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GARRIGUES

Latest developments and legal trends - Legislation of interest

News Roundup - Judgments

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1. Form 720: Shares listed abroad are reported at market value

Directorate General for Taxes clarifies how shares listed on a regulated foreign market similar to the Spanish market have to be reported on Form 720. The resolution may have implications for wealth tax.

The legislation on the information return on assets and rights abroad states that assets must be valued under wealth tax rules.

In the case of investments in entities, the wealth tax law makes a distinction between (i) securities representing investments in equity, traded on organized markets (article 15), and (ii) other securities representing investments in the equity of entities (article 16). The first type must be reported at their average trading values for the fourth quarter of each year, and for these purposes a list of the securities traded on organized markets with their average market prices for the last quarter of the year is published annually. Only shares listed in Spain appear on the lists approved every year.

For this reason, the Directorate General for Taxes (DGT) interpreted years ago (and this is also mentioned every year in the instruction manual for preparing the wealth tax return) that shares listed abroad had to be reported as unlisted shares.

With regard to Form 720, AEAT, in its reply to request number 41 on its list of FAQs in relation to this form, concluded that taxpayers are allowed to choose to report shares listed abroad as listed or unlisted shares; and in the first case, either at their average market value for the last quarter of the year (which is the wealth tax rule) or at their market value at the end of the fiscal year.

The DGT has now concluded, however, in resolution V3511-19 issued on December 20, only in relation to Form 720, as follows:

(a) The term "organized markets" has a broader meaning than official secondary market or regulated market. That first term must be construed under the Spanish securities market law, although the applicable legislation in the foreign country where the reported shares are located also has to be taken into account.

(b) Therefore, shares in a company listed abroad (in the case submitted for resolution, in the U.S.) must be reported as listed shares where the regulated market has similar characteristics to the Spanish market, although the maker of the return may choose either their average trading value for the fourth quarter of each year or their market value as of December 31.

In view of the reasoning it uses, this resolution by the DGT may be expected to have implications in relation to wealth tax itself.

2. Judgments

2.1 Corporate income tax.- Interest on participating loan not deductible if it actually implies a contribution to the borrower's equity (legislation prior to 2015)

National Appellate Court. Judgment of November 11, 2019

Two related entities signed a participating loan for a twenty-year term that would start to run from when the agreement was recorded in a public deed. That public deed never took place, and besides, the agreement did not stipulate any consequences in the event of a breach of that term.

The agreement set out the option of swapping the loan for shares in the borrower shares and allowed termination by agreement between the parties. It moreover provided that, if the lender assigned its rights associated with the loan, it would also have to transfer to the same acquirer its shares in the borrower.

According to the National Appellate Court, this all suggests that what is actually taking place is a contribution to the investee's equity. For that reason, the court set aside the argument that the finance costs in relation to the agreement were deductible.

It must be taken into account that the law as it currently stands expressly states that the finance costs associated with participating loans are not deductible, unless the loans were entered into before June 20, 2014.

2.2 Personal income tax.- The employer has to substantiate that paid per diems relate to work-related travel

Supreme Court. Judgments of January 29 (1), and February 6 (2) 2020

The Personal Income Tax Law states that certain transport and subsistence per diems are not taxable, subject to the requirements in the personal income tax regulations. One of the requirements to be eligible for the exemption for certain per diems is to be able to prove the date and place of travel and the reason for travelling. If the per diems are not taxable, the payer does not have to withhold tax and as a result the worker will not have to be taxed on those per diems.

In the cases examined by the Supreme Court in these three judgments, tax auditors had disallowed the exemption because the worker had not been able to prove the circumstances mentioned above in relation to certain per diems for subsistence expenses. When it examined the proof of these circumstances in relation to the exempt per diems, the court concluded as follows:

(a) The general rule is that each party has the burden of proving the circumstances favoring them. Therefore, where an exemption is involved, it is the person benefitting from the exemption (the taxpayer) who will have to prove that they satisfy the requirements for claiming that exemption.

(b) However, the burden of proof shifts to the other party (the authorities, in this case) if it has means of proof that are out of the taxpayer's reach.

(c) In the specific case of exempt per diems:

- The Personal Income Tax Regulations state specifically that it is the payer of the income that has to substantiate the date and place of travel, together with the reason for travelling, in other words its association with the employment relationship generating the right to receive the per diems.

- This being so, it may be presumed that the authorities must be informed by the payer of these circumstances and that they therefore cannot require the taxpayer to prove something they already know. In other words, the taxpayer simply has to complete their return and attach the withholdings certificate issued by the company.

- In short, in these cases, the tax authorities have the burden of proof in relation to substantiating the taxation of per diems (provided that withholding agent and recipient have met their procedural obligations). And if the tax authorities do not have the necessary proof, then they need to contact the employer, who is required to substantiate that the amounts paid in respect of per diems relate to trips made for work reasons.

This interpretation is particularly important for other issues where the personal income tax of the recipients depends on circumstances that generally may be regarded as forming part of the decision-making sphere of payers.

2.3 Nonresident income tax / investment funds.- Law laying down requirements for exemption on dividends to apply to investments funds does not constitute restriction on free movement of capital, unless it discriminates against nonresident funds

Court of Justice of the European Union. Judgment of January 30, 2020. Case C-156 /17

A German investment fund received dividends distributed by companies established in the Netherlands on which tax was withheld. The investment fund applied for a refund of the withheld tax because it considered that the dividends were exempt. The application was refused because, under the Netherlands legislation, the exemption was only available for FIE investment funds meeting a number of requirements, including:

(a) Their shares must be admitted to trading on a regulated market in financial instruments, so it can be verified whether their shareholders satisfy certain requirements.

(b) The distribution of dividends to shareholders must be made within 8 months of the end of the fiscal year.

The investment fund had not proved that the conditions had been satisfied, according to the Netherlands tax authorities. The interested party argued, however, that it did satisfy them. Namely:

(a) In relation to the first requirement mentioned, it argued that the chosen trading system did not enable it to know who the shareholders are.

(b) In relation to the second, it demonstrated that the German legislation required tax to be levied on income from investments, even if no actual distribution of dividends had taken place, which meant that in practice this condition had been satisfied.

The CJEU was asked to rule whether provisions of the type found in Netherlands legislation restrict the free movement of capital. Specifically, three questions were referred for a preliminary ruling, in relation to which the CJEU concluded as follows:

(a) Eligibility for the exemption only for funds meeting the conditions in the law: The CJEU concluded that member states are free to provide for a specific tax regime applicable to the dividends received by investment funds, and to define the material and formal conditions which must be respected to benefit from such a regime. When exercising their fiscal autonomy member states must nevertheless respect the requirements of EU law and, in particular, there cannot be any restriction on the free movement of capital.

(b) Refusal to grant the exemption to a fund not resident in the Netherlands that has not provided sufficient proof of satisfaction of the conditions mentioned: The CJEU recalls that the tax authorities of a member state are entitled to require the taxpayer to provide any proof they consider necessary to determine whether the conditions for a tax advantage provided for in the legislation concerned have been met. However, in order not to make it impossible or excessively difficult for a non-resident taxpayer to obtain a tax advantage, it cannot be required to produce documents which are absolutely identical to the documentary evidence laid down in the applicable legislation for resident funds .

(c) Refusal of the exemption for a fund not resident in the Netherlands that does not distribute the income on its investments within a certain period of time, even if this income has been taken into account in the tax levied in the state of residence of the shareholder as though the income had actually been distributed: The CJEU concluded that the legislation does not infringe the principle of free movement of capital due to refusing to allow the exemption on the ground of failure to provide proof of requirements such as that relating to the identity of the shareholders (provided that this does not in fact only disadvantage non-resident investment funds); but it does infringe this principle if the exemption is refused because dividends have not actually been distributed within a certain period of time, if it is evidenced that the shareholders must have been taxed in their state of residence as if they had received the dividends.

In short, requirements to be eligible for an exemption can be laid down, but they must be sought in the same way from residents and nonresidents alike, and also, satisfaction of the requirements must be confirmed by reference to both the regime set out in the national legislation and the specific provisions in the state of residence to conclude, in each specific case, whether the nonresident fund is in a comparable position with that of a resident fund.

2.4 Tax on stock exchange transactions.- It is not a restriction on the freedom to provide services for the legislation on the tax on stock exchange transactions to establish differences depending on the residence of the professional intermediary.

Court of Justice of the European Union. Judgment of January 30, 2020. Case C-725 /18

Belgian law provides that transactions concluded or executed in Belgium in respect of Belgian or foreign government stocks are subject to the tax on stock exchange transactions. For these purposes transactions concluded or executed in Belgium include (among others) transactions where the order relating to them is given directly or indirectly to an intermediary by an individual who has their habitual residence in Belgium or by a legal entity that has a place of business or permanent establishment in Belgium. The intermediary may be either resident in Belgium or a nonresident. However, the legislation of that state determines as follows:

(a) If the intermediary is resident in Belgium, the intermediary is liable for the tax and required to withhold and report the tax liability.

(b) Where the intermediary is not resident in Belgium, the issuer of the order (individual or legal entity resident in Belgium) is liable for the tax and required to report the tax liability, and the intermediary is not required to withhold the tax.

The CJEU concluded that this tax respects the principle of freedom to provide services on the basis of the following observations:

(a) It was made clear that the Belgian legislation establishes a difference in treatment which may dissuade the recipients of financial intermediation services resident in Belgium from using the services of non-resident service providers, while making it more difficult for these to offer their services in that member state.

(b) However, such a restriction may be justified in that (i) it ensures the effectiveness of tax collection and of fiscal supervision and (ii) prevents any unfair competition between resident and non-resident professional intermediaries (insofar as residents are required to withhold tax whereas non-residents are not).

(c) Additionally, the legislation at issue does not go beyond what is necessary to achieve the sought objectives, in that it provides a number of options (the non-resident intermediary is able to appoint a representative for the purpose of carrying out certain formalities, for example) that limit the restrictions in the law to what is necessary to attain its sought objectives.

2.5 Transfer and stamp tax.- UTEs are taxable persons for stamp tax

Supreme Court. Judgment of January 30, 2020

Two companies acquired equal undivided interests in a number of properties and recorded in the public deed for the sale that for everything related to those properties the acquirers had set up an UTE (temporary joint venture).

The UTE filed a stamp tax self-assessment return, on which they applied for relief due to considering that UTEs are not taxable persons for stamp tax (because they do not appear as such in the law on the tax).

The Supreme Court concluded in this judgment that:

(a) It is true that article 35.4 of the General Taxation Law (LGT) allows entities without a separate legal personality to be liable for tax, in terms of *"the laws that so determine"* and that the transfer and stamp tax legislation does not expressly mention UTEs as taxable persons for the tax.

(b) However, there is no reason why *"the law"* referred to in article 35.4 of the General Taxation Law has to be the specific law on each tax.

(c) Law 19/1982, of May 26, 1982, on the tax regime for temporary groupings and joint ventures and companies for regional industrial development is a tax law. In article 9 ("liability to the tax authorities"), it states that the partners of UTEs are jointly and severally liable to the tax authorities in respect of any *"indirect taxes that the joint entity is required to pay as a result of carrying on the activity they conduct"*. This implies that any indirect taxes chargeable on the activities conducted by UTEs must be paid by the UTEs not by their partner companies.

(d) Moreover, the "acquirer" as used in article 29 of the Transfer and Stamp Tax Law (when defining the taxable person for the tax in relation to notarial documents) is a broad term that does not exclude per se entities without a separate legal personality, and the issue of ownership of the properties that is recorded in the notarial deed is not a determining factor for excluding UTEs as taxable persons.

2.6 Transfer and stamp tax.- The transfer of shares in real estate developers or construction companies is exempt, even if their corporate purpose is broader (article 108 of the Securities Market Law in force until 2012)

Madrid High Court. Judgment of May 08, 2019

The former article 108 of the Securities Market Law (LMV) (in the wording before the 2012 reform) allowed an exemption from transfer and stamp tax for transfers of shares in companies. To be eligible for that exemption a number of requirements had to be met. In particular, transfers of shares in the capital stock of companies where more than 50% of their assets consisted of real estate, which placed the acquirer in a position of control over the company, were excluded from the exemption (and therefore were taxable).

Any real estate forming part of the current assets of companies whose sole corporate purpose consisted of carrying on business activities relating to construction or real estate development did not have to be included in their assets for the purposes of calculating that 50% threshold. In other words, transfers of shares in these companies were generally exempt from the tax.

This is precisely the element that was discussed by the tax authorities in the proceeding leading to this judgment. The tax authorities argued that a transfer of shares in a real estate development company was not exempt because the company's corporate purpose was not confined to the "construction or development of real estate" due to also including "banking intermediation services".

Accordingly, they concluded that at least 50% of the company's assets consisted of real estate for the purposes of article 108 of the Securities Market Law and so it was not eligible for the exemption.

Madrid High Court, however, took the appellant's view by applying the case law theory supporting that procedural requirements cannot condition the ability to claim a tax benefit, provided sufficient proof has been provided that in the specific case concerned the economic aim of the benefit is met. In the examined case, the fact of the company's corporate purpose including two activities ("construction or development of real estate" and "banking intermediation services") does not mean that it carried on both activities. If, as was proven, the company only carried on the first activity, it was eligible for the exemption in this case.

2.7 Management procedure.- The tax authorities cannot systematically impose obstacles on the taxpayer for procedural reasons to avoid recognizing entitlement to a refund of incorrect payments

Madrid High Court. Judgment of July 4, 2019

In the case examined in this judgment, the tax authorities had refused a refund of incorrect payments made by the taxpayer in respect of the tax on retail sales of certain oil and gas products, by arguing that the invoices produced to evidence the charged tax were incomplete.

In subsequent pleadings, the taxpayer provided evidence that the invoices showed that the tax was included in the price, in line with the parameters set out in the law. Despite this, the tax authorities again refused the refund for the same reason.

At the following instance (economic-administrative claim to Madrid Regional Economic-Administrative Tribunal), the appellant produced authorization from the tax authorities to issue the invoices with that information and the refund was refused a third time, for different procedural reasons.

In this judgment, Madrid High Court concluded that the tax authorities are creating, beyond acceptable limits, procedural obstacles, with the only aim of avoiding having to refund the incorrect payments to which the taxpayer is entitled, and for this reason it acknowledged the taxpayer's entitlement to the refund.

3. Decisions

3.1 Personal income tax.- The reduction for rental of a dwelling is applicable regardless of its characterization in the Urban Leasehold Law

Catalan Regional Economic-Administrative Tribunal. Decision of August 22, 2019

The Personal Income Tax Law allows a 60% reduction for income from real estate obtained by leasing residential properties.

In the case examined in this decision the taxpayer had two properties which it had leased (in each case) for two consecutive periods shorter than a year; so under the Urban Leasehold Law (LAU) the agreements had to be characterized as "nonresidential" lease agreements. For that reason, the tax auditors argued that they did not give entitlement to that reduction.

The Catalan Regional Economic and Administrative Tribunal, however, found that they were eligible for the reduction. It affirmed that the Personal Income Tax Law article containing the reduction does not make any reference to the LAU; and that therefore the determining factor is the actual and proven use of the properties. In this case, the taxable person had provided evidence (as acknowledged by the tribunal) that the properties had been leased consecutively to the same lessees, though under lease agreements for 11 month terms (which implied they had "lived" in the properties for 22 months). This evidenced that the properties did not satisfy a temporary need of the lessees, but amounted to their principal residence.

3.2 Inheritance and gift tax.- A reduction recognized in a procedure commenced as a result of a return may be questioned in a later audit

Central Economic-Administrative Tribunal Decision of January 21, 2020.

As a general rule taxpayers may report their tax liability by filing a self-assessment return; or file the necessary documents for the tax authorities to issue an assessment.

In the case analyzed in this decision, the heirs elected the second alternative. Namely they filed a list of the property and rights in the estate and made a written request for certain specific reductions (in respect of acquisition of shares in family businesses and of principal residence). The tax authorities made the relevant provisional assessment including the securities reported by the heirs and made the requested reductions.

Later, the tax authorities commenced an audit in which they questioned the values given to the assets, together with the right to make the reduction relating to the inherited shares.

The Asturias TEAR set aside the assessment that had been issued due to considering that the procedure initiated as a result of the filed documents and completed by issuing a provisional assessment had precluding effects.

Against the decision of the Asturias TEAR, the tax authorities filed an appeal to TEAC which set it aside in view of the interpretation determined by the Supreme Court in its judgment of May 31, 2019 (cassation appeal 1215/2018). TEAC concluded as follows:

(a) The recognition or acceptance (even if implied) of the reductions in the provisional assessment means that tax auditors cannot later examine satisfaction of the statutory requirements laid down for claiming those tax benefits, in that the tax authorities had right from the start all the information relating to satisfaction of the requirements that were conditions for those tax benefits and these were recognized by the authorities in the provisional assessment.

(b) The only way that the conclusion reached in the procedure commenced as a result of a return could be changed is if in the later audit new facts or circumstances are found resulting from activities other than those performed and specified in the provisional assessment ending the procedure commenced as a result of a return (with the filing of documents by the taxpayers). Finding otherwise would be contrary to the principle of legal certainty.

3.3 Inheritance and gift tax.- Reduction for principal residence under Galician legislation must be requested in voluntary period

Galician Regional Economic-Administrative Tribunal. Decision of February 21, 2019.

Acquisition of the principal residence by inheritance gives entitlement to a reduction in inheritance tax in the autonomous community of Galicia, which is more beneficial than the reduction allowed in central government legislation. To be able to claim this reduction the taxpayer must request it within the statutory filing period for the tax.

In the case examined in this decision, the taxpayer forgot to request the reduction in that period, and, after realizing the error, requested (outside the time limit) correction of the self-assessment. The Galicia TEAR disallowed the right to make the correction in the following terms:

(a) We are faced with an essential requirement, due to being expressly laid down in the autonomous community legislation. It must therefore be met in the voluntary period.

(b) If the autonomous community reduction is not requested within the time limit, the central government reduction may be claimed. In this case, if in the self-assessment filed in the voluntary period the central government reduction was not claimed, the self-assessment may be corrected within the statute of limitations period, because central government law and regulations do not stipulated a time period for making the request.

3.4 Tax on economic activities.- Commencement of a residential property rental business is exempt from the tax on economic activities, even if the company had previously been renting industrial premises

Galician Regional Economic-Administrative Tribunal. Decision of May 23, 2019.

The law on the tax on economic activities allows an exemption for the first two years an economic activity is conducted within Spain.

In the case examined in this decision, the Galician TEAR recognized eligibility for this exemption for an entity that had been carrying on a rental business for industrial premises, and later started to conduct a rental business for residential properties, which is contained in a separate caption of the classifications for the tax on economic activities. The tribunal held that, insofar as the taxpayer has to file a separate return for notification of commencement of the new activity in a different caption to the one for its previous activity, it may be considered that these are two different activities and therefore the exemption may be claimed.

3.5 Cadastral appraisals.- It is not valid to substantiate the construction categories for a building by simply transcribing the comparative methods for appraising values

Madrid Regional Economic-Administrative Tribunal. Decision of December 20, 2019.

The cadastral appraisal of the construction of a building is determined in part by reference to the construction category assigned to it. For that reason, the assignment of one category or another, which depends in turn on the quality of the structure itself, must be suitably substantiated by the Cadaster.

The Madrid TEAR ruled in this decision to set aside the cadastral appraisal of a building on the basis that the category assigned to its structure had not been suitably substantiated. In particular, the court specified that it is not valid to substantiate those categories with a transcription of the comparative methods for appraising values and a general mention of the catalog of types of constructions accompanying those comparative methods.

3.6 Tax resolutions.- Requests for resolution submitted by third parties to the DGT after an audit has commenced have binding effects for the person being audited

Central Economic-Administrative Tribunal Decision of December 18, 2019.

AEAT adjusted a taxpayer's tax position. The taxpayer filed the relevant economic-administrative claim with TEAC arguing that the performed assessment had to be set aside because its actions were not consistent with the DGT's conclusions in a reply to a resolution request submitted by an association, of which it was not a member, and which was given before the assessment ending the audit of its tax position had been issued.

TEAC upheld the taxpayer's claim and upheld the binding effects of that resolution, on the basis of the following observations:

(a) The bodies for application of taxes are bound by the interpretation contained in a reply to a resolution request submitted to the DGT, provided that the facts and circumstances relating to the person with tax obligations are the same as those included in the reply to the resolution request. TEAC had confirmed their sameness in the examined case.

(b) In any event, the body for application of taxes should have substantiated why it was departing from the DGT's interpretation and the reasons (whether factual or legal) why it considered the reply to the resolution request incorrect, although it failed to do so.

(c) While it is true that article 89.2 of the General Taxation Law determines that replies to resolution requests do not have binding effects where they concern issues related to the subject-matter or handling of a procedure, appeal or claim commenced before the request, TEAC considers that this article is only applicable when it is the requesting party (or a member of the requesting entity in the case of an association, for example) that is being audited.

In the examined case, the request was submitted after the audit had begun, but the audited entity was not a member of the requesting association, so TEAC held that the provision in article 89.2 was not applicable and therefore the binding effect of the resolution could not be removed.

3.7 Management procedure.- Waiver of refund in favor of the public treasury cannot be corrected

Catalan Regional Economic-Administrative Tribunal. Decision of April 8, 2019.

A taxpayer filed a personal income tax self-assessment return in which by mistake it waived the refund due to it. A while later (after the voluntary filing period had ended) it applied for correction of its self-assessment to amend that error. The tax authorities rejected this request by arguing that the waiver of the refund in favor of the public treasury is a tax option which, under article 119.3 of the General Taxation Law, may only be corrected within the voluntary filing period for the return.

The Catalan TEAR, however, concluded that a waiver of a refund is only classifiable as error, not as the election of a tax option, therefore the requested correction must be granted.

3.8 Special application for judicial review of final decisions.- A special application for judicial review of final decision is not admissible where documents of material value could have been produced earlier

Central Economic-Administrative Tribunal. Decision of December 18, 2019.

A taxpayer filed a request for a refund of incorrect payments in relation to the tax on retail sales of certain oil and gas products which was refused due to the absence of documents evidencing that the taxable person had charged the tax on the invoice. The decision became final. Against the decision, the party with tax obligations lodged a special application for judicial review of final decisions, in which it produced correcting invoices recording that charge.

TEAC concluded that the produced correction invoices do not qualify as material documents produced subsequently or unable to be produced that evidence an error in the challenged decision; and this insofar as they could and should have been filed in the relevant tax procedure, because they were accessible to the taxpayer.

According to TEAC, what the taxpayer is seeking is to use the special application for judicial review of final decisions after the end of the ordinary application period, for the purposes of requesting a fresh review of the facts, which is not allowable.

4. Resolution requests

4.1 Corporate income tax.- The transfer of tax losses in a spinoff under the neutrality regime is only restricted by any impairment losses that were deductible

Directorate General for Taxes. Resolution V3525-19 of December 23, 2019.

The requesting entity intends to carry out a short-form spin-off of a line of business of company B to its sole shareholder A. Company B has generated tax losses in the activities in that line of business; and company A has recorded tax deductible impairment losses in respect of its investment in B, which relate to the losses generated by B that have given rise to the mentioned tax losses.

In relation to the transfer of the tax losses to the recipient of the line of business (A), the DGT affirmed that:

(a) The spirit and aim of laws restricting transfers of tax losses in transactions under the tax neutrality regime is to prevent the same loss being used twice.

(b) For that reason, in the described transaction the unused tax losses at B may be used by A, but after reducing those losses by the impairment loss that was deductible at A.

(c) For the same reason, any portion of the impairment loss recorded and deducted by A that was reverted before the spin-off (and, as a result, was included in the tax base) does not reduce the tax losses to be received by A.

However, insofar as company A will retire a portion of its shares in B to receive the spun-off assets and liabilities, the impairment loss associated with those shares and to be reverted (which will be retired as a result of the transaction), is included in the tax base to the extent of the income generated in the transaction.

4.2 Corporate income tax.- Not-for-profit entities may use the capitalization reserve and claim credits

Directorate General for Taxes. Resolution V3521-19 of December 4, 2017

A not-for-profit association whose purpose is to foster scientific research and the development of technology, carries on activities related to research and development technical advice, studies and evolution of markets. Because it has not been granted public benefit status, it is eligible for the special tax regime for not-for-profit entities under the Corporate Income Tax Law.

The DGT replied that, in view of the activities carried on by the association, which require an organization for its own account of means for the purpose of participating in the production or distribution of goods or services, any income it obtains will be treated as obtained from conducting an economic operation and therefore will not be exempt from tax.

Despite this fact, the association may use the capitalization reserve, and claim the tax credit for R&D&I activities, if the requirements laid down in the law in relation those benefits are met.

4.3 Corporate income tax.- The separation of properties without mortgage liens from others that are mortgaged is a valid economic reason for claiming the tax neutrality regime

Directorate General for Taxes. Resolution V3418-19 of December 13, 2019

Entity A conducts a business involving the acquisition and development of business premises. As a result of conducting this business, it has acquired a varied portfolio of properties, a few with mortgages. It also leases certain properties to other group companies.

It is considering performing a spin-off, in which it would transfer all of its assets and liabilities to two newly created companies. One would receive properties free of mortgage liens; and the second company, a portfolio of properties with or without mortgage liens.

The DGT accepted as a valid economic reason that the spin-off will be performed for the purpose of separating a portion of the properties without liens, so they are not liable for the bank debts that other properties are securing.

4.4 Corporate income tax.- An expense incurred by not requesting refund of VAT incurred abroad is not deductible

Directorate General for Taxes. Resolution V3417-19 of December 13, 2019

A company received an invoice from a French supplier with VAT. The invoice was accounted for separately from the VAT with the intention of applying for a refund in France. However, after the period for applying for a refund had run and therefore the right had expired, it recorded the VAT cost as an expense.

According to the DGT, the input VAT paid in France was originally a recoverable amount, because an application could be made using the statutory procedure for obtaining VAT refunds in France. Therefore, the expense incurred by waiving the right to apply for a refund cannot be treated as tax deductible, because it is really a gift.

4.5 Corporate income tax.- Reduced rate applicable for new entities if a related entity created earlier has the same corporate purpose but never started operating

Directorate General for Taxes. Resolution V3382-19 of December 11, 2019.

The Corporate Income Tax Law allows a 15% reduced rate for newly created entities carrying on economic activities, in the first tax period when the tax base is positive and in the following period. One of the conditions for charging this reduced rate is, among other requirements, that the economic activity must not have been carried on earlier by other individuals or entities related to the newly created entity.

In the case studied in this resolution, a newly created entity is 33% owned by a member who also owns 50% of a second entity created earlier. Both entities share the same corporate purpose but the one created first never started operating.

In these circumstances, the DGT allows the reduced rate to be charged to the new entity, because, although it is related to the one created first, this first entity never started operating; for which reason it cannot be considered that the new entity acquired the business of the previous one.

4.6 Personal income tax.- Tax on late-payment interest received and later refunded to the public finance authority is only recovered by filing a correction return

Directorate General for Taxes. Resolution V3503-19 of December 20, 2019

In 2012 the Madrid autonomous community government issued an assessment disallowing the taxpayer's right to use certain inheritance and gift tax benefits. The taxpayer paid the assessed debt, but appealed against it to TEAC, and in 2017 obtained a decision partially upholding its appeal and ordering the Madrid autonomous community government to issue a new assessment.

The Madrid autonomous community government issued a new assessment in 2017 and ordered a refund to the taxpayer of the excess amount paid; a refund that was made in a subsequent year with late-payment interest. The Madrid autonomous community government, however, appealed against TEAC's decision to Madrid High Court, and obtained a favorable judgment in 2019, meaning that the taxpayer had to return to the public finance authority the amount paid earlier by the autonomous community government in respect of a refund of incorrect payments and late-payment interest.

The DGT examined the taxation of the interest received by the taxpayer in 2017 and the taxation of its subsequent return and concluded as follows:

(a) Late-payment interest received as a result of a decision to refund incorrect payments amounts to a capital gain to be included in the savings component of taxable income.

(b) A subsequent return of the interest will have an impact on the assessment for the year in which the received interest was reported by the taxpayer as a capital gain. To correct this situation, an application may be filed for correction of the self-assessment for that year.

4.7 Personal income tax.- Eligibility for exemption on transfer of bare ownership of principal residence with reservation of a usufruct right does not prevent its subsequent rental

Directorate General for Taxes. Resolution V3313-19 of December 3, 2019

The Personal Income Tax Law allows an exemption for income obtained on transfers of principal residences by individuals over 65. The DGT has already concluded that this exemption is available for the transfer of bare ownership with reservation of a usufruct right.

In this resolution, the DGT concluded also that this exemption is not forfeited simply because the usufruct right holder (former full owner) rents the home after bare ownership has been transferred; a rental which is also fully consistent with the powers that civil law grants to the holders of usufruct rights in properties.

4.8 Personal income tax and inheritance and gift tax.- DGT looks at how income generated by a website is taxed

Directorate General for Taxes. Resolution V3320-19 of December 4, 2019

An individual obtains copyright revenues from publishing work. He also shares teaching materials on a website. The website generates revenues for him from inserting advertisements (which are calculated by reference to the users who access the advertisements) and anonymous contributions from users, in respect of teaching material he shares on the website. The right to access that material does not depend on whether or not the user makes a voluntary contribution.

The DGT considers that:

(a) Copyright revenues in respect of publishing work are characterized as salary income, unless the author's work is the result of carrying on an economic activity.

(b) The revenues from including advertisements on the website are characterized as income from an economic activity.

The anonymous contributions made by visitors to the website amount to income subject to inheritance and gift tax, insofar as they are voluntary contributions and access to the documents shared on the website does not depend on the making of those contributions. It is necessary, therefore, for the taxable person to put in place a mechanism by which it can identify givers as a result of its obligation both to identify them in the assessments of gifts and to apply the rule on the accumulation of gifts received from the same giver over a three-year period.

5. Legislation

5.1 Spanish tax agency to access database of General Council of Notaries

The February 15 edition of the Official State Gazette published the Decision of February 5, 2020, by the Planning and Institutional Relations Service Directorate attached to AEAT, publishing the contract with the General Council of Notaries in relation to the supply of information.

Under this contract, signed on February 3, 2020, AEAT will have access to the information contained in the notaries' database of real property owners. It also allows AEAT to receive periodical information on certain transactions or groups of transactions contained in the unified electronic index for notaries and to have direct and individual remote access to this index. Additionally it allows specific requests for information to be made to notaries.

Lastly, the tax agency and the General Council of Notaries have signed a second agreement setting out a general framework for collaboration concerning the terms and conditions on which notaries will be able to carry out steps with the agency on behalf of parties with tax obligations that have used their services.

5.2 Transposed directives on quick fixes (VAT), dispute resolution, distribution of insurance, and occupational pension funds

The February 5, 2020 edition of the Official State Gazette published Royal Decree-Law 3/2020, of February 4, 2020 on urgent measures transposing various EU directives:

(a) In relation to VAT it transposes Council Directive (EU) 2018/1910, of 4 December 2018, and Council Directive (EU) 2019/475 of 18 February 2019, both supplementing the provisions in Council Implementing Regulation (EU) 2018/1912 of 4 December 2018. See our VAT Commentary dated February 10, 2020 with an analysis of the amendments in this field.

(b) It also transposes Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union. See our Alert dated February 5, 2020 on this subject.

(c) Besides transposing Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision, discussed in our Commentary dated February 20, 2020 on this transposition.

(d) And the other directive it transposes is Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution, summarized in our Commentary dated February 19, 2020.

Other tax amendments are introduced related to pension plans and funds. Namely:

- An exemption from transfer and stamp tax is allowed for the creation, the dissolution and amendments consisting of increases and decreases in pension funds as defined in the revised Pensions Plans and Funds Law, approved by Legislative Royal Decree 1/2002, of November 29, 2002.

- For personal income tax purposes, it is provided that the amounts received in the cases defined in article 8.8 of the revised Pensions Plans and Funds Law (long-term unemployment or serious illness and early withdrawals from pension plans in the individual system associated with contributions made at least ten years before) will have the same tax treatment as pension plan benefits.

Lastly, the February 29, 2020 edition of the Official State Gazette published the Decision of February 20, 2020, by the Spanish parliament (lower house), ordering publication of the resolution to confirm this Royal Decree-Law 3/2020.

5.3 Brexit UK's withdrawal from the European Union takes effect

On January 31 the UK's withdrawal from the EU took effect and a transition period began until December 31 this year, in which EU law will continue to be applicable in relationships with the United Kingdom, while waiting for a future agreement setting out the conditions governing bilateral relationships from that date onwards.

The key implications of the UK's withdrawal from the EU (including those relating to tax) for companies were discussed in our article dated January 31, see this article for further information.

6. Miscellaneous

6.1 EU updates tax haven blacklist

On February 18 the EU Council resolved to update the list of non-cooperative tax jurisdictions. See our Alert dated February 19, 2020 on this subject.

6.2 Digital services tax and financial transactions tax bills laid before parliament

On February 18 the council of ministers approved the decision to lay before parliament the bills creating the digital services tax and the financial transactions tax; the bills' wording was finally published on February 28. For further information see our Alerts (available here and here), recalling the main features of the two taxes.

6.3 Directorate General for Taxes determines rules for treating certain types of entities created abroad as pass-through entities

Article 35.4 of the General Taxation Law provides that the following are parties with tax obligations: undistributed estates, joint property entities and other entities without a separate legal personality that form a separate business unit or separate set of assets that are taxable.

Moreover, the personal income tax and nonresident income tax laws add that the following are pass-through entities: entities formed abroad and having a legal nature that is identical or similar to that of pass-through entities. Formed under Spanish law.

Lastly, the Corporate Income Tax Law classes as pass-through entities partnerships other than those having a separate legal personality and corporate purpose, undistributed estates, joint property entities and other entities referred to in article 35.4 of the General Taxation Law.

The DGT has resolved a numerous issues submitted for resolution on the status or otherwise as pass-through entities of entities created abroad, but a host of doubts remain in this respect.

To resolve these doubts, the February 13, 2020 edition of the Official State Gazette published the DGT's decision of February 6, 2020, on the treatment as pass-through entities of certain entities created abroad. According to this decision, the basic characteristics that an entity created abroad must have to be treated in Spain as a pass-through entity for personal income tax, corporate income tax and nonresident income tax purposes are:

- The entity must not have been a personal income taxpayer in the state where it was created.

- The income generated by the entity must pass through to its members or investors for tax purposes (it is not relevant whether it has been distributed).

- That income must preserve, under the legislation of the state where the entity was created, the nature of the activity or source from where it was obtained for every member or investor.

This decision has binding effects for tax authority bodies and entities on and after February 13, 2020, and its associated effects will be valid in respect of taxable events occurring on or after that date.

6.4 Tax agency's 2020-2023 Strategic Plan published

The tax agency has published its 2020 – 2023 Strategic Plan on its website. The document is posted as a work in progress and may be modified at any time as new needs and priorities arise.

The purpose of the plan is (i) to serve as a key instrument of management and support for decision-making, (ii) to obtain a clear view of what is sought to be achieved and how, in the medium and long term, (iii) to identify priorities among all possible lines of action, measures and steps, (iv) adapt the organization to the changes and demands of the economic environment, nationally and internationally and (v) assign human and technical resources in alignment with the identified priorities.

6.5 AEAT publishes information notice with its position on insolvency processes

The tax agency has published on its website an information notice regarding its position and action criteria in insolvency proceedings. It notably contains the following measures:

(a) AEAT recognizes that it holds numerous claims that are affected by the agreements reached at creditors' meetings and, for this reason, states its interest in increasing its participation at these meetings and in being demanding in the assessment of proposals for an arrangement, by paying particular attention to particular factors such as the existence or otherwise of write-offs, the length of potential debt rescheduling arrangements or the proportion of the tax agency's claim; all for the purpose of supporting proposals containing payment terms that benefit the collection of public claims.

(b) When faced with the potential existence of liquidity problems at insolvent entities, AEAT underlines that the Insolvency Law requires (in article 84.3) that post-insolvency claims must be paid when they become due; and that tax claims are inalterable. Therefore, if the insolvency practitioner decides to alter the payment-when-due criterion in the interests of the insolvency proceeding (subject to sufficient assets available to creditors), they must take that inalterable nature into account.

Where, under article 176.bis.2 of the Insolvency Law, an order for payment of post-insolvency claims must be implemented other than that defined in article 84 of the same law because it has been calculated that the assets available to creditors are not sufficient to pay them, this must be notified to the court and only then may a payment order be considered that defers payment of tax claims.

(c) AEAT observes that, at times, the insolvency practitioner encounters situations in which the insolvent debtor and its directors fail to fulfill their duty of collaboration and disclosure of information as envisaged in article 42 of the Insolvency Law, which may have serious consequences because it means the insolvency practitioner does not have the necessary information to perform their duties, one of which is filing tax returns.

For these purposes, remember that neither the insolvency legislation not the tax legislation state that the insolvent company is entitled not to fulfill its obligations to keep accounts and file its tax returns, and therefore, if these obligations are not fulfilled, the insolvency practitioner will have to take the appropriate measures.

For example:

- Where a material breach of the obligation to keep accounts occurs, the insolvency practitioner must apply to the insolvency judge for the insolvency proceeding to be classed as fault-based.

- Additionally, the insolvency practitioner must use their power to report the facts to the criminal judicial authorities.

If the insolvency practitioner acts in the described manner, the tax authorities will be able to take this into account (together with the other particular circumstances) to find whether the necessary diligence was applied to determine the existence or otherwise of tax liabilities resulting from the failure to file the self-assessments as a result of the inexistence of accounting information.

(d) AEAT recalls that, in scenarios involving the disappearance of the insolvent company, it must be removed within a month from the roll of traders professionals and withholding agents; which is the insolvency practitioner's obligation.

(e) It determines, moreover, that, under the findings rendered by TEAC in its decision of February 26, 2019, it will not be allowed to net post insolvency claims against tax refunds and assets payable to the taxpayer arising in assessments filed after the insolvency order was issued, as it had been doing in the past. It also recalls that the Insolvency Law determines that the insolvency practitioner must notify AEAT of every insolvency order, for which there is a form that the insolvency practitioner must use.

AEAT considers however that the law does not determine the same type of obligation for scenarios of recommencement of insolvency proceedings, and therefore, for these cases, the recommencement of an insolvency proceeding must be notified by email to the enabled address, accompanied by the necessary documentation.

(f) In relation to the certificate of debts that AEAT issues to the insolvency practitioner, it recalls that a general clause is usually included relating to the correction invoices for VAT purposes, so that the insolvency practitioner can take into account that AEAT's debts will be increased by the change to the VAT taxable amounts as a result of issuing correction invoices.

AEAT adds that, if any such changes occur and are included in subsequent certificates, the insolvency practitioner must check them suitably to be able to match them to the relevant year.

(g) Lastly, AEAT considers that it can sign exceptional agreements to enable collection of its debts and to enable the insolvent debtor to pay the debts; but that to achieve this a number of minimum requirements must be considered (for example, all post-insolvency claims must have been paid and, if any, claims arising after the effective date of the arrangement). These exceptional agreements cannot ever be used in pre-insolvency scenarios. In those cases, the only options are to request deferred or split payment of the debts.

For more information:

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