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UNJUSTIFIED DISMISSAL BY A CLUB DOES NOT ENTITLE PLAYER TO BONUSES FOR REMAINING IN THE DIVISION AGREED BY THE CLUB

It was discussed whether the unjustified termination of a player's employment contract, coinciding with the winter market, gives rise to the bonuses determined for remaining in the first division and that stipulated for obtaining a given number of points in the competition

ÁNGEL OLMEDO JIMÉNEZ

1. Issue under debate

The judgment by Madrid High Court on June 13, 2018 dismissed the claim in relation to the bonuses requested by the player, after it was found that he does not have the right to claim them, and additionally, the court rejected the amount recognized in the lower court's judgment in respect of a severance payment for unjustified dismissal.

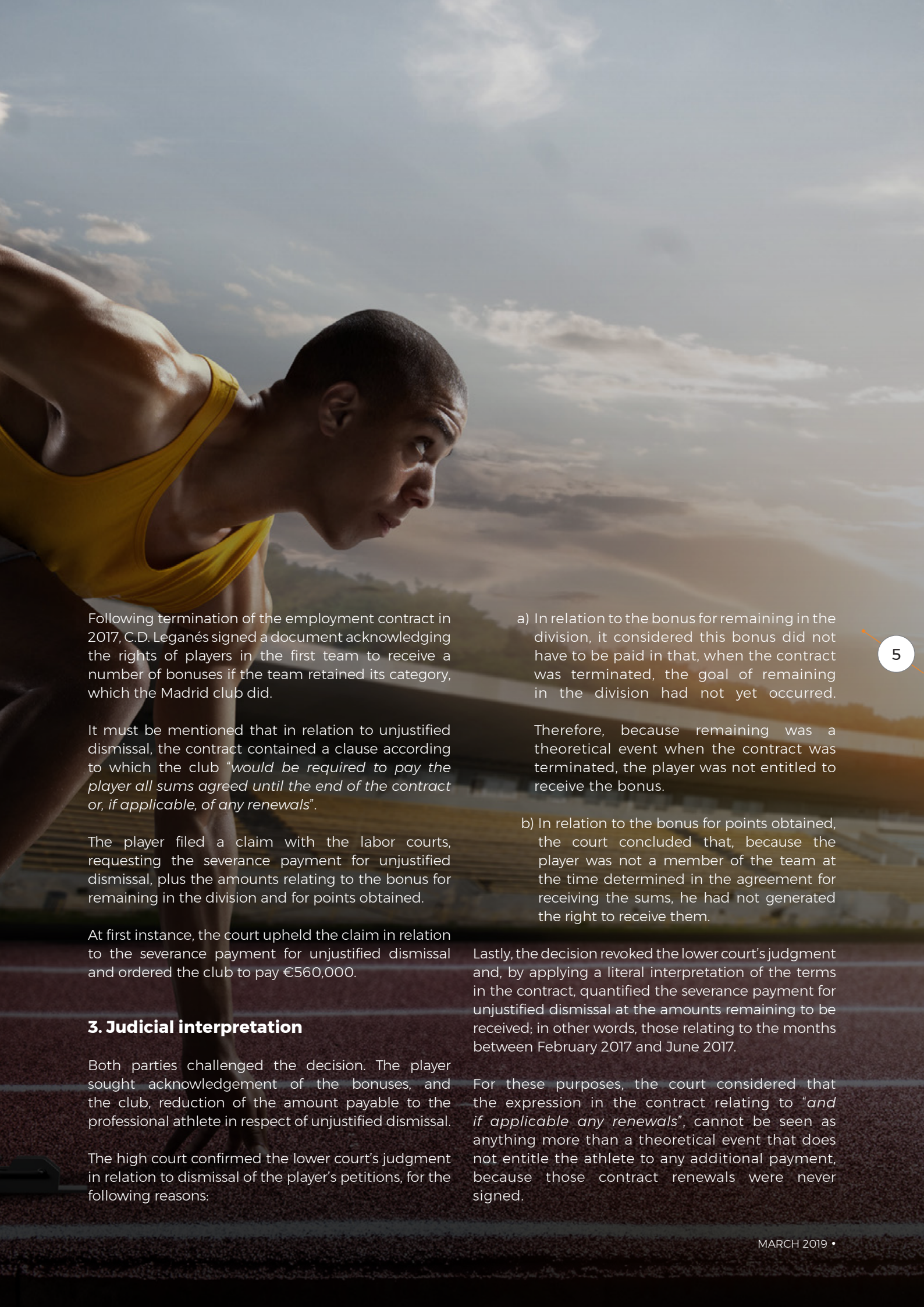
2. Facts of interest

The player had signed a professional athlete's employment contract with C.D. Leganés. The contract was signed for a term lasting one season.

The compensation stipulated by the parties was €400,000, gross, payable in ten monthly payments. The club had paid, in August, September and November 2017, a number of advance sums to the player, and when the team paid the other players the bonus for remaining in the division it deducted those advance payments from the bonus amount.

Moreover, the contract stipulated that if the team retained its category it would be renewed for another season.

On January 31, 2017, the club gave notice of termination of the contract, by reason of low performance, and the player signed a contract with another team, Rayo Vallecano, in February 2017.



Following termination of the employment contract in 2017, C.D. Leganés signed a document acknowledging the rights of players in the first team to receive a number of bonuses if the team retained its category, which the Madrid club did.

It must be mentioned that in relation to unjustified dismissal, the contract contained a clause according to which the club "*would be required to pay the player all sums agreed until the end of the contract or, if applicable, of any renewals*".

The player filed a claim with the labor courts, requesting the severance payment for unjustified dismissal, plus the amounts relating to the bonus for remaining in the division and for points obtained.

At first instance, the court upheld the claim in relation to the severance payment for unjustified dismissal and ordered the club to pay €560,000.

3. Judicial interpretation

Both parties challenged the decision. The player sought acknowledgement of the bonuses, and the club, reduction of the amount payable to the professional athlete in respect of unjustified dismissal.

The high court confirmed the lower court's judgment in relation to dismissal of the player's petitions, for the following reasons:

a) In relation to the bonus for remaining in the division, it considered this bonus did not have to be paid in that, when the contract was terminated, the goal of remaining in the division had not yet occurred.

   Therefore, because remaining was a theoretical event when the contract was terminated, the player was not entitled to receive the bonus.

b) In relation to the bonus for points obtained, the court concluded that, because the player was not a member of the team at the time determined in the agreement for receiving the sums, he had not generated the right to receive them.

Lastly, the decision revoked the lower court's judgment and, by applying a literal interpretation of the terms in the contract, quantified the severance payment for unjustified dismissal at the amounts remaining to be received; in other words, those relating to the months between February 2017 and June 2017.

For these purposes, the court considered that the expression in the contract relating to "*and if applicable any renewals*", cannot be seen as anything more than a theoretical event that does not entitle the athlete to any additional payment, because those contract renewals were never signed.

INTERNATIONAL TAXATION FOR ATHLETES RESIDENT IN SPAIN: RECENT CONCLUSIONS BY THE DIRECTORATE-GENERAL FOR TAXES

JOSÉ MARÍA COBOS GÓMEZ

Sport undeniably has an important role in the international projection of Spain. This is borne out in the preamble to the preliminary Sport Law Bill which categorizes high-level sport and the representation of Spanish sport as a matter of public interest, precisely due to their contribution to the international projection of Spain and the way it is reflected not just in sport, but in many other sectors of the economy that drive the country's growth.

From a tax standpoint, we have for a long time been hearing claims regarding the need to adapt the Spanish tax system to the particular characteristics displayed by sport. The preliminary bill contains a specific provision, by envisaging, among the rights of professional athletes, the right to specific tax rules adapted to the lengths of their careers and to the revenues generated over that period.

That need, rather than right almost, cannot be dissociated from the international side of an athlete's activities and the revenues they obtain in other countries, especially if we agree on highlighting the importance of sport for the international projection of our country not simply in fields related strictly to sport. As we discuss below, however, the tax system still has imperfections that place barriers to the international activities of our athletes and therefore act as a weight holding sport back from making such an important contribution to Spain's economic development. The two recent rulings of the Directorate General for Taxes issued in January 2019 which we discuss below place emphasis on this issue.

Taxing worldwide income

Before entering into those conclusions in detail, we should take a minute to recall the basic principles of taxing worldwide income, paying particular attention to athletes practicing their sports outside the scope of the organization and management of an employer (in other words mainly athletes practicing individual sports), because that is the starting point for the rulings we are discussing here.

Athletes, like other taxpayers having their tax residence in Spain, must be taxed according to the principle of taxing worldwide income. Therefore, as a general rule, they are subject to tax on all income obtained, wherever it arose and wherever the payer's residence.

This (Spanish or foreign) income is normally classified as income from economic activities, and the difference between their revenues and the expenses related or linked to those revenues is included in the athlete's taxable income for personal income tax purposes (V0702-18). Their revenues must include both the "fixed" amounts they receive and the sums that competition organizers/sponsors pay to participants (V0704-18, V0756-16), together with any payments they receive from sponsors for brand promotion (V0201-19, V0702-18). There are, however, two exceptions:

a) If the revenues result from an employment relationship (or a relationship that must be classified as such, because a supply of services takes place compensated by another within the scope of the organization and management of an employer), they are treated as salary income.

b) If the income cannot be classified as income from economic activities because the athlete does not have their own organization of the means of production or of human resources, or either of the two, for the purpose of participating in the production or distribution of goods or services, and that income cannot be included in salary income either due to not resulting from an employment relationship, the income must be classified as a capital gain (V0704-18).

Exemption for work performed abroad

Having established the principle that all income received by athletes in the course of their professional activities is subject to tax, wherever it is generated, and that it is classified, as a general rule, as income from economic activities, the personal income tax legislation sets out a few exemptions for athletes, which include certain types of financial aid to high-level athletes (which we will not go into here), together with the exemption for work performed abroad, envisaged in article 7.p) of the Personal Income Tax Law. Under that article, up to €60,100 of the annual salary income received for work actually performed abroad may be exempt, if two requirements are satisfied:

a) The work must be performed for a non-Spanish resident company or entity.

b) In the territory where the work is performed there must be a tax of an identical or similar nature to Spanish personal income tax, and it must not be a country or territory classed as a tax haven. This requirement is satisfied for these purposes where the country or territory where the work is performed has signed an international tax treaty with Spain that contains an exchange of information clause.

The Directorate General for Taxes allowed this exemption, for example, for the income obtained by an individual hired under an employment relationship as coach for the Mexican Olympic team, by the Mexican judo association, due to deeming that all the established statutory requirements had been satisfied (0863-02).

In a recent ruling, however, issued on March 30, 2019 (V0201-19), the Directorate General for Taxes disallowed the exemption for a Spanish tax resident professional motorcycle driver, who, as an elite athlete, has signed sponsorship agreements with foreign companies which require the supply of a service outside Spain, consisting, principally, of promoting the brand sponsoring the driver.

That rejection was based on deeming that this exemption does not apply to all types of salary income, instead only the income arising from an employment relationship or a relationship for statute-based personnel (relación estatutaria) (article 17.1 of the Personal Income Tax Law), together with certain cases envisaged in article 17.2 of the Personal Income Tax Law, such what are known as "special" employment relationships (including the special employment relationship for professional athletes). This shows a type of discrimination between athletes practicing their sports under a (special) employment relationship and athletes not carrying on their activities under the organization and management of an employer. Since the aim of this exemption is to encourage taxpayers' international mobility, an amendment to the law appears necessary, or else a more flexible interpretation by the authorities to allow the exemption to apply to all professional athletes regardless of the form for carrying on their sport activities.

Double taxation, correcting it, and the impact on prepayments

Athletes carrying on their activities in other countries are going to face the additional problem that, as a result of the principle of taxing income at source or on local income, they may find they have to be taxed in the states where the income was generated. The OECD Model Convention regulates this case in article 17, by

determining that the income of artists and athletes may be taxed where the activities of the artist or athlete are carried out (whether as a business activity or as work for an employer). Spain has implemented this interpretation in the many treaties signed with other states, with the notable exception of the treaty with Austria, which provides for taxation exclusively in the state where the activity of the artist or athlete is carried out.

This shared taxation principle could therefore place the income obtained by athletes in a double taxation scenario, due to being taxed first in the state where the sport activities took place and later taxed again in their state of residence (Spain, in our case).

The treaties themselves contain mechanisms to correct or reduce the adverse impact that double taxation may have. Most of the tax treaties signed by Spain contain this option to deduct the tax paid in other countries (to the extent of the amount of tax payable in Spain), although some treaties determine that income taxed in other countries is exempt in Spain (treaties with Japan or Poland, for example).

Obtaining income from sport activities performed in other states, subject to withholding in other countries, also has an impact on the calculation of prepayments, as was determined in the second ruling by the Directorate General for Taxes, discussed below.

Athletes, like other professionals, are required to make four quarterly prepayments throughout the year, one at the end of each quarter in the calendar year. The prepayment for each quarter is calculated, as a general rule, as 20% of the net income (revenues less expenses) relating to the period falling between the first day of the year and the last day in of the quarter, with subtraction of the sums paid over in respect of the prepayments made in the previous quarters and the tax withheld until the end of the quarter concerned. There is no obligation to make prepayments, however, if in the previous calendar year, tax was withheld from at least 70 percent of the revenues in cash or in kind from the activity.

Prepayments are nothing more than payments on account of the final amount of tax and therefore their main purpose is to bring forward the collection of tax. In relation to this mechanism, it was asked whether athletes could include the tax withheld in other countries for the purpose of calculating the prepayment.

The Directorate General for Taxes, in a ruling dated January 14, 2019 (V0079-19), has rejected this option. It concluded, from one angle, that the revenues on which tax had been withheld in other countries cannot be included in the 70% portion of income from which tax has been withheld which exempts the recipient from the obligation to file prepayments, by arguing that this percentage only includes the revenues from which tax has been withheld by payers resident in Spain. And, for the same reason, it does not allow either the tax withheld in other countries to be deducted to calculate the amount to be paid over (unlike the tax withheld in Spain), because those payments fall within the athlete's personal tax in other countries. None of this prevents the applicable method to correct double taxation from being used in the final return.

The points discussed above illustrate that imperfections continue to exist in the Spanish system that may restrict the international activities of our athletes. A review of the system is therefore recommendable to prevent the associated adverse effects not only on sport itself but also on the general economic growth of our country.

SUPREME COURT SUBMITS A REQUEST FOR A RULING ON CONSTITUTIONALITY REGARDING RADIO BROADCASTS OF FOOTBALL GAMES

EVA GOLMAYO SEBASTIÁN

The Supreme Court has submitted a request for a ruling on constitutionality in relation to a doubt as to whether unrestricted access by radio broadcasting operators to stadiums for live broadcasts of sport events is consistent with the right of ownership and free enterprise (decision available here).

The dispute over the unrestricted access of radio broadcasting operators to stadiums is not a new one:

(i) The law on broadcasts and retransmissions of sports competitions and events (Law 21/1997) provided that social media, due to enabling the right to information, had unrestricted access to stadiums and sport facilities. Unlike television broadcasters, however, the written press and radio broadcasting operators were not subject to time limits and restrictions on live broadcasting.

(ii) This regime appeared to change with the approval of the General Audiovisual Communication Law (Law 7/2010), repealing Law 21/1997, and with it, the express reference to the unrestricted access rights of radiobroadcasting operators. This change was interpreted by the right holders as excluding the rights of radio broadcasting operators to access stadiums for live broadcasts of sport events.

(iii) In the absence of agreement, Royal Decree-Law 15/2012 changed this regime, and expressly recognized the right of radiobroadcasting operators to unrestricted access to the premises in exchange for the payment of a fee equal to the costs generated by exercising that right.

(iv) Lastly, the Telecommunications Market Commission set the fee at €85 in a decision rendered on November 29, 2012 ("Decision").

(v) Spain's Professional Football League (**LFP**, La Liga de Fútbol Profesional) filed an application for judicial review of that decision with the National Appellate Court, arguing that it was null and void by being rendered under a law (Law 7/2010) which, in the LFP's opinion, is contrary to the Spanish Constitution.

The Supreme Court has now upheld the doubts over the constitutionality of Law 7/2010, in particular of article 19.4, because it considers it may be contrary to the right of ownership and to free enterprise in the part relating to freedom of contract.

The key point in this article is that it limits the fee that broadcasting right holders are allowed to receive, and disallows the LFP and its member clubs from marketing and exploiting exclusive broadcasting rights for sport events.

The Supreme Court considers that the organizers, exploitation right holders, may be deprived of an essential part of their financial reward which contrasts with the advertising revenues that the radio broadcasting companies obtain.

In the words of the Supreme Court: "*This court harbors doubts as to whether a legal provision such as that questioned is necessary, adequate and proportional when the right to communicate information confronts the rights of ownership and free enterprise of sport event organizers in the part relating to freedom of contract (...) it must be asked whether the legal provision imposing on football clubs the obligation to allow radio broadcasters access to stadiums to broadcast sport events live, free of charge, and in full, thereby impeding the marketing of broadcasting rights for sport events organized by them, includes the essential content of the right to information*". The request for a ruling on constitutionality centered, therefore, on determining whether the content of the right to communicate information acknowledged in article 20.1.d of the Spanish Constitution necessarily includes the access of private radio broadcasters to stadiums to broadcast football matches live and free of charge, or whether, by contrast, this right would be secured with measures compatible with the marketing of radio broadcasting retransmission rights.

NEWS

GARRIGUES SPORTS & ENTERTAINMENT GIVES LECTURES ON TAXATION IN SPORT FOR THE MASTER IN SPORTS LAW APPLIED TO PROFESSIONAL FOOTBALL, ORGANIZED BY LALIGA BUSINESS SCHOOL

On January 25 and January 26 the lectures on taxation in sport took place at LaLiga Business School as part of the Master in Sports Law Applied to Professional Football.

Félix Plaza, partner in the tax department and co-head of Garrigues Sports & Entertainment, and Gonzalo Rincón, partner in the tax department, together with other professionals from the firm, gave those lectures on the international taxation of professional football players, on the taxation of rights of publicity, and on the taxation of international transfers of professional football players.

GARRIGUES SPORTS & ENTERTAINMENT PARTICIPATES IN CONFERENCE ON CULTURAL PATRONAGE AND SPONSORSHIP: LIMITS AND OPPORTUNITIES FOR A NEW TYPE OF PHILANTHROPY, ORGANIZED BY MADRID BAR ASSOCIATION

On January 31, a conference was held at the Madrid Bar Association on the subject of cultural patronage and sponsorship: limits and opportunities for a new type of philanthropy (*Mecenazgo y patrocinio culturales: límites y oportunidades de una nueva filantropía*), organized by the law and culture section of the Madrid Bar Association.

Félix Plaza, partner in the tax department and co-head of Garrigues Sports & Entertainment, took part in that conference, held for the purpose of claiming a new patronage law, and involving a debate on the restrictions in the legislation currently in force, along with the main features claimed in the reform to ensure that it encourages philanthropy in Spain.

PRESENTATION OF LALIGA'S ECONOMIC GUIDE

The presentation of LaLiga's Economic Guide was held on March 26 at LaLiga's offices, attended by Félix Plaza, partner in the tax department and co-head of Garrigues Sports & Entertainment.

The document, prepared by Palco23 sponsored by Centro de Estudios Garrigues, contains a contribution by Félix Plaza, who wrote a commentary on the subject of "What does the Future hold?", discussing various Spanish taxation issues, mainly from the standpoint of transfer fees, payments to intermediaries, publicity rights and the incoming expatriate regime.

GARRIGUES SPORTS & ENTERTAINMENT DEPARTMENT RECOGNIZED ONCE AGAIN BY CHAMBERS EUROPE

In March, UK publisher Chambers & Partners published its ranking in which Garrigues Sports & Entertainment was commended for sport law for another year running.

Félix Plaza, co-head of Garrigues Sports & Entertainment, and Carolina Pina, partner in the intellectual property department, were named among the recognized lawyers.

COMPARISON AMONG THE LARGE EUROPEAN LEAGUES AT COMPLIANCE AND GOOD TAX PRACTICES CONGRESS

On March 12 a congress on compliance and good tax practices, organized by the Lefebvre legal publisher, was held at Círculo de Bellas Artes in Madrid, presided by King Felipe VI.

Félix Plaza, partner in the tax department and co-head of Garrigues Sports & Entertainment, took part, along with Javier Gómez, corporate general manager of LaLiga, in the parallel lecture on the subject of competitive comparison of tax issues among the most important European leagues (*Comparativa competitiva por cuestiones fiscales entre las más importantes ligas europeas*), discussing, among other subjects, the exclusion of professional athletes from the inbound expatriates regime, and comparing Spain with other European countries that do have special regimes. They also discussed the taxation arising on the remuneration of football players' agents, and on transfer fees.

7TH LALIGA CONFERENCE ON SPORT LAW, WITH GARRIGUES SPORTS & ENTERTAINMENT AS INVITED GUEST SPEAKER

The 7th LaLiga Conference on Sport Law, organized by Fundación LaLiga was held at LaLiga's offices on March 19.

José María Cobos, partner in the tax department, took part in the conference, with a talk on the latest conclusions by the authorities on the international taxation of athletes, which are included in this newsletter.

Judgments

1 National Appellate Court confirms sanction imposed on football club for displaying extreme group's posters

National Appellate Court judgment of July 4, 2018

The National Appellate Court dismissed an appeal lodged by the club against a sanction imposed as a result of deeming that the provisions laid down by the safety coordinator for a match between teams from the same city were breached, thereby contributing to promoting and supporting an extreme group.
It is the fact of their containing the logo of the extreme group in question that gave rise to the initiation of the sanction procedure, in that the club should have acted with due diligence by checking whether the poster ultimately displayed at the football ground matched the logo sent to the club days before the event was held.
The National Appellate Court accepted the determinations in the appealed judgment, by arguing that it was "inconceivable" that the club was unaware of the violent or extreme nature of the group that placed the poster, because, among other reasons, the group appears in the club's Followers' Book as the only extreme group, and had led numerous violent incidents.
All in all, it confirmed the sanction imposed on the club, not because of its support or enabling of means, but because of its lack of diligence or its negligence when adopting the envisaged prevention measures regarding the display of posters with slogans referring to the extreme group in question.

2 Provisions recorded by clubs in relation to assessments issued to their players are not deductible on corporate income tax returns

National Appellate Court judgment of July 12, 2018

The National Appellate Court settled an appeal lodged by a football club which deducted on its corporate income tax return an expense in respect of a provision for the assessments issued to one of its players as a result of audit work on the recognition as personal income of sums received in respect of selling rights of publicity through non-resident entities.
The club provided a guarantee for the player in respect of any debt he might have to pay as a result of that audit work. Because the club had no obligation to accept responsibility for the player's outstanding tax obligations, however, the auditors disallowed deduction of the expense. Moreover, the club did not appear in either the assessment reports or the administrative and court proceedings related to them.
The National Appellate Court concluded that it is not sufficient, for the purposes of being able to deduct an expense on a corporate income tax return, for it to be recorded and documented on an invoice. Instead, evidence has to be provided of the actual existence of the service and the need for the expense, along with the close connection with the revenues obtained, which was not deemed to be proved by the appellant. Furthermore, the finance costs arising from the guarantee are not deductible either, or the installments and interest charged to the club due to being jointly and severally liable as payer of the income taxed on a limited basis.

3 Local council ordered to pay indemnification for injury sustained by player at municipal football ground

Basque Country High Court judgment of September 19, 2018

Basque Country High Court settled an appeal lodged by a non-association football player who sustained a fractured kneecap after colliding with a concrete wall when playing football at a local authority owned ground.
The court held that far from having evidenced compliance with the required safety measures to prevent accidents such as that sustained by the appellant, the local authority had proved that measures were omitted (distance between the touchline and the concrete wall and protection from the wall) which, had they been implemented, would have prevented or reduced the injuries sustained by the claimant. It considered, therefore, that a causal relationship must be observed between such omissions and the damage and its illegal nature.
The fact that the local authority had given its consent to the use of its facilities to dispute a football match, whatever the nature of the competition or its promoters, transfers to that authority the responsibility for any injuries sustained by players as a result of failures in the services of the local authorities responsible for designing and implementing safety measures to the required standards, having regard to the characteristics of the event and risks associated with it.

4 National Appellate Court decides whether entry to a football ground by a previously sanctioned individual amounts to an infringement

National Appellate Court judgment of September 26, 2018

The National Appellate Court dismissed an appeal lodged by an individual who had received a sanction preventing him from entering a football stadium, even though a previous sanction existed consisting in a ban from entry to football grounds.

The appellant pleaded, first, that the proof consisting in images and recordings does not evidence his presence at the stadium, and secondly, that the validity of the first sanction was subject to notification of its final nature to the interested party, and to the club owning the premises; which should have decided to withhold his membership card to stop him entering.
The National Appellate Court failed to allow this claim, and confirmed imposition of the sanction on the appellant, by specifying that the first sanction was valid when the appellant attended the event in question. It therefore recalled that it is valid from when the decision brings the administrative jurisdiction to an end, a fact that was evidenced. In view of the successive proceedings and appeals that had been brought, the National Appellate Court also threw out the argument that the sanction was not valid as a result of unawareness on the part of the interested party or failure to notify the club.

5 National Appellate Court confirms doping-related ban imposed on basketball team doctor

National Appellate Court judgment of September 28, 2018

The National Appellate Court heard the appeal lodged by a basketball team's doctor against a ban served on him by the Spanish Agency for Health Protection in Sport as a result of the adverse outcome of an antidoping test carried out on a player in the team.
The doctor pleaded that he had supplied the substance concerned to the player as a result of an ankle injury, arguing that his actions had been based at all times on good faith and therapeutic purposes.
The National Appellate Court held that the appellant's broad experience in professional basketball, together with the actual presence of the substance in the player's body when the test took place, impeded him from evidencing the existence of good faith in his actions. It therefore shared the opinion contained in the CAS decision, concerning holding that the reason for blameworthiness in relation to these types of substances does not lie simply in supplying them, as the appellant pleaded, but in the beneficial effects they cause when present in the athlete's body on competing.

6 A residence certificate issued by Spanish consulate authorities evidences, together with consideration of the taxpayer's other circumstances, tax residence abroad

Judgment by Barcelona Labor Court no 19 on October 1, 2018

A motorcyclist's conviction for a criminal offense against public finance stemmed from the fact of not having reported the whole of his worldwide property on a wealth tax return, only his assets in Spain, and Spanish tax agency AEAT considered that his real and effective residence was in Spain not in Switzerland, as the accused had argued.
Both the authorities and the private prosecution argued at all times that his residence in Switzerland was feigned, by concluding there were no elements evidencing it, and considering, among other personal circumstances of the accused, that the residence certificate issued by the mayor of the Swiss locality where he resided was fraudulent. Whereas the court held that his residence in Switzerland had been sufficiently evidenced by arguing that the questioned formal evidence submitted was supported by the factual evidence provided by a certificate from the Spanish consul in Geneva (not considered by the tax auditors). These factual circumstances in turn were reinforced by a number of elements, such as reports in the specialist motorcycle press expressly referring to his spending time and residing in Switzerland, payments of traffic insurance, medical insurance and rental payments for his home in that country, together with a congratulations card from the mayor.
For all these reasons, the court determined that his effective residence was in Switzerland according to the terms in the tax treaty between Spain and Switzerland, and acquitted the accused from the criminal offense against public finance.

7 National Appellate Court confirms sanction imposed by CNMV on RTVE for covert advertising of a gym chain

National Appellate Court judgment of October 9, 2018

The National Appellate Court settled an appeal lodged by Spanish public television broadcasting company Corporación de RTVE against a CNMC decision imposing a sanction for including a covert commercial communication by a gym in one of its reports.
The National Appellate Court considered that for that infringement to exist there must be two essential elements: (i) the purpose to advertise, and (ii) an instance of misleading the general public.
As for the first requirement, given that the broadcasted report was about the benefits of physical exercise for a certain group of women, and the specific activities and programs of a particular gym were presented (giving the name of the gym), the National Appellate Court upheld that it took place. The second was also considered to be satisfied, because the promotion of the gym's services was not identified as television advertising, but rather was broadcast with the appearance of being seemingly objective information unrelated to the gym's particular interests. The law does not specify that there must be consideration, which did not exist in this case. The National Appellate Court therefore confirmed the imposed sanction.

8 Extremadura High Court concludes on treatment of friendly matches disputed after termination of employment contract as supply of services

Extremadura High Court judgment of October 11, 2018

Extremadura High Court settled an appeal lodged by a professional football player whose employment relationship with the defendant, a sport club, had been terminated following a decision by the club not to use the player's services at the end of the 2016/2017 season. He nevertheless played friendly matches in July and August 2017.

The court considered that the fact of the player disputing matches with the club after his employment relationship had terminated does not in itself determine that it was a supply of services, and the fact of receiving a sum of money does not mean either that the received sum should be treated as salary. It held, therefore, that the presumption of an employment contract under article 8 of the Workers' Statute did not apply, because for it to take effect all the elements identifying a salaried employment relationship must exist; elements that do not arise in this case in which, additionally, the court did not even find evidence that services had been provided.

9 Supreme Court confirms the order for payment imposed on a television channel for publishing an individual's police identification file in relation to a subsequently acquitted crime

Supreme Court judgment of November 7, 2018

The Supreme Court settled an appeal lodged by an individual, whose image from the police identification file as a result of his arrest, which was followed by his acquittal, was broadcast on television (on various programs on the same channel), which, in the appellant's opinion, was a breach of his right to reputation, to his own and his family's privacy, and to personal portrayal as set out in article 18 of the Spanish Constitution.

For all these reasons he requested the payment of indemnification by several defendants, in addition to various steps to protect his image. After an out-of-court agreement was reached between the appellant and one of the respondents, it was asked whether that agreement could include the other respondents (producers of the broadcasted programs), as a result of the joint and several liability that had been held to exist.

The court considered in this respect that if any of the potentially liable parties makes a payment with which the creditor considers satisfaction has been achieved, and the creditor waives its right to seek payment from all of them, the parties that have not participated in the agreement may refuse to pay; but, by contrast, if the agreement is not binding on those who did not execute it, the potentially liable parties cannot rely on that agreement to end the proceeding brought against them, because their liability has not been determined.

Additionally, the court confirmed the existence of an invasion of the claimant's right of personal portrayal, after concluding that the fact of his marriage to a famous singer receiving extensive coverage in the celebrity press a few days earlier, is not a reason for broadcasting the images, when no consent had been given for their distribution and the broadcasting related to an image that had not been obtained in a public place.

10 Supreme Court concludes on the classification of a certain type of advertising as sponsorship

Supreme Court judgment of November 8, 2018

The Supreme Court settled a cassation appeal lodged by an audiovisual communication group against the fine imposed on it by the CNMC as a result of overstepping the limits on broadcasting time for adverts on television channels.

It first examined the issue of the classification of certain types of advertising messages as sponsorship, which, under the applicable legislation, falls outside the calculation of the mentioned broadcasting time limits. The Supreme Court concluded that the questioned element amounts to conventional advertising not sponsorship, due to not satisfying the requirements to be placed before or immediately after the sponsored program, or at the beginning of each resumption after the break.

Secondly, it looked at the treatment as advertising of the promotion of merchandising goods for the 2014 World Cup, after the appellant pleaded that it was a case of self-promotion, separate from conventional advertising for the purposes of applying the broadcasting limits. Although the National Appellate Court considered that the World Cup cannot be seen as a sport program of the appellant, but rather as a sport event for which the channel holds broadcasting rights, the Supreme Court sided with the appellant in this respect, by mentioning that it is indeed a sport program, due to involving the live retransmission of cultural or other types of events envisaged in the law, although it considered that the ownership of the rights and the economic exploitation of the products had not been evidenced.

11 CJEU finally determines that the tax regime applicable to sport clubs is not state aid

Judgment by the Court of Justice of the European Union (CJEU) on February 26, 2019

The CJEU examined an appeal challenging the European Commission decision in which it held that the tax regime applicable to four Spanish professional football clubs, having the forms of not-for-profit entities, amounted to state aid prohibited by EU law, due to breaching free competition and the single market among member states. Two of the clubs concerned challenged the decision with the court, and one of the appeals was successful. So the CJEU set aside the Commission's decision by arguing that the Commission did not properly observe its obligations in relation to the need to found its decision, causing an error in the finding of the facts.

One of the clubs pleaded that examination of the advantage obtained from the preferred tax rate could not be dissociated from examination of the other components of the tax regime for not-for-profit entities; referring to the tax credit for reinvestment which was higher in the case of S.A.D. companies (12% versus 7%), a significant tax credit in this industry in which player transfers occur. The CJEU held that it cannot not be excluded on the basis of the data presented in the challenged decision that the lower tax credit options in the regime for not-for-profit entities manage to counteract the advantage derived from a lower nominal rate.

Moreover, the Commission had based its decision on a study produced by Spain, when it affirmed that, in most of the fiscal years, the effective taxation of the professional football clubs that were taxed as not-for-profit entities was lower than that of comparable entities subject to the standard regime, although those figures related to data referring without distinction to all industries and to all operators, and only covered four fiscal years, and therefore did not show the real impact of the regime applied to the football clubs concerned.

Ruling request

1 DGT concludes on international dance association having permanent establishment in Spain and on tax regime for not-for-profit entities being applicable

DGT binding ruling V2102-18 of March 16, 2018

The request concerned whether the offices leased in Spain by an international dance association, a private not-for-profit entity existing in Switzerland, having as its purpose to organize and manage sport dance worldwide, imply that it has a permanent establishment, and if so, whether Law 49/2002 applies to it.
The DGT referred first to the Spain-Switzerland tax treaty, to the commentaries on article 5 of the OECD Model Tax Convention and to the nonresident income tax legislation to confirm the existence of a permanent establishment in Spain of the requesting entity, due to having a fixed place of business where it carries on all or part of its activities. After determining that fact, for the special tax regime set out in Law 49/2002 to be applicable, the permanent establishment's activities must be exclusively for the public benefit, with the establishment satisfying all the requirements laid down in article 3 of Law 49/2002.

2 Sport services provided by a rescue and lifesaving association are subject to but exempt from VAT

DGT binding ruling V2461-18 of September 12, 2018

The request concerned whether the services provided to athletes by a sport rescue and lifesaving association, billed at times to a commercial company engaged in organizing triathlon competitions are able to be treated as VAT-exempt supplies of services under article 20.One.13 of the VAT Law.
The DGT concluded that they could. Because the requesting association is one of the entities referred to in the article, the services mentioned are subject but exempt, and the requirement for the customers of the supplied services to be individuals practicing sport or physical education is deemed to be satisfied, even if the supplier of the services invoices their prices to individuals or entities other than the individuals (for example, the surveillance, rescue and assembly services for the swimming field in a triathlon competition are exempt but not services such as the surveillance of beaches and swimming pools, regardless of whether they are provided to individuals, commercial companies, local councils etc., who are not, in any case, athletes or participants in competitions or tests).
The DGT also clarified that the exemption applies if the activities are deemed supplies of services, not where they are transactions that must be classified as supplies of goods.

3 Payments received for performance of musical or theatrical works are subject to withholding

DGT binding ruling V2574-18 of September 20, 2018

The request concerned whether the income obtained by the requesting entity, which organizes shows (theatrical and musical works) that it puts on for third parties, and is a registered VAT taxpayer for activities included in sections one and two of the classifications for the tax on economic activities, is subject to withholding.
The DGT replied that article 95.2 of the Personal Income Tax Regulations determines that income from professional activities generally includes "that arising from performing the activities included in sections two and three of the classifications for the tax on economic activities".
Therefore, the activity carried on by the requesting entity consisting in organizing public shows that it puts on for third parties, by hiring groups or individual artists for performances, due to being included in caption 965.4 of section one, under article 75 of the Personal Income Tax Regulations, is not subject to personal income tax withholdings.

4 Prizes paid by horseracing sport association are subject to and not exempt from VAT

DGT binding ruling V2744-18 of October 16, 2017

The request concerned whether the prizes awarded by a sport association whose activities include calling, organizing, regulating and refereeing trotting horse races in Spain are subject to VAT.
The service for organizing competitions and races, for which the consideration is an enrollment fee paid by the participants, is in principle subject to VAT where the competition is held in Spanish VAT territory. In relation to the exemption under article 20. One.13, the DGT concluded that entry to horse races falls outside the exemption, because it does not satisfy the requirements.
Lastly, it specified that the supplies of services consisting in participation in trotting horse races by the owner of the horses entail the performance of a trade or professional activity, regardless of the type of consideration they receive for them (fixed amount for each time they participate, prizes or cash payments according to the classification obtained or others), for which reason their transactions are subject to and not exempt from VAT, and any prices the professional jockeys receive as a result of their participation is also treated as consideration.

5 Payment for association license of an athletics judge cannot be treated as a personal income tax deductible expense

DGT binding ruling V2786-18 of October 24, 2018

The request concerned whether the payment for the mandatory association license to take part in athletics competitions organized by the Spanish athletics association and autonomous community associations is equivalent to the fees paid to professional associations for the purpose of being treated as a personal income tax deductible expense.
The DGT denied that the payments for association licenses made by judges or referees to sport associations are equivalent to the fees paid to professional associations, treated as deductible expenses from gross salary income, because the association licenses do not appear in letter d) of article 19.2 of the Personal Income Tax Law (labor union or professional association membership fees).

6 Revenues obtained from the commercial exploitation of rights of publicity by a footballer players' association are subject to corporate income tax

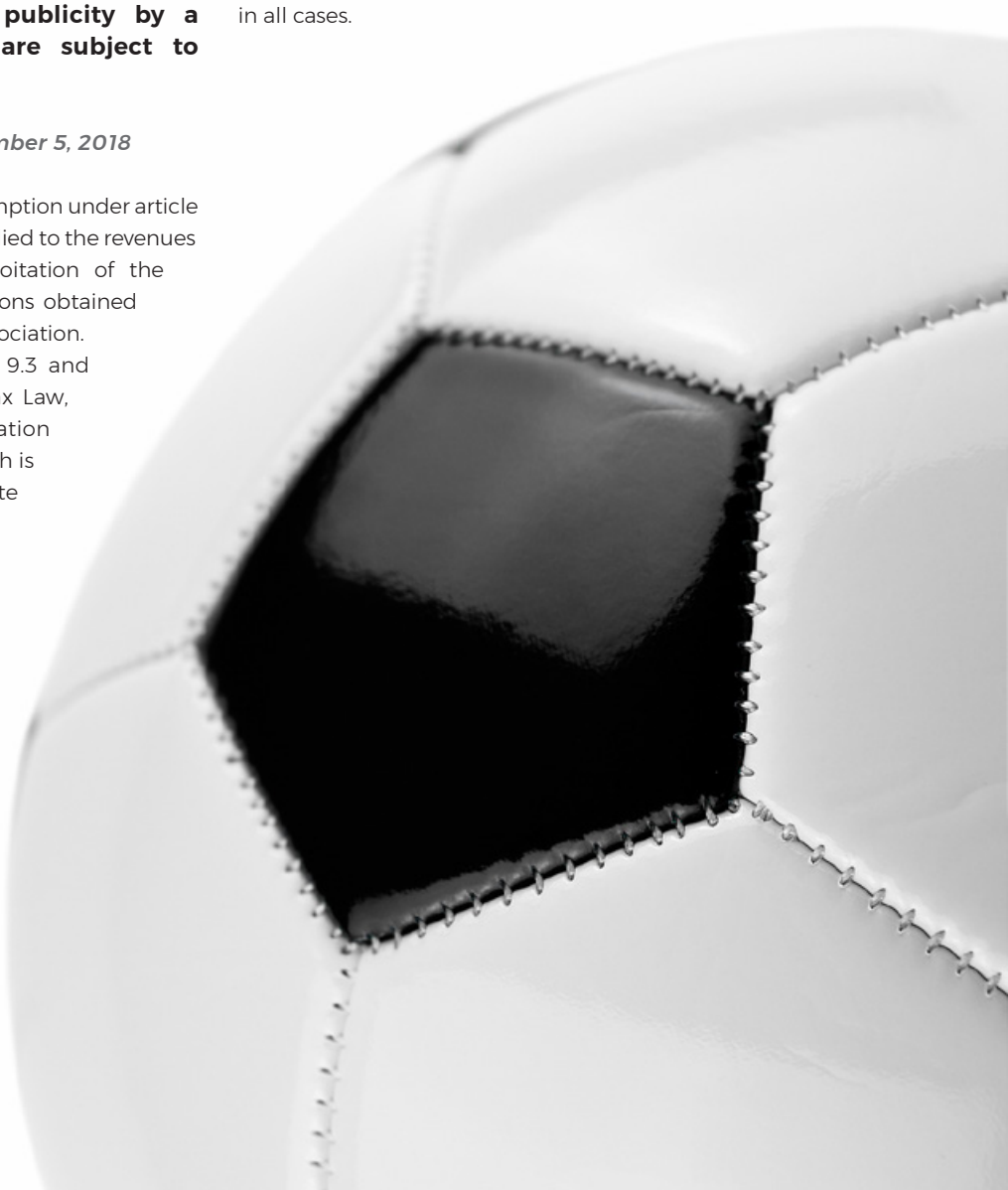
DGT binding ruling V2877-18 of November 5, 2018

The request concerned whether the exemption under article 110 of the Corporate Income Tax Law applied to the revenues from the combined commercial exploitation of the audiovisual rights for football competitions obtained by a Spanish professional footballers' association.
The DGT clarified that, under article 9.3 and article 110 of the Corporate Income Tax Law, the requesting entity is an association having the nature of a labor union which is an entity partially exempt from corporate income tax.
Accordingly, the revenues obtained from the combined commercial exploitation of the audiovisual rights for football competitions, in the DGT's opinion, determines the existence of an economic operation which entails the organization for their own account of material and/or human resources for the purpose of participating in the production or distribution of goods or services. Therefore, the revenues arising from the supply of those services are subject to and not exempt from corporate income tax.

7 The special regime for mergers applies to transactions between sport associations

DGT binding ruling V2878-18 of November 5, 2018

The request concerned whether the special regime under chapter XIV of title VII of the Corporate Income Tax Law applies to the merger by absorption carried out by the consulting entity, formed as a sport club under the general regime, between two not-for-profit associations, each formed as a sport club also.
The DGT explained that the fact of the participating entities being not-for-profit associations does not prevent the special tax regime from applying to the described transaction, provided the conditions set out in article 76.1.a) of the Corporate Income Tax Law are satisfied, to the extent that this transaction performed under corporate law entails the winding up without liquidation of the entities and in that transaction the whole of its assets, rights, and liabilities are transferred to the consulting entity, in such a way that it does not alter any type of interests held by the members of either entity. The existence of valid economic reasons underlying the transaction is a condition for the special regime to apply in all cases.



8 DGT interprets VAT place-of-supply rules in relation to photograph sessions and to events

DGT binding ruling V2932-18 of November 14, 2018

The request submitted by a company engaged in the management and exploitation of rights of publicity by transferring them to third parties concerned whether the fact of the photograph sessions or the meetings with athletes taking place in Spanish VAT territory gives rise in itself to application of 70.two of the VAT Law:

The article determines that certain services are deemed to be supplied in Spanish VAT territory where they are not deemed to be supplied in the EU, but their actual use or enjoyment is deemed to take place in that territory. For the described regime to apply, it is necessary for the service to be used by the customer – the non-established entity, customer of the requesting entity for the transactions subject to VAT performed in Spanish VAT territory.

However, the transactions carried out after the transfer, by transferees located in third states are not deemed to be performed in Spanish VAT territory, and therefore are not subject to VAT. Therefore, the transfer services supplied by the requesting entity to transferees established outside the EU are not subject to VAT.

9 Sponsorship revenues obtained by athlete may be classified as capital gains for personal income tax purposes

DGT binding ruling V3270-18 of December 26, 2018

A request was submitted concerning the personal income tax on the income obtained by an elite young athlete under a sponsorship agreement signed with a company for materials and travel.

The income described in the request may only be classified as income from economic activities if the sport activities from which it was obtained amount to an economic activity within the meaning of article 27.1 of the Personal Income Tax Law, and therefore if there is no organization for their own account of the means of production and of human resources, or of either of the two, for the purpose of participating in the production or distribution of goods or services, and it does not result from an employment relationship (or a relationship that must be classified as such, as a result of providing compensated services for another, within the scope of the organization and management of an employer), the amount obtained in respect of the sponsorship payment must be classified as a capital gain, as determined in article 33.1 of the Personal Income Tax Law.

Legislation

1 **Royal Decree-Law 26/2018 of December 28, 2018 approving urgent measures on artistic creation and filmmaking**

Following the approval of this royal decree-law, various measures, effective January 1, 2019, have been introduced, designed to improve tax in the entertainment industry. It notably contains the following new legislation:

- A reduction to the personal income tax withholding rate for income from movable capital from copyright, where the taxpayer is not the author (from 19% to 15%).

- Making the reduced VAT rate (10%) chargeable on the services supplied by performers, artists, directors and technical staff, who are individuals, to the producers of films intended to be shown at theaters and to the organizers of theatrical and musical performances.

2 **Law 6/2018 of December 19, 2018, for the autonomous community of Madrid, on tax measures for the autonomous community of Madrid, amending the revised statutory provisions for the autonomous community of Madrid regarding taxes devolved by central government, approved by Legislative Decree 1/2010 of October 21, 2010**

The tax credit for gifts to foundations based in the autonomous community of Madrid, set up for cultural, welfare, educational or healthcare purposes or any other similar purposes, has been reinstated after being repealed since January 1, 2014, in an amount equal to 15% of the gifted sum, which is also applicable, *ex novo*, to elemental and basic sport clubs, as defined in their sectoral legislation.

3 **Decision rendered by the Chairperson-in-Office of the National Sports Council on December 21, 2018, approving the list of substances and methods prohibited in sport**

Following the approval of that decision, the former list of substances and methods prohibited in sport, approved by the Decision of December 22, 2017, by the Chairperson-in-Office of the National Sports Council, has been adapted to the list in the International Convention against Doping in Sport adopted by UNESCO.

4 **Law 16/2018 of December 4, 2018 on physical activity and sport in Aragon.**

5 **Law 1/2019 of January 30 on physical activity and sport in the Canary Islands.**

6 **Order APA/126/2019 of February 1, 2019, approving responsible recreational diving standards for marine reserves.**

7 **Decision rendered by the Chairperson-in-Office of the National Sports Council on February 8, 2019, publishing the public prices for the use of its facilities and services.**

8 **Order PCI/238/2019 of March 4, 2019, creating the administrative body responsible for implementing the support program for holding the event of exceptional public interest called Programa 'Nuevas Metas' (New Targets Program).**

9 **Order PCI/239/2019 of March 4, 2019, creating the administrative body responsible for implementing the support program for holding the event of exceptional public interest called Programa 'Deporte Inclusivo' (Inclusive Sport Program)'.**

10 **Order PCI/240/2019 of March 4, 2019, creating the administrative body responsible for implementing the support program for holding the event of exceptional public interest called Programa 'Plan 2020 de Apoyo al Deporte de Base II' (2020 Support Plan for Base II Sport).**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