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In recent years, the tax authorities have stepped up inspections of companies to review the personal income tax exemption applied in the calculation of withholdings made from certain severance payments, following the guidelines of the Annual Tax and Customs Control Programs in relation to the monitoring of withholdings on payments in cash and in kind.

Those reviews focus on several points. On the one hand, the inspectors are scrutinizing high severance payments to which the exemption has been applied, where the recipient should be deemed a senior manager because of his position in the company's organizational chart or his real or actual powers. The inspectors are also reviewing whether, where a senior management or commercial relationship exists, the ordinary employment relationship before the promotion was held in abeyance or terminated.

On the other hand, they are looking closely at cases where the severance payments are not those established in the Workers' Statute. In these cases, circumstances such as the dismissed person's age, how the severance is calculated or the high number of dismissals where the company has not implemented a collective layoff procedure, have led the inspectors to consider them "early retirements" to which the exemption might not apply. In this bulletin, we comment on the Murcia High Court judgment of July 12, 2013, precisely disallowing the application of the exemption to the severance paid for a purported early retirement; the Court, as did the inspectors, reclassified a dismissal as a termination by mutual agreement, thus disallowing the right to the exemption.

In any case, it should be remembered that Spanish employment/labor legislation encourages conciliation in order to avoid lawsuits, the result being that in numerous dismissals, severance payments are agreed which differ from the amounts established in the Workers' Statute, without that meaning that the dismissal was not a unilateral decision by the company. Furthermore, involuntary retirement does not exist, except in absolutely exceptional cases, so the fact that a dismissal takes place at an apparently advanced age does not necessarily mean that it derives from a mutual agreement.

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I. Judgments

1. *Personal income tax.- Periodic payments for early retirement: they do not qualify as severance or multi-year income (Murcia High Court. Judgment of July 12, 2013)*

The appellant had requested the correction of his tax returns on the ground that the amounts received each month for early retirement should have been treated as severance payments, that is, he asked to apply the exemption for severance paid for unjustified dismissal and, on the non-exempt amount, the 40% reduction for multi-year income.

The Court disallowed the exemption because, according to the law, it does not apply to severance payments under an agreement, covenant or contract between the company and the worker. The Court stated that the decisive issue is not whether an employment relationship is being terminated but whether a unilateral decision is being imposed on the worker. Thus, as the case in question entailed a bilateral agreement by the parties for early retirement which the employee was not under obligation to sign, it could not be equated to a dismissal for the purposes of applying the exemption.

As regards the treatment of the payments as multiyear income, the Court stated that the requirements for that purpose would not be met:

- On the one hand, the payments were not generated over more than two years and they were obtained on a periodic or recurring basis, because they were obtained monthly.

- Nor could the payments be classified as income obtained on a notably irregular basis over time because, although the Regulations establish that the income from the termination of an employment relationship by mutual agreement would qualify as such, that income must be recognized in one tax period, which was not the case of the appellant.

2. *VAT.- Input VAT borne is not deductible if it should have been reverse-charged (Court of Justice of the European Union. Judgment of February 6, 2014, case C-424/12)*

The Court of Justice of the European Union (CJEU) analyzed the deductibility of the input VAT borne by the recipient of a transaction, in the context of a supply of services to which the reverse charge mechanism applied, and the supplier of the services had failed to include in the invoice the compulsory reference to the applicability of the reverse charge and had charged the VAT.

As a consequence of that practice, in the case examined, the recipient of the services, which should have reverse-charged the applicable VAT, paid it to the supplier, which was declared insolvent and failed to pay over the tax to the tax authorities.

Although in the past the CJEU has considered it contrary to tax neutrality to reject the deductibility of the input VAT borne due to failure to comply with formal requirements, in this case, it held that there was not a mere formal breach but a substantive breach, consisting of the failure to reverse-charge the tax, which was incorrectly paid to the supplier of the service. Furthermore, the Court considered that the recipient did not take the necessary measures to correct the invoice which erroneously included the VAT charge.

For that reason, the CJEU held that the VAT incorrectly paid to the supplier, through an invoice not issued as required, is not deductible for the recipient which should have reverse-charged the VAT, even when the supplier's insolvency made it impossible to correct that error. According to the Court, that tax was not charged according to the law and should not be deducted, and the recipient's only alternative is to claim from the supplier the amount incorrectly invoiced using the procedures established for the purpose in domestic law.

Lastly, as a separate issue, the Court affirmed that the principle of legal certainty is not infringed by the fact that the tax authorities of a member state revoke a previous decision granting a taxable person the right to deduct the input VAT borne when, based on new facts and within the limitation period, a new inspection is initiated and ends up reclaiming from the taxable person the amount incorrectly deducted, along with the applicable late-payment interest.

3. Tax on economic activities.- To apply the exemption from the tax on economic activities tax, group entities with which there is not an obligation to file consolidated financial statements should not be taken into account as the entities under article 42 of the Commercial Code (Cataluña High Court. Judgment of March 6, 2013)

The appellant claimed that it was exempt from the tax on economic activities because its net revenues were below one million euros, by considering that to compute that figure, it did not have to include the revenues of the group entities under article 42 of the Commercial Code with which it was not obliged to file consolidated financial statements, given that article 82.1.c) of the Local Finances Law expressly establishes that *the cases of article 42 of the Commercial Code are deemed those listed in section I of chapter I of the provisions for the preparation of consolidated financial statements, approved by Royal Decree 1815/1991, of December 20, 1991*.

The Regional Economic-Administrative Tribunal ruled that the fact that consolidated financial statements are not filed was irrelevant because what the applicable provision measures is not the obligation to file consolidated financial statements but the number of companies forming the group.

Contrary to that view, the Cataluña High Court held that the law is referring to the companies that act as part of a consolidated group, meaning that, where no such consolidation took place, the turnover to be considered will be that of the company in question.

4. Administrative proceeding.- Expiration can be contended for the first time in the judicial review jurisdiction without entailing a departure from procedure (Castilla y Leon High Court. Judgment of December 13, 2013)

In the case at issue in the proceeding, the Government Lawyer objected to the appeal due to a departure from procedure, on the ground that the expiration of the proceeding requested by the appellant was a new ground of appeal and that the Economic Tribunal had not been given the chance to rule on it.

The High Court, however, in accordance with Supreme Court case law, considered that those arguments could not be upheld because article 56.1 of the Judicial Review Jurisdiction Law allows, without changing the claims, the submission of all the grounds considered to be necessary, even if they have not been heard in the administrative jurisdiction.

5. Administrative proceeding.- The filing by telefax starting on the last day of the filing period but received after midnight is considered late (Castilla y León High Court. Judgment of November 29, 2013)

The tax authorities rejected as late two claims filed via the telefax service established by the Castilla y León Regional Government which, due to technical problems, were received after midnight on the last day of the filing period. It so happens, also, that shortly before that hour, a third claim had entered on time.

The Court, stating first that the period established in article 135.1 of the Civil Procedure Law, which permits filing up to 3:00 p.m. of the following day, does not apply to the economic-administrative proceeding, rejected the appeal on the ground that it was filed late because the date and time of receipt of the claims is what must be used to determine the periods, even if the transmission began on time.

The Court added that the conclusion is not altered by the fact that one of the claims was received before midnight. In this regard, the Court held that although the three claims were sent in a single transmission, a receipt entry is made for each appeal, and they cannot lose their individuality.

6. Collection proceeding.- Enforced collection order reversed due to confusing debt deferral agreement (National Appellate Court. Judgment of July 8, 2013)

The tax authorities granted the deferral of the payment of three assessments, indicating the new payment dates in the decisions granting deferral and expressly stating that the interested party would receive the relevant payment documents at its domicile.

On the payment date, the appellant had not received the payment documents and, on the assumption that the tax authorities were still analyzing the proposal, did not make the payment, and the tax authorities issued the order initiating enforced collection proceedings against which the appeal in question was lodged.

The National Appellate Court held that although indeed none of the established grounds for appealing against enforced collection orders were present, the enforced collection surcharge issued was disproportionate because (i) the wording of the deferral decision was confusing, (ii) it was not proven that the payment documents had been sent, and (iii) the interested party was in conversations with the tax authorities for reconsideration of the deferrals, which was finally accepted.

The Chamber held that, in view of the presence of the aforementioned circumstances as a whole, the consequences were disproportionate and clearly impaired the taxpayer’s due process rights, without any evidence of bad faith or negligence on its part. For that reason, the Chamber set aside the enforced collection surcharge and granted a new period for voluntary payment.

7. Penalty proceeding.- Collaboration in the issue of false invoices as criterion for aggravation of the infringement or as independent infringement (Balearic Islands High Court. Judgment of May 29, 2013)

The taxpayer deducted certain expenses recorded in false invoices, and a penalty was imposed for an infringement consisting of the failure to pay over the tax debt, which was classified as very serious because of the use of fraudulent means. Moreover, the taxpayer was held jointly liable for the infringement consisting of the issue of those false invoices, on the ground that it had caused or collaborated in the infringement.

In short, the taxpayer was charged with two independent infringements: (i) the use of fraudulent means to avoid paying over the tax debt; and (ii) the collaboration in the issue of invoices with falsified data. The Court analyzed whether that was correct or whether the second act formed part of the first one and, therefore, they constituted a single infringement.

In the Court's opinion, given that the issuer needed the recipient's active collaboration by providing the relevant data to issue the invoice, there was a single fraudulent act—failure to pay over the debt—and that the use of the false invoices was only a criterion for classifying that infringement. Thus, the Court held that there was a single act of willful misconduct and that a separate penalty for the act needed to commit the fraud would go against the *non bis in idem* principle (not punishing someone twice for the same infringement).

Two of the judges voted against that conclusion, holding that there were two distinct, separate and independent acts by two different taxpayers (even though one had been held jointly liable with the other), and that the *non bis in idem* principle requires the facts to be the same. Thus, they stated that there was both a breach of a formal obligation—the issue of false invoices—and also a breach of a substantive obligation—the failure to pay the debt.

II. Decisions and rulings

1. *Personal income tax.- Withholding taxes paid in Switzerland under Directive 2003/48/EC are deductible in Spain as such (Directorate-General of Taxes. Ruling V3508-13 of December 3, 2013)*

Council Directive 2003/48/EC on taxation of savings income in the form of interest payments authorizes Luxembourg and Austria to levy, during a transitional period, a withholding tax at a rate of 35% on interest paid to a beneficial owner resident in another EU Member State. This provision also applies to paying agents established in Switzerland, by virtue of the Agreement between the European Community and the Swiss Confederation on the establishment of measures equivalent to those contained in the Directive.

In turn, the Personal Income Tax Law provides that tax withholdings effectively levied under Directive 2003/48/EC will be considered advance payments of personal income tax.

The question raised was whether the provision also applied to withholding taxes levied by paying agents established in Switzerland. In reply, the DGT recalled that the Agreement between the European Community and the Swiss Confederation envisages a system to eliminate double taxation, consisting in the Member State of residence granting a tax credit equal to the amount of the withholding tax. As a result, the DGT concluded that the tax withholding levied by the Swiss paying agent will be deductible as such.

2. *Corporate income tax.- Amortization/depreciation of assets whose useful life ends in 2013 or 2014 (Directorate-General of Taxes. Ruling V3642-13 of December 19, 2013)*

Law 16/2012 limits the ability to deduct the depreciation of property, plant and equipment and investment property and the amortization of intangible assets for corporate income tax purposes in the tax periods starting in 2013 and 2014.

Under that Law, any depreciation/amortization for accounting purposes that is not tax deductible under that rule may be deducted, on a straight line basis, over a period of ten years, or optionally over the useful life of the asset in question, as from the first tax period starting in 2015.

In this respect, the DGT established the following criteria:

- The option to deduct any depreciation/amortization for accounting purposes that was not previously tax deductible on a straight line basis over a period of ten years or over the useful life of the asset reflects that the deduction may be made in a shorter period than the specified ten years.

- If before the start of the first tax period beginning in 2015 (in 2013 or 2014), certain property, plant or equipment, intangible assets or investment property were removed from the entity's assets, due to transfer or retirement from inventory, any depreciation/amortization for accounting purposes that was not previously tax deductible could be deducted all at once in the tax period in which the asset was transferred or retired from inventory.

- However, if the property, plant or equipment, intangible assets or investment property were not removed from the requesting taxpayer's assets due to transfer or retirement from inventory, but because their useful life ended in 2013 or 2014, any depreciation/amortization for accounting purposes that was not previously tax deductible could be deducted from the first tax period beginning in 2015. In that tax period the requesting taxpayer can deduct one-tenth of the depreciation/amortization, if it chooses to make the deduction over ten years, or it could deduct the full amount, as the useful lives of the assets will have ended.

- If the assets had been revalued under the asset revaluation envisaged in Law 16/2012 and their useful life ended in 2013 or 2014, the depreciation/amortization charge relating to their pre revaluation value will continue to be made in 2013 and 2014 until the end of their useful life, while the net increase in value resulting from the revaluations will be depreciated/amortized from the first tax period beginning on or after January 1, 2015, and may be depreciated/amortized in full in that period, as the useful lives of the assets will have ended.

3. *Corporate income tax.- In order for the super-reduced tax rates for maintaining employment to apply, the ordinary working hours set by the company must be treated as the full amount of working hours (Directorate-General of Taxes. Ruling V3570-13 of December 11, 2013)*

Pursuant to additional provision twelve of the Revised Corporate Income Tax Law, entities with revenues under €5 million and with an average headcount of less than 25, provided it is not smaller than the average headcount in the twelve months preceding the start of the first tax period beginning on or after January 1, 2009, may apply super-reduced rates of 20% and 25%.

For that purpose, it provides that the average headcount will be calculated according to the persons employed, on the terms provided in the employment/labor legislation, by reference to the working hours for which they were hired relative to the full amount of working hours.

The question raised was whether a 10-hour working week, which is the amount of time that may be worked, may be treated as the full amount of working hours. The DGT noted that, since the Workers' Statute establishes the maximum, but not the minimum, amount of working hours, the hired workers will be computed at 100% since the working hours for which they were hired coincide with the full amount of working hours, meaning the ordinary working hours set by the company.

4. *Corporate income tax.- Tax credit for double taxation of dividends: various questions (Directorate-General of Taxes. Ruling V3515-13 of December 3, 2013)*

This ruling answered various questions relating to the tax credit for double taxation of dividends under article 30 of the Revised Corporate Income Tax Law:

- The dividends must be included in the tax base for the tax period in which they become payable, i.e., when the shareholder becomes entitled to receive the dividend, which occurs when the financial statements and distribution of income are approved at the shareholders' meeting.

- The related double taxation tax credit is taken in the tax period in which the dividends have been included in the tax base.

- The tax withholding may be deducted from the gross tax liability for the tax period in which the dividends have been included in the tax base and the double taxation tax credit has been taken, if applicable, provided that the dividend becomes payable in that same tax period. Otherwise, the tax withholding will be deducted in the tax period in which the dividend becomes payable.

- Once the dividends have become payable and have, therefore, been included in the tax base, the double taxation tax credit may be taken even if the securities on which the dividends arose are transferred before the dividends are actually paid.

- For the purposes of the restriction established in article 30.4.d) of the Revised Corporate Income Tax Law, according to which no tax credit may be taken in respect of dividends relating to securities acquired within two months preceding the date on which the dividends are paid where, in the two months following the dividend payment, securities of the same kind are transferred, the period to be taken into account runs from 00:00 hours of the first day through 24:00 hours of the last day.

- With regard to the restriction established in article 30.4.e) of the Revised Corporate Income Tax Law, according to which no tax credit may be taken where the distribution of the dividend has given rise to an impairment loss on the investment, the DGT noted that the provisions of the General Taxation Law on the burden of proof (article 105) and on evidence and the assessment of evidence (article 106) must be considered for the purposes of determining the portion of the impairment attributable to the distribution of dividend.

  Lastly, the DGT ruled that this restriction does not apply when the impairment loss on the investment arising from the distribution of the dividend is not tax deductible.

5. *Corporate income tax.- Debt write-offs agreed in fiscal year 2013 will not be included in the computation of the limit on tax losses (Directorate-General of Taxes. Ruling V3509-13 of December 3, 2013)*

Law 16/2013 establishes that for tax periods starting in 2014 and 2015, the limit on the offset of tax losses will not apply to income relating to debt write-offs arising from agreements with non-related creditors, approved in a tax period starting on or after January 1, 2013.

The question raised was, in the case of a debt write-off agreed in fiscal year 2013, whether the new rule may be applied in fiscal year 2013, or whether it cannot be applied until fiscal year 2014 and fiscal year 2015.

Bearing in mind that from an accounting and tax standpoint, the income arising from the debt write-off will be recognized in the fiscal year in which the arrangement with creditors is court-approved, or if there is no arrangement with creditors, when the debt write-off is approved, the DGT noted that a reasonable and inclusive interpretation of the rule must imply that the new rule will apply in fiscal year 2013. The DGT added that this conclusion will be equally valid in the case of tax groups.

6. *Transfer and stamp tax (ITP-AJD).- Until a purchase option is exercised, leased property will not be included in the computation of real estate assets for the purposes of article 108 of the Securities Market Law (Directorate-General of Taxes. Ruling V3633-13 of December 19, 2013)*

The question raised was whether, in the case of the acquisition of all of the shares of a company whose only asset is land held under a finance lease, the leased land must be included in the computation of real estate assets for the purposes of article 108 of the Securities Market Law.

Reiterating the criterion established in its ruling V2735-11, the DGT held that in the case of a finance lease, the ownership will only be transferred if and when the purchase option is exercised, which means that the leased assets continue to be owned by the lessor until that fiscal year. Therefore, the lessee cannot compute the real estate as its own during the term of the lease, and article 108 of the Securities Market Law does not apply, irrespective of whether or not control of the entity is obtained.

7. *Transfer and stamp tax (ITP-AJD).- The tax authorities are the taxpayer where a unilateral mortgage is created in their favor (Central Economic-Administrative Tribunal. Decision of December 3, 2013. R.G. 947/2013)*

In the cases of requests for the enforcement of a tax debt secured by a mortgage to be deferred, divided or stayed, there have been disputes in the past (with changing views by the authorities) as to whether the transfer and stamp taxpayer is the party making the request for the tax debt to be deferred, divided or stayed, or the tax authorities.

In this Decision, in a special appeal for a definitive ruling, the Central Economic-Administrative Tribunal clarified that the tax authorities are the taxpayer, because the mortgage is created not on the wishes of the registered property owner but to secure the deferral, division or stay requested from the tax authorities, which are therefore the beneficiaries of the creation of the mortgage; this is irrespective, in all cases, of an exception finally being applicable, as provided for in the Revised Transfer and Stamp Tax Law.

III. Legislation

1. *Works of art: corporate income tax withholding rate of 21% extended for 2014 and VAT rate reduced*

Royal Decree-Law 1/2014, of January 24, 2014, on the reform of infrastructure and transport and other economic measures, which includes, among other changes, a number of VAT and corporate income tax measures, was published in the Official State Gazette on January 25, 2014. Specifically:

- In respect of VAT, and with effect from January 26, 2014:

  - Reduction from 21% to 10% in the rate applicable to imports of works of art, antiques and collectors' items, irrespective of the identity of the importer, and to intra-Community acquisitions and supplies of works of art made by: (i) their authors or beneficiary rightholders; or (ii) traders or professionals other than dealers in works of art with the right to deduct the full amount of the input tax charged directly or paid on their acquisition or import.

  - The special scheme for second-hand goods, works of art, antiques and collectors' items will apply to dealers that supply works of art acquired from traders or professionals that have been subject to the new reduced rate of 10%.

- In the case of corporate income tax, the higher withholding tax rate of 21% (instead of 19%) will apply from January 1, 2012 to December 31, 2014.

2. *Model card for registration at the territorial register for the tax on fluorinated greenhouse gases*

The Decision of the Department of Customs and Excise and Special Taxes of the State Tax Agency of January 28, 2014, approving the model card for registration at the territorial register for the tax on fluorinated greenhouse gases, and which entered into force on February 6, 2014, was published in the Official State Gazette on February 5, 2014.

The card will record the "Greenhouse Gas Activity Code", which identifies the activity pursued by the taxpayers and, where appropriate, the establishment from which they pursue that activity.

IV. Miscellaneous

1. *New legislation relating to deferrals and payment by installment of tax withholdings, and to debtors in an insolvency proceeding*

The Tax Collection Department at the Spanish Tax Agency issued a new Direction 6/2013, of December 9, 2013, on the handling of deferrals and payment by installment of tax withholdings on payments in cash or in kind, and of debtors in a situation of insolvency. This Direction, which amends the Tax Collection Department's Direction 1/2009 of January 9, 2009 on the same subject will apply to requests filed on or after January 1, 2014.

The Direction contains the following main new terms:

- In general, requests for deferral or for payment by installment of tax withholdings on payments in cash or in kind are not allowable, although they may be granted, exceptionally, when the data held in the databases of the State Tax Agency (AEAT) and the data furnished by the party concerned provide sufficient proof that enforcement against its assets could have a material impact on the level of production capacity and number of jobs in the respective economic activities or may trigger a serious loss for the tax authorities.

  In such cases, it will be the requesting party that has to prove that these exceptional circumstances exist. Nevertheless, in the case of requests for deferral or for payment by installment with no need to provide a guarantee (up to €18,000), it will automatically be considered that these conditions are not met.

  Requests for deferral or for payment by installment of tax withholdings will be handled separately from other requests for deferral or for payment by installment, to expedite the handling of the requests and their refusal, if applicable.

- Adaptation of the system of deferrals and payment by installment in insolvency proceedings to the requirements in the insolvency legislation.

  The Decision provides that:

  - Debts that are considered post-insolvency order claims in accordance with the Insolvency Law cannot be deferred.

    In cases where the effects of the insolvency order end as the result of the approval of an arrangement with creditors, the Decision provides that:

    - Debts arising after the date of the insolvency order and before the arrangement enters into force are non-deferrable post-insolvency order claims.

    - Debts arising after the arrangement enters into force are deferrable similarly to any other tax debts.

    However, if the arrangement with creditors is not fulfilled and the liquidation phase commences, all of the debts arising after the date of the insolvency order will be considered post-insolvency order claims and will therefore be non-deferrable.

  - In relation to requests for deferral of debts that are pre-insolvency order claims, the Decision provides that:

    - Deferrals requested before the insolvency order and in respect of which a decision is yet to be handed down will be rejected, on the ground of a supervening want of subject matter.

- Requests for deferral of pre-insolvency order claims filed after the insolvency order will not be admitted, as they will be held to have no ground and subject-matter, given that the payment of tax debts will be subject to the legal process. Nevertheless, this nonadmittance will be notified, specifying that the relevant appeals may be lodged.

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