New levies on energy and on credit institutions and new solidarity tax on large fortunes have been created

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Moreover, a temporary limit is established in the corporate income tax regime for tax groups on the group's use of tax losses generated by its entities during the taxable period, and significant new legislation is introduced on the tax credit for investments in productions of films, series and live shows. Lastly, an important amendment has been made to the wealth tax legislation under which non-Spanish resident taxable persons will have to be liable for tax in Spain on the ownership of shares in entities with real estate assets in Spain.

On December 28, 2022, the Official State Gazette (BOE) published Law 38/2022 of December 27, 2022 for the establishment of temporary levies on energy and on credit institutions and credit financial establishments, and which introduces the temporary solidarity tax on large fortunes, in addition to amending certain tax laws. The key contents of this law are summarized below.

1. Temporary levies on energy and on credit institutions and credit financial establishments

The law has introduced two new levies for credit institutions and credit financial establishments and for companies in the energy industry, which will apply in 2023 and 2024. Both charges have the following characteristics in common:

a. They are classed as **non-tax levies of a public nature** and their revenues will be used to fund the measures determined by the law in each case.

b. **Due date and time periods**

   a) The payment obligation arises on January 1 each year.

   b) The law establishes that an advance payment will have to be made in February each year equal to 50% of its amount, based on an estimate of the annual amount, which will have to be made as of that date. The final assessment must be filed in September each year, from which the advance payment made in February will be deducted.

c. **Deductibility and pass on the charge**

   a) Amounts paid in respect of levies cannot be a deductible expense for corporate income tax purposes.

   b) Furthermore, they cannot be passed (directly or indirectly) to customers. A breach of this restriction is classed as a very serious infringement, subject to a fine equal to 150% of the passed amount. Auditing powers in this respect have been conferred on the Spanish Markets and Competition Commission (CNMC).

d. **Penalty regime and review in the administrative jurisdiction**

   Separately from the penalty mentioned above, the law refers to the General Taxation Law (GTL) for anything related to the penalty regime and to the demanding, management and collection of these charges, and confers powers on the relevant bodies of the Central Office

for Large Taxpayers within the State Tax Agency. In relation to review in the administrative jurisdiction of acts relating to the levies, the law refers to Title V of the GTL.

e. **Potential extension of the time period for the charges**

The new law states that the Government will prepare a provisional report towards the end of 2023 on the first fiscal year in which they were applicable and a study towards the end of 2024 in which it will assess the keeping of both charges on a permanent basis, by reference to the situation of each sector concerned, the changes in prices and interest rates and fees (according to each sector) and their cumulative effect with corporate income tax.

Implementing regulations have yet to be issued (by ministerial order) on the return forms and how they are to be reported.

The specific components of each charge are summarized below:

1.1 Temporary charge on energy

a. **Payers.** Individuals or entities who are considered a principal operator in energy sectors under the CNMC decisions dated December 10, 2020, December 16, 2021 or June 9, 2022.

For the purposes of the levy, principal operators will include any individuals or entities who carry on in Spain activities relating to the production of crude oil or natural gas, coal mining or oil refining, where their net revenues in the year before the year in which the payment obligation for the levy arises are obtained at least in a 75% portion from economic activities relating to extraction, mining, oil refining or the manufacture of coke products.

Entities will be **exempt from payment** if they fulfill either or both of the following tests:

a) Their net revenues (NR) figure was below €1 billion in 2019.

b) Their NR in 2017, 2018, and 2019 obtained from the activity determining their consideration as principal operator in an energy sector did not exceed 50% of their total NR in the year concerned.

b. **Amount payable.** The amount payable is to be calculated as follows:

$$\text{Energy charge} = 1.2\% \times \text{NRe}$$

Where NRe are their net revenues from the activity they carry on in Spain in the previous year, as disclosed in the income statement.

Their NRe do not include:

a) Revenues relating to the tax on oil and gas, the Canary Islands special tax on petroleum derived fuels and the additional charges on carburants and petroleum-based fuels in Ceuta and Melilla, which have been paid or incurred as input tax.

b) Amounts relating to regulated activities, meaning the supply at regulated prices (the voluntary price for the small consumer -PVPC- for electricity, the last resort tariff -TUR- for gas, bottled liquefied petroleum gas and piped liquefied petroleum gas), the regulated revenues of electricity and natural gas transmission and distribution networks and, in the case of generation with regulated prices and additional prices in non-mainland areas, all revenues of the plants, including any received from the market and from peak load pricing respectively.

Special rules have been provided where the entity belongs to a tax or business group which files returns in the special "foral" areas in the Basque country and Navarra or in the rest of Spain.

1.2. Temporary charge for credit institutions and credit financial establishments

a. **Payers.** Credit institutions and credit financial establishments operating in Spain whose aggregate revenues from interest and fees relating to 2019 are equal to or higher than €800 million.

b. **Amount payable.** The amount payable is to be calculated as follows:

Charge for credit institutions = 4.8% x NII

Where NII is the sum of net interest income and the revenues and expenses in respect of fees obtained from the activity carried on in Spain as disclosed in the income statement for the calendar year before the year in which the payment obligation arose (e.g. 2022 in relation to the charge for 2023).

Special rules have been provided where the entity belongs to a tax group or business group which files returns in the special "foral" areas in the Basque Country and Navarra and in the rest of Spain.

2. Temporary solidarity tax on large fortunes and wealth tax

A solidarity tax on large fortunes has been introduced, for the purposes of increasing revenues and harmonizing autonomous community legislation. Its main features are as follows:

a. **Nature and purpose.** This is a direct and personal supplementary tax to wealth tax which is charged on net assets over and above €3,000,000.

The tax is a central government tax which cannot be devolved to the autonomous communities.

b. **Geographic scope.** It will apply in the whole of Spain, without precluding the special "foral" tax systems in the Basque Country and Navarra (its amendment is expressly mentioned in the Law) or the provisions in international treaties and conventions forming part of Spanish domestic law.

c. **Term.** The tax will apply in the first two taxable periods arising following the entry into force of the law, in other words, in 2022 and 2023, although the law introduces a clause determining a review at the end of its term to assess whether it is to be continued or eliminated.

d. **Taxable amount, taxable persons and exemptions.** Each of them will be determined according to the wealth tax rules.

e. **Tax-free allowance.** In the case of Spanish resident taxpayers, the taxable amount will be reduced, in the form of a tax-free allowance, by €700,000. In other words, non-Spanish resident taxpayers will not have this tax-free allowance.

f. **Tax scale.** The scale is set out below:

Net taxable amount - Up to €	Tax payable - €	Remaining net taxable income - Up to €	Applicable rate - Percentage
0.00	0.00	3,000,000.00	0.00
3,000,000.00	0.00	2,347,998.03	1.7
5,347,998.03	39,915.97	5,347,998.03	2.1
10,695,996.06	152,223.93	Thereafter	3.5

g. **Limit.** Taxpayers will be able to apply a combined limit similar to the existing limit on personal income tax and wealth tax.

Specifically, where the sum of the amounts of **gross tax payable** in respect of personal income tax, wealth tax and solidarity tax exceeds 60% of taxable income for personal income tax, the amount of solidarity tax payable will be reduced down to that limit, although the reduction may not exceed 80% of the solidarity tax payable prior to that reduction. For calculation of these figures, the law refers to the rules in the wealth tax legislation.

h. **Tax credits.** The following amounts will be deductible:

a) For Spanish resident taxpayers, any amounts of tax paid abroad within the meaning of the wealth tax legislation (without prejudice to the provisions in international treaties or conventions).

b) The amount of wealth tax effectively paid.

i. **Due date, reporting and payment.** The tax will fall due on December 31 of each year and must be claimed via a self-assessment, which must be filed when it results in tax payable.

However, taxpayers that pay tax directly to the central government because wealth tax revenues have not been devolved to any autonomous community (i.e. nonresidents) will not be required to file a return “unless this tax results in an amount payable.”

The filing period will be regulated by the Ministry of Finance and Public Service.

Article 65 of Royal Decree 111/1986 of January 10, 1986, partially implementing Law 16/1985 of June 25, 1985 on Spanish cultural heritage, has been amended to state that assets belonging to that cultural heritage may be used to pay the tax.

j. **Appointment of a representative**. A representative, who may be an individual or legal entity resident in Spain, must be appointed before the end of the filing period for the purposes of their relationship with the Spanish tax authorities by the following taxable persons:

a) Taxpayers not resident in Spain that are not resident in another member state of the European Union (EU) or in a state of the European Economic Area (EEA), in this second case if there is legislation on mutual assistance in relation to the exchange of tax information and collection on the terms of the General Taxation Law.

b) Taxpayers resident in Spain who leave Spain, after the occurrence of the taxable event, with destinee to a third state that does not belong to the EU or the EEA (in this case, again, if it has legislation on mutual assistance in relation to the exchange of tax

information and collection), if they are going to return to Spain after the end of the filing period for the tax return.

The appointment of the representative must be notified to the competent territorial office in which the return will be filed, with a notice of acceptance by the representative.

In relation to **wealth tax** and therefore also concerning the new solidarity tax, an amendment has been introduced in relation to the tax liability of nonresidents who are liable for this tax as nonresident taxpayers, in other words, on the assets and rights they own when they are located, may be exercised or must be fulfilled in Spain.

A new provision in relation to this liability for tax as a nonresident taxpayer is that securities will be considered to be located in Spain if they represent an investment in the equity of entities, not traded on organized markets, whose assets (directly or indirectly) consist in a portion higher than 50% of real estate located in Spain.

In order to determine the calculation of the assets, the net carrying amount of all the assets recorded in the accounts must be replaced with their market values on the due date of the tax. In the case of real estate assets, the values used to determine the taxable amount according to article 10 of the law (i.e. the higher value between the cadastral value, the value determined or verified by the authorities for the purposes of other taxes, or the price, consideration or acquisition cost) will be applied.

Therefore the criterion issued by the DGT (already upheld by some courts) in its recent resolution V1947-22, of September 13, 2022 is no longer valid. In this resolution, it was concluded that "*wealth tax does not tax the ownership of shares or holdings of companies not resident in Spain that are owned by individuals not resident in Spain, who should only be subject to the tax for the ownership of assets and rights that are situated, may be exercised or must be fulfilled in Spain.*"

3. Corporate income tax

The following amendments have been made to the Corporate Income Tax Law (Law 27/2014 of November 27, 2014):

3.1 Temporary measures in relation to determining the tax base in the consolidated tax regime

Under article 62.1.a) of the Corporate Income Tax Law, group's tax base is determined by first aggregating the tax bases of all the entities forming part of the group. Accordingly, if an entity obtains taxable income and another, a tax loss, they are netted against each other to give the aggregated tax base (before the adjustments established in the law) of the tax group.

A limit has now been placed temporarily on that netting mechanism. Namely, in fiscal year 2023, when those bases are aggregated, only 50% of the individual tax losses can be used. In other words, if, for example, there are two entities in a group and one of them obtains taxable income amounting to 100 and the other, a tax loss amounting to -100, instead of 0, the result obtained from aggregation will be 50.

The unused amount of tax losses (50, in our example) will be included in the group's tax base in equal portions in each of the first ten fiscal years that commence on or after January 1, 2024 (in other words, in our example, an amount equal to 5 will be included in each of those periods) even if any of the entities with individual tax losses leaves the group.

In the event of forfeiture of the consolidated tax group regime or of termination of the tax group, the amount in respect of individual tax losses that has yet to be included in the group's tax base will be

included in the last taxable period in which the group is taxed under the consolidated tax group regime.

3.2. Amendments to the tax credit for investments in film productions, audiovisual series and live performing arts and music shows.

3.2.1 Tax credit for Spanish and foreign productions (articles 36.1 and 36.2 of the law)

Starting in taxable periods commencing on or after January 1, 2023, the new law has raised the limits on the tax credits under article 36.1 (tax credit for investments in Spanish products) and under 36.2 (tax credit for certain producers responsible for the making of a foreign production). The specific provisions concerned are as follows:

a. The maximum amount of the tax credit has been raised for both cases to €20 million (previously €10 million). Regarding audiovisual series, for both tax credits, the deduction will be determined by episode and the maximum limit on the tax credit will be €10 million per episode produced.

b. For the tax credit under 36.2 of the law (foreign productions), in relation to the expenses forming part of the tax credit base, the previously existing €100,000 limit for expenses relating to creative personnel (who must be resident in Spain or in a country belonging to the European Economic Area) has been removed.

In relation to the application of these amendments, it is stated that they will be conditioned by their compatibility with EU law on state aid.

3.2.2 Tax credit for the funders of works (article 39.7 of the law)

Law 11/2020 of December 30, 2000 on the General State Budget for 2021 amended the tax credit for investments in productions of films, audiovisual series consisting of fiction, animation or documentaries or the production or putting on of live shows of performing arts and music so as to allow anyone participating in funding ("funder") a work produced by another taxpayer to apply it also, but specifying that the both tax credits are incompatible (commentary dated December 2020).

Now, taking effect for taxable periods commencing on or after January 1, 2021, the following new legislation has been introduced:

a. The amounts to be used to fund all or part of the production costs will also include costs in respect of obtaining copies, advertising and promotion at the producer's expense up to a limit equal to 30% of the production costs.

b. It is clarified that the amounts used to fund production costs may be contributed at any stage of production, before or after the producer incurs on production costs and until the related certificates are obtained (which has resolved the doubts created by the DGT's resolution V1811-22 dated July 29, 2022).

   However, in relation to the amounts used to fund costs in respect of obtaining copies, advertising and promotion at the producer's expense, a specific time limit is given, determining that those amounts cannot be contributed after the taxable period in which the producer incurs them.

c. The amount of any tax credit applied by the funder must be taken into account for the purposes of applying the combined 25% limit for all tax credits applied in the taxable period as set out in article 39.1 of the law.

That limit will be raised to 50% where the amount of the tax credit under article 36.1 and article 36.3 of the law relating to the funder is equal to 25% or more of their gross tax payable less their tax credits for international double taxation and reductions.

d. A limit has been introduced to prevent this credit being able to be applied where the funder is a related party (within the meaning of article 18 of the Corporate Income Tax Law) to the producer generating entitlement to the tax credit.

e. It has been clarified that the funder will be able to apply the tax credits under article 36.1 and 36.3 of the law subject to the terms and conditions they contain and by determining their amounts under the same conditions as applied to the producer (where the producer generated them). Also, the provision which stated that the funder would apply the tax credit each year by reference to the contributions paid in each taxable period has been eliminated.

f. The producer and any taxpayers participating in funding the production will continue to have to sign an agreement with the same terms as those already existing in the law, but now including the specification relating to costs in respect of obtaining copies, advertising and promotion at the producer's expense, as mentioned above.

   Furthermore, it is allowed for there to be more than one funding agreement and for all of them to be signed at any stage of production.

   To apply the tax credit it continues to be necessary for the funder to submit the funding agreement and the certificates required by the law, via a notification to the tax authorities, signed by the producer and by the funder; although now this has to be done before the end of the taxable period in which the funder is entitled to apply the tax credit (the law previously said it had to be notified before the taxable period in which entitlement to the tax credit was generated).

g. The paragraph specifying that the contributed amounts would be paid via credits against net tax payable, which under the agreement and the provisions set out in article 36.1 and 36.3 of the law the producer would transfer to the funder, has been eliminated.

4. Other amendments

4.1 Inheritance and gift tax

La Rioja has been included among the autonomous communities that have the mandatory self-assessment system in place for this tax.

4.2 Fees

a. **The Canary Islands Special Zone (ZEC).** The existing fee for registration on the Official Register of Entities has been replaced by a new **fee for management of the application for authorization for registration on the Register.**

   This new fee will fall due at the point when registration on the register is requested and its amount has been set at €850 in 2023, €1,200 in 2024 and €1,500 in 2025 and thereafter.

   The fee is not refundable if authorization is denied or waived or expires without registration. The fee will not be payable again where an application has been denied and a new application is filed for the same or a similar purpose and applicant.

b. **Fees under the Law on safeguards and the rational use of medicinal products and medical devices**: The funding system for activities and services provided under public law in the field of medicinal products and medical devices has been updated, by (i) updating the structure and amount of previously existing fees, (ii) creating new fees adapted to the current situation, and (iii) eliminating those relating to activities that are no longer performed.

   This amendment is set to enter into force six months after its publication in the BOE.

For more information:

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