Tax Newsletter

Spain

GARRIGUES

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1. Judgments

1.1 Corporate income tax. - The reduced rate can be applied even if the new company's activity and that carried on by its majority shareholder belong to the same sector

Madrid High Court. **Judgment of February 28, 2024**

Article 29 of the Corporate Income Tax Laws contains a 15% reduced rate for newly created companies. One of the requirements for this rate is that the economic activity started by the new company must not have been conducted by its majority shareholder in the year before the year the company was formed. Madrid High Court has concluded that the fact of the majority shareholder’s activity and the activity carried on by the newly created company belonging to the same sector (the pharmaceutical sector, in this case) does not prevent this reduced rate being applied, if they each engage in different activities.

1.2 Corporate income tax / Audit procedure. – A complete adjustment by the tax authorities is required even if it affects statute-barred fiscal years

Supreme Court. **Judgment of June 7, 2024**

A company used, in one fiscal year, prior year tax losses which had become statute-barred. The tax authorities reviewed these tax losses and proposed a reduction to their amount, after finding that certain provisions for bad debts had been incorrectly deducted in the year the losses were generated. These provisions, as the auditors themselves acknowledged, related to income that should not have been recognized for tax purposes but nevertheless was taxed. The view taken, however, was that the income could not be adjusted because it had been recorded and taxed in years which were statute-barred when the audit process commenced. The taxpayer maintained in this appeal that the principle of complete adjustment meant that the tax authorities should not simply have adjusted the prior year tax losses without also adjusting the income incorrectly recorded for accounting purposes and relating to the provisions that they rejected.

The Supreme Court concluded that the tax authorities must take into consideration all the consequences having a determining effect on fulfillment of the tax obligation and arising from their auditing and investigative powers on fiscal years which have become statute-barred and those which have not, irrespective of whether this is favorable or unfavorable to the taxpayer. Therefore, if the adjustment affects the amounts of tax losses from years which are statute-barred, because they were offset in a reviewed non-statute barred year, it must be applied (in the examined case) by disallowing deduction of the provision, together with rejecting taxation of the income incorrectly recorded, even if that income was recorded in a statute-barred year.

1.3 Corporate income tax / Audit procedure. – The right to offset unused tax losses is not lost even if the correct procedure was not used to report them

Castilla y León High Court. Judgment of February 9, 2024

When completing its 2016 corporate income tax self-assessment, a company found an error in its 2014 self-assessment, because it should have reflected a tax loss rather than the taxable income figure that was reported. The company elected to reflect the 2014 tax loss directly on its 2016 self-assessment, and offset the gross amount of that loss against the taxable income generated in 2016. The tax authorities rejected this offset (i) because the company had failed to follow the ordinary procedure for correcting self-assessments, and (ii) because, when they reviewed the 2016 self-assessment, fiscal year 2014 had already become statute-barred.

Castilla y León High Court pointed out that the offset of tax losses is a taxpayer's right, closely linked to its economic capacity, and only the restrictions clearly imposed by the lawmakers are allowed. It took the view that, although the right procedure for correcting the error made on the 2014 self-assessment was to file an application for correction, the company showed an unequivocal and express intention to correct that self-assessment when it filed its self-assessment for 2016, which was not statute-barred when the audit process started.

Furthermore, the auditors were fully entitled, when examining fiscal year 2016, to audit the tax losses offset in that year, including that generated (although not correctly reported) in 2014, because the 10-year period set out by the lawmakers for the review of tax losses had not yet expired. The tax authorities' failure to exercise that right means that the contested assessment is null and void.

1.4 Personal income tax. – Income from the licensing of image rights by professional sportspersons can be classed as income from movable capital in certain circumstances

Supreme Court. Judgment of June 6, 2024

A professional sportsperson obtained income from licensing his image rights to a company partly owned by him, which he reported as income from movable capital, applying the 40% reduction available for clearly multiyear income. The tax authorities saw it as income from economic activities, meaning that the reduction could not be applied. According to the tax authorities, in cases involving professional sportspersons who are not tied to a company under an employment contract, it is not possible to separate the licensing of image rights (an ancillary activity) from the sports activity (the main activity).

The Supreme Court's view, however, was that the licensing of a professional sportsperson's image rights can constitute an independent source of income from the income for their sports activity. In other words, there is no legal basis to support image rights being classed automatically as a sports-based economic activity. Classing the rights in this way also has the effect of negating "*their personal income tax system devised by the lawmakers, and it is formulated so generically that it fails to allow for specific individual cases".* In short, the circumstances of each case must be considered in order to determine whether such amounts should be classed as income from movable capital (article 25.4 of the Personal Income Tax Law) or as income from economic activities (article 27).

1.5 Personal income tax. – Nonmonetary contributions are taxable under the specific rules applicable to capital gains and losses even if the beneficiary is a related entity

Supreme Court. Judgment of May 30, 2024

An individual made a nonmonetary contribution in the incorporation of a company, becoming its majority shareholder. On his tax return, he reported a loss calculated under the specific rules on the calculation of capital gains and losses set out in the Personal Income Tax Law (article 37.1.d). According to this article, in contribution transactions of this type, the capital gain or loss is calculated as the difference between the acquisition value of the contributed assets or rights and the greater of (i) the par value of the shares received for the contribution (plus the relevant share premium amounts), (ii) the listed price of those shares, or (iii) the market value of the contributed asset or right. The tax authorities argued that the pricing rule for related-party transactions (article 41 of the Personal Income Tax Law and article 18 of the Corporate Income Tax Law) should have been applied and the taxpayer should have been denied the option of requesting an expert appraisal.

The Supreme Court concluded as follows:

(a) In this case (in which the contributing party was not a shareholder at the entity before the contribution) there is no conflict between the two sets of valuation rules, because the parties were not related before the transaction. In other words, there is no doubt that the applicable rules are those set out in article 37(1)(d) of the Personal Income Tax Law.

(b) Even if there is a conflict between the two sets of rules, the provisions of article 37.1d will prevail in any case because it contains a special rule, as opposed to the general rule for related-party transactions.

The contributor was therefore entitled to request an expert appraisal.

Similarly, the Central Economic-Administrative Tribunal (TEAC) has accepted, in a decision dated May 27, 2024, that capital gains or losses arising from making nonmonetary contributions in the incorporation of a company (the contribution of a real estate asset, in this case) must be calculated under the rule set out in article 37.1.d), because this is a special rule, and as such prevails over the general rule on the pricing of related-party transactions.

1.6 VAT. – Notification of the claim to the insolvency practitioner should not be required for modification of the taxable amount in cases involving insolvency proceedings

National Appellate Court. Judgment of May 16, 2024

In the examined case, modification of the taxable amount for VAT purposes was rejected, in a case where an insolvency order had been issued on the debtor and all the requirements stipulated in the rules on that modification had been met, although the claim had not been notified to the insolvency practitioner. The tax authorities and TEAC stated that there is an implicit obligation under Spanish law for the claim to be recognized in the insolvency proceedings in order to recover unpaid VAT (alternatively, proof that the amount concerned has not been collected should be required).

The National Appellate Court, however, pointed out that the VAT Law does not require notification of the claim in insolvency proceedings initiated against the debtor, and therefore if all the requirements that are stipulated in the rules are met, the right to modify the taxable amount cannot be refused.

1.7 Stamp tax and the free movement of capital. - A stamp tax exemption for short-term financial transactions dependent on where the debtor is resident breaches EU law

Court of Justice of the European Union. Judgment of June 20, 2024. Case C-420/23

Portuguese stamp tax legislation establishes an exemption for short-term financial transactions performed by entities resident in Portugal. This tax benefit is not applicable if any of the parties in the transaction is resident in a third state. This exception does not apply if the creditor has its head office or effective management in another EU member state or in a state with which a tax treaty has been signed. In other words, according to the described national legislation, short-term cash transactions (such as loans) between two entities resident in Portugal, and transactions in which the debtor (borrower) resides in Portuguese territory and the creditor (lender), in EU territory or in a country with a tax treaty, are exempt from stamp tax, but the same does not apply when the situation is reversed.

The Court of Justice of the European Union concluded that this legislation is contrary to the free movement of capital, because taxation for stamp tax purposes is made to depend on the debtor's state of residence, implying a discriminatory treatment which is unjustified.

1.8 Cadastral values. – For a condominium regime to be fully effective, the property must have more than one owner

Supreme Court. Judgment of June 6, 2024

The Supreme Court has ruled that a property owned by just one party cannot be condominiumized. The court's view was that for the purposes of the cadaster, the creation of a condominium regime on a property requires the existence of all the components of this regime. These include the existence of more than one owner (a subjective element) and therefore, the sole owner's intention or wish to sell a part of the property is not sufficient, by itself, for the creation of a condominium.

1.9 Management procedure. - Requests for information must give an adequate account of the tax significance of the requested documentation and information

National Appellate Court. Judgment of January 30, 2024

The tax authorities issued a request to a telephone company asking for certain information relating to a telephone line, including the identity of the line holder, with a view to locating assets which could be attached to settle a tax debt.

The National Appellate Court noted that the request was issued without the tax authorities even knowing the line holder's identity. In other words, they issued the request without knowing for sure whether the information being requested bore any relation to the debt they were aiming to collect. It concluded therefore that they had not given an adequate account

of the reasons for the request. The court pointed out that an adequate account is essential for requests issued to third parties, especially if they relate to the tax significance of the requested information, and this means providing an adequate explanation of the connection between the requested information and the objective that the request is intended to achieve.

1.10 Refund procedure. – Refunds of excess prepayments generate late-payment interest from when they were made

Supreme Court. Judgment of May 31, 2024

The tax authorities upheld an application for correction of corporate income tax self-assessments relating to more than one year on the understanding that the tax base had been incorrectly calculated, as the taxpayer was claiming. As a result of this correction, the incorrectly paid amount was refunded. The incorrect payment had in fact taken place when making prepayments of the tax.

The Supreme Court concluded that the refund of excess tax paid when making prepayments is governed, as regards the accrual of interest, by article 32 of the General Taxation Law (LGT). The late-payment interest arising from the refund must therefore be calculated from the date on which the incorrect payment was made (i.e. from the date when the prepayment was made) and up to the date on which a refund was ordered.

1.11 Refund procedure. – Late-payment interest on refunds made due to Royal Decree-Law 2/2016 being held unconstitutional must be calculated from when prepayments of the tax were made

Supreme Court. Judgment of May 13, 2024

In judgment 78/2020, delivered on July 1, 2020 (summarized in our publication dated July 7, 2020), the Constitutional Court held that Royal Decree-Law 2/2016 of September 30, 2016 was unconstitutional due to the breaching of substantive limits that a legislative instrument of this type cannot overstep. This decree-law set out the minimum corporate income tax prepayments for the first time and increased the rate to be used for calculating them. The declaration of unconstitutionality concerned both elements of the law.

The Supreme Court concluded that any amounts paid under the decree-law declared to be unconstitutional are to be treated as incorrectly paid tax. They therefore have to be refunded, with late-payment interest calculated over the period between the date the prepayments were made and the refund date.

1.12 Audit procedure. – The tax authorities cannot recharacterize payments made by a football club to a player’s agent in a way that disregards the parties’ true intentions

Supreme Court. Judgments of May 20 and May 27, 2024

A football club made payments to players’ agents in respect of several items (player signings and transfers, terminated contracts, among others). Tax auditors recharacterized these payments as earned income for the players because, in their view, the players are the beneficiaries of the agents’ services. To make this adjustment they relied on the characterization concept under article 13 LGT.

The Supreme Court pointed out that, in its own judgments delivered on July 2, 2020 and July 22, 2020 (the first of these was summarized in our July - September 2020 newsletter), it had already held that the "characterization", "conflict in the application of tax rules" and "sham transaction" concepts must be used for the purposes for which they were created, and that the procedures specifically defined for each of those concepts must be observed. It also cited its own judgment delivered on February 23, 2023 (summarized in our March 2023 newsletter), in which it examined a very similar case.

In this new judgment, the court took the view that the tax authorities had overstepped their remit because, instead of simply characterizing the transaction performed by the parties and declaring the resulting tax obligations, they had isolated the business revenue stream that had resulted in the payment to the agents and associated it with another parallel transaction without demonstrating that this reflected the parties' true intentions.

1.13 Review procedure. – A court upholding an appeal against a judgment refusing admission of an application for judicial review must examine the substance of the matter if it has jurisdiction by reason of amount and subject-matter

Supreme Court. **Judgment of May 23, 2024**

The appellant filed an application at the judicial review court which was refused admission by judgment. An appeal was filed against that judgment, which was upheld by Madrid High Court. The court did not examine the substance of the matter, however, because it did not have jurisdiction by reason of amount. It therefore referred the proceedings for a judgment by the judicial review court.

The Supreme Court concluded that, if the court hearing an appeal against a judgment refusing a prior application for judicial review finds that the decision to refuse the application was incorrect, it is required, under article 85.10 of the Law on the judicial review jurisdiction, to examine the substance of the matter, provided that it has jurisdiction by reason of the substance of the appeal, based on the amount and subject-matter of the application. If, by contrast, the court does not have jurisdiction, it must set aside the refusal decision and revert the proceedings to the court that had delivered the judgment contested by the appeal, for it to deliver a decision on the substance of the matter.

2. Decisions

2.1 Corporate income tax. - Directors' compensation for non-executive functions is deductible even if it is not envisaged in the bylaws

Central Economic-Administrative Tribunal. **Decision of May 27, 2024**

In our February 2024 newsletter, we reported that TEAC had allowed the deduction for corporate income tax purposes of amounts of compensation paid to directors for the performance of executive functions, as long as an actual service falling outside the scope of their directorship functions had effectively been provided. The court continued to make the deduction of compensation for directorship functions dependent on corporate law compensation rules.

In this new decision, TEAC has amended this principle to adapt it to the interpretation upheld by the Supreme Court in its recent judgment of March 13, 2024 (appeal 9078/2022) (March 2024 newsletter), in which it reiterated its own case law on the subject (contained in its judgment dated June 27, 2023 - appeal 6442/2021- and judgment dated November 2, 2023 - appeal 3940/2022-, among others) in a case where the company's bylaws stated that directors were not to be compensated for their services. The tribunal allowed the deduction of this type of compensation for non-executive functions, on the basis that there is a clear valuable consideration, provided there is adequate support and recognition for accounting purposes.

2.2 Personal income tax. – If the rule based on the balance sheet for the latest fiscal year is applied to calculate the transfer price of shares in unlisted companies, the price cannot be modified even if errors are substantiated in that balance sheet

Central Economic-Administrative Tribunal. Decision of May 27, 2024

Article 37.1.b) of the Personal Income Tax Law contains a special pricing rule for transfers of shares in unlisted companies, stating that the transfer price cannot be lower than the greater of (i) equity according to the balance sheet for the latest fiscal year closed before the accrual date for the tax, and (ii) the value resulting from capitalizing at 20 percent the average earnings figure over the latest three fiscal years before the accrual date (unless proof is provided that the paid amount matches the price that would have been agreed between independent parties on an arm's-length basis).

TEAC held that this article contains a special pricing rule and the only exception to that rule requires the proof envisaged in the article itself (in other words, the interested party has to substantiate that the reported value is arm's length). Therefore, unless that proof exists, the price determined from the balance sheet must be used, even if the balance sheet contains errors.

3. Resolutions

3.1 Corporate income tax. - Tax losses can be offset without any limit against revenue obtained from a write-off under an arrangement with creditors

Directorate General for Taxes. Resolution V0931-24 of April 25, 2024

Under a viability plan for a concession holder company, the shareholders acquired, from the concession-holder's creditor financial institutions, part of a subordinated loan convertible into shares and later forgave the debt that the company owed to them. The creditor for the remainder of the loan (the part not acquired by the shareholders) converted its debt into equity. According to resolution number 5 by the Spanish Accounting and Audit Institute (ICAC), published in issue 79 of ICAC's Official Gazette in September 2009, this transaction should give rise to the following accounting entries at the concession-holder company:

(a) The write-off relating to the forgiven debt gives rise to an increase in equity at the company receiving the gift, which must match the value of the loan taken over by the shareholders and paid to the financial institutions.

(b) An amount equal to the difference between the amount of the gift (equal to the increase in equity) and the carrying amount of the written-off debt must also be recorded as revenue in that company's income statement.

According to the DGT, this revenue must receive the treatment for debt write-offs, which means that the company's tax losses can be offset against it without any limit. For these purposes, the DGT sees a debt write-off as a release or remission of debt, by the creditor to the debtor, which does not need to result from application of the provisions of the Insolvency Law (Law 22/2003 of July 9, 2003).

3.2 Corporate income tax. - Shares acquired before 2021 which represented at least a 5% ownership interest and had an acquisition value greater than €20 million cannot benefit from the transitional dividend exemption regime

Directorate General for Taxes. Resolution V0886-24 of April 23, 2024

In taxable periods that commenced before 2021, dividends could benefit from the exemption under article 21 of the Corporate Income Tax Law (i) if the ownership interest was at least 5%, or (ii) if it was below that percentage and the acquisition value was greater than €20 million. This second case was removed, coming into effect in 2021. However, the law defines a transitional regime for shares falling below that 5% ownership interest, if the acquisition value was higher than €20 million and the shares were acquired in taxable periods that commenced before 2021. This transitional regime allows the exemption to be applied to these shares in taxable periods commencing between 2021 and 2025.

The DGT noted that if before January 1, 2021 the two alternative requirements were fulfilled simultaneously (at least a 5% ownership interest and acquisition value higher than €20 million), the transitional regime cannot be applied. As a result, if a taxpayer acquired an ownership interest amounting to at least 5% before 2021, but that ownership interest later falls below 5%, the exemption cannot be applied, even if the acquisition value of that ownership interest is greater than €20 million. The FIFO method must be used to identify which shares are transferred.

3.3 Personal income tax – Analysis of how income from a phantom plan is taxed

Directorate General for Taxes. Resolution V0784-24 of April 17, 2024

A compensation plan (approved in 2021) contained an incentive to be calculated by reference to the appreciation in value of a number of phantom shares in the company's share capital. Under that plan, a senior manager received a percentage of phantom shares that would entitle him to receive a certain sum when all the shares in the company were sold to a third party. This transaction took place in 2023, before two years had run.

DGT analyzed the plan and concluded that (i) the grant of phantom shares gives rise, rather than to an amount of earned income for the senior manager, to the recognition of a right to receive compensation in the future; and that (ii) the amount received in 2023 following the liquidity event must be treated as earned income attributable to that fiscal year and cannot benefit from the treatment for multiyear income, because the period between the vesting of the rights relating to the phantom shares and the date when the income became payable was shorter than two years, and it was not income clearly obtained on a non-regular basis, either.

3.4 Personal income tax. – Providing living accommodation to an employee amounts to income in kind even if it is used for remote working

Directorate General for Taxes. Resolution V0711-24 of April 16, 2024

An employee works part of the time from living accommodation provided by his employer (who rents that living accommodation). The DGT recalled that, under Law 10/2021 of July 9, 2021 on remote working, the decisions to work remotely and on where that work is to be performed are made by the employee. Therefore, the provision of living accommodation is seen as income in kind (which must be valued under the legal rules on this type of income), even if the employee uses the living accommodation partly for work.

3.5 Nonresident income tax. - The income received by a UK resident silent partner is not taxable in Spain

Directorate General for Taxes. Resolution V0885-24 of April 23, 2024

A Spanish company engaged in purchasing rural properties for lease under business lease agreements signed a silent partnership agreement with a British company without a permanent establishment in Spain, which was interested in investing in the business consisting of the leasing of a given property. The Spanish company was the active partner and the British company, a silent partner. Every year, the Spanish company settles the silent partnership's accounts, and delivers to the British company its share of the year's income, by reference to its investment in the business.

The DGT concluded that this annual settlement creates an amount of income for the silent partner which must be treated as falling, in principle, within the definition of interest in article 11.2 of the Spain-United Kingdom tax treaty, and therefore, under that treaty, it is not taxable in Spain.

3.6 VAT. - Transfer pricing adjustments require the taxable amount for VAT purposes to be modified if they can be viewed as alterations to the pricing of earlier transactions between the parties

Directorate General for Taxes. Resolution V0565-24 of April 9, 2024

The DGT looked at whether transfer pricing adjustments on financing transactions between a parent company and its subsidiary are subject to VAT.

It concluded that where the transfer pricing adjustment relates to a prior supply of goods or services, made either by the subsidiary or by the parent, and entails an alteration to the agreed consideration, it constitutes a modification of the taxable amount and the necessary corrections must be made. If, by contrast, the amount transferred by the subsidiary to its parent company (or vice versa) by reason of the transfer pricing adjustments does not constitute an adjustment of the price or consideration for a supply of goods or services, it will not be subject to VAT.

3.7 Real estate tax. - If a taxpayer only owns part of a building they may apply for the tax bill to be split so they only have to pay their portion

Directorate General of Taxes. Resolution V0586-24 of April 9, 2024

The DGT concluded in this resolution that if a taxable person for real estate tax purposes owns only part of a building, they may ask the tax authorities to split the tax bill and charge to each co-owner only their portion of the payment obligation. For this to happen, the tax authorities must be provided with the personal particulars and addresses of the other taxable persons, as well as their ownership shares of the building.

4. Legislation

4.1 Publication of the annual equivalent rates for the third quarter of 2024, to characterize certain financial assets for tax purposes

The decision dated June 25, 2024 by the Office of the General Secretary for the Treasury and International Finance, published in the Official State Gazette (BOE) on June 28, 2024, sets out the annual equivalent rates relating to the third calendar quarter of 2024, for the characterization for tax purposes of certain financial assets. The rates are as follows:

- Financial assets with a term equal to or shorter than four years: 2.431 percent.
- Assets with terms higher than four, but equal to or shorter than seven years: 2.398 percent.
- Assets with ten-year terms: 2.676 percent.
- Assets with fifteen-year terms: 2.889 percent.
- Assets with thirty-year terms: 3.082 percent.

4.2 Amendments made to forms 038, 296 and 282

Order HAC/646/2024, of June 25, 2024, published in the Official State Gazette on June 28, 2024, amends the orders approving forms 038, 216 and 296 and 282.

In **form 038** (information return for transactions performed by entities registered at public registries), a new field has been added for listing transactions performed by entities registered at public registries, for the identification of registrations made on digital sheets.

Elsewhere, technical enhancements and corrections have been made to **form 296** (annual summary of withholdings and prepayments for nonresident income tax without a permanent establishment); and the classification of types of support has been updated in **form 282** (annual information return for support received under the Canary Islands Economic and Tax Regime and other government support).

4.3 Enhancements relating to the capitalization reserve for corporate income tax purposes and other new tax legislation

Royal Decree-Law 4/2024 of June 26, 2024, extending certain measures to confront the economic and social consequences of the conflicts in Ukraine and the Middle East, and adopting urgent tax, energy and social measures, was published in the Official State Gazette on June 27, 2024. In our publication dated June 27, 2024, we summarized the main tax measures introduced by this royal decree-law.

4.4 The voluntary payment period has been modified for tax on economic activities bills for 2024 in respect of the national and provincial amounts of tax payable

The decision dated May 31, 2024 by AEAT's Revenue Department, published in the Official State Gazette on June 12, amends the voluntary payment period for tax on economic activities bills for 2024 in respect of the national and provincial amounts of tax payable and stipulates where these amounts are to be paid.

That period starts on September 16 and ends on November 20, 2024, both inclusive.

Tax Department

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