must be imposed for obstructing the tax authorities' work

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

A limited review commenced after a request for information was served requesting certain documents. The absence of a reply to that request within the specified period gave rise to the imposition of a penalty for an infringement consisting of resistance, obstruction or refusal to cooperate with the work of the tax authorities.

TEAC confirmed the imposed penalty. According to TEAC, both the acts element of the defined and punishable offense (not replying to a request in full within the time limit), and the intentional element, showing negligent conduct by the claimant, existed. For these purposes, the tribunal underlined that it is particularly reprehensible that the taxpayer produced the requested documents in the appeal phase against the assessment decisions rather than when the request was made.

2.8 Collection procedure. – An advance pricing agreement is not a prior request for the purposes of avoiding late filing surcharges

Central Economic-Administrative Tribunal. Decision of October 24, 2022

After signing an advance pricing agreement (APA) with the tax authorities, an entity filed an additional corporate income tax self-assessment for the previous year to make the corrections required for consistency with that agreement. The tax authorities assessed late filing surcharges.

The issue centered on determining whether APAs are prior requests for the purposes of the surcharge rules, in which case those surcharges did not have to be imposed.

TEAC applied the principle determined in its decision of September 22, 2021 (R.G. 8015/2021) and concluded that the APA cannot be considered a prior request for the taxpayer to file an additional return. In the tribunal's opinion, this type of agreement stems from a taxpayer's request for the tax authorities to determine a pricing principle for controlled transactions, and therefore does not result from a step carried out by the authorities on their own initiative. As a result, TEAC confirmed the imposed surcharge.

3. Resolutions

3.1 Corporate income tax. - Percentage of completion method may be used to recognize revenues

Directorate General for Taxes. Resolution V2156-22 of October 13, 2022

A company manufactures complex machinery systems and exports almost all of its production. The company issues an invoice for 100% of the value of the product at the point

when they are exported, even if certain tasks still remain to be done for ownership of the performed project to be fully transferred to the customer.

After requesting a report from the Spanish Accounting and Audit Institute (ICAC), the DGT accepted that revenues could be recognized on a percentage of completion basis (recognition standard 18 in the standards for adaptation to the Spanish Chart of Accounts by construction companies). To be able to use this method the requirements in the accounting standard must be fulfilled.

3.2 Corporate income tax. - For intermediary activities, the net revenues figure only includes the remuneration for those activities

Directorate General for Taxes. Resolution V2180-22 of October 18, 2022

The DGT analyzed whether for determining its net revenues figure a lottery office has to treat as revenue the aggregate amount obtained from lottery sales or, conversely, only the commission for its sales.

In a report requested from the Spanish Accounting and Audit Institute (ICAC), it concluded that, insofar as the entity simply acts as intermediary in sales of lottery tickets, the only revenue it has to record on its income statement is the remuneration for its services as intermediary. The corporate income tax treatment will be based on the accounting treatment, because the corporate income tax legislation does not contain any rules designed to modify the applicable principles for quantifying the net revenues figure.

3.3 Corporate income tax. - The inclusion in a new tax group of only a few of the entities forming part of another tax group, which is terminated, prevents the special rules reducing the effects of the termination from applying

Directorate General for Taxes. Resolution V2182-22 of October 18, 2022

The controlling company of a tax group is acquired by a multinational group having a Luxembourg entity as its controlling company. As a result, a new tax group is formed which includes all the subsidiaries in the former group except for one. The effects arising from this transaction would be as follows:

a) The former group will be retained for the period in which the acquisition of its controlling company occurs and will be terminated with effects in the following period.

b) The legislation provides that, where the controlling company of a tax group becomes a subsidiary and all the entities included in that tax group become part of another tax group, special rules mitigating the effects of termination of the tax group will apply. These special rules do not apply, however, where only a portion of the subsidiaries are included, which happens in the case submitted for resolution.

3.4 Corporate income tax. - The acquisition value of a property for corporate income tax purposes is not altered due to the fact of an autonomous community reviewing the value for transfer and stamp tax purposes

Directorate General for Taxes. Resolution V2125-22 of October 10, 2022

An entity acquired a property which the autonomous community later valued at above the acquisition price for stamp and transfer tax purposes. The request concerns whether to calculate the gain on the sale of the property the acquisition value given by the autonomous community has to be taken.

The DGT recalled that, under the Corporate Income Tax Law, assets have to be valued under the principles set out in the Commercial Code. This code determines that assets must be recognized for accounting purposes at their acquisition price or production cost, and there is no article allowing that valuation to be corrected for accounting purposes, not even by reason of a valuation by an autonomous community.

Therefore, the autonomous community's valuation for transfer and stamp tax purposes will not affect the value to be considered for the purposes of a transfer of the property.

3.5 Personal income tax. - A resident in Spain who works from their own home for an employer from another state must be taxed on their worldwide income in Spain

Directorate General for Taxes. Resolution V2223-22 of October 25, 2022

An individual who is tax resident in Spain is going to work for a company resident in the Netherlands. The work will be performed in Spain from the worker's private home. The DGT noted the following:

a) According to the Netherlands-Spain tax treaty, interpreted in light of the Commentaries on the OECD Model Convention, employment income in respect of work performed under a remote working arrangement is taxable in the state where the work is physically performed, in other words where the worker's private home is located. The fact that the work is performed for the benefit of a Netherlands company does not alter this conclusion, because the worker is tax resident in Spain and exercises his employment in this country.

b) The Netherlands entity will have a withholding obligation only (i) if it operates in Spain through a permanent establishment, or (ii) if the employment income is a deductible expense for determining the income mentioned in article 24.2 of the Revised Nonresident Income Tax Law (income obtained from the provision of services, technical support, installation or assembly work under engineering contracts and, generally, from economic activities or operations performed in Spain other than through a permanent establishment).

3.6 VAT. - Transfer of all the shares in managed subsidiaries is not subject to VAT

Directorate General for Taxes. Resolution V2109-22 of October 5, 2022.

The DGT analyzed the VAT rules for the transfer by a holding entity of all of its shares in a subsidiary managed by it. In the specific case analyzed, that transfer also means an indirect transfer of the shares held by the subsidiary in other operating companies at which the holding entity participates in their management.

It was asked whether this transfer (which, in the specific case under analysis, was made in a share exchange) is not subject to VAT by applying article 7.1 of the VAT Law.

The DGT concluded that that nontaxable case does apply. It considers (on the basis of its interpretation of CJEU case law) that "the transfer by the requesting party of all the shares of a holding entity which, in the case under consideration, also includes all of the shares of another five completely operative business entities, in which each of them is comprised of a set of material and human elements forming part of its business or professional assets, which amount to an independent economic unit as defined in article 7.1 of Law 37/1992, also qualifies for that nontaxable case".

4. Legislation

4.1 Mortgage novations that take place under the Code of Good Practices are exempt from stamp tax

On November 23, 2022, the Official State Gazette (BOE) published Royal Decree Law 19/2022, of November 22, 2022, establishing a Code of Good Practices to soften the effects of the rise in interest rates on mortgages for principal residences, amending Royal Decree-Law 6/2012, of March 9, 2012, on urgent measures to protect low-income mortgage borrowers, and adopting other structural measures to improve the mortgages market.

Among other measures, the law introduces an exemption from ad valorem stamp tax on notarial documents for deeds formalizing contractual novations of mortgage loans and credit facilities that are executed under that code.

4.2 Changes introduced to VAT return forms

On November 22, 2022, the Official State Gazette (BOE) published Order HFP/1124/2022, of November 18, 2022, amending several orders in relation to various VAT return forms. The amendments include adapting forms 303, 322 and 390 to changes to the tax rates:

- The zero rate introduced by final provision three of Law 7/2022 of April 8, 2022 (commentary dated April 10, 2022) for certain types of gifts of products to not-for-profit entities.

- The 5% rate introduced for certain types of electricity contracts by article 18 of Royal Decree-Law 11/2022 of June 25, 2022 (alert dated June 27, 2022).

It also introduces technical modifications making them easier to complete by taxpayers.

4.3 Changes to form 591 for the tax on the value of electricity production

In 2021, exceptional suspension measures were implemented in relation to the tax on the value of electricity production which have meant that the remuneration relating to the electricity fed into the grid in the quarters subject to the suspension do not have to be settled, which alters the calculation of the taxable amount and of prepayments. More particularly, payment of the tax was suspended in the third and fourth quarters of 2021, by Royal Decree-Law 12/2021 of June 24, 2021 and Royal Decree-Law 17/2021 of September 14, 2021 (September 2021 commentary).

The November 22, 2022 edition of the Official State Gazette published Order HFP/1123/2022 of November 18, amending Order HAP/2328/2014 of December 11, 2014, approving forms 591 and 588, to adapt these forms to the effects of these suspensions.

5. MISCELLANEOUS

5.1 AEAT and Science and Innovation Ministry reach agreement on eligibility of R&D&I projects

On November 17, 2022, the Decision of November 10, 2022, by the Subsecretary's Office, publishing the agreement between the Central Government Tax Agency and the Science Ministry was published, which, according to its preamble, attempts to create a stable framework governing collaboration in issuing reports to classify projects as research and development or technological innovation (R&D&I), for the purpose of being eligible for the tax incentives allowed in the corporate income tax legislation.

The aim is that when AEAT is carrying out audit and investigation work on taxpayers who have reported R&D&I tax credits it may request a (reasoned) technical opinion from the General Secretary's Office in relation to fulfillment of the scientific and technology-related requirements needed to be able to apply those credits (therefore, generally, it is likely that these reports will be requested when the taxpayers themselves have not previously obtained them).

For these purposes, AEAT will have to provide the Secretary's Office, among other items, with a technical report on each project (individually), with the same format, structure and contents as are required for issuing a binding reasoned report (as provided in the Corporate Income Tax Law) according to Royal Decree 1432/2003 of November 21, 2003. The information will be collected from the taxpayer by AEAT.

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