GARRIGUES

Tax Newsletter

Spain

May 2025

Brazilian 'juros sobre o capital proprio' are exempt from corporate income tax

A recent ruling by the National Appellate Court has settled the issue by stating that tax treaties prevail over domestic laws which, as a general rule, cannot contradict the terms and spirit of tax treaties.

The Spanish tax agency (AEAT) has in the past questioned whether Brazilian *juros sobre o capital proprio* (JSCP) can benefit from exemptions allowed in the corporate income tax legislation. The first time was while the Revised Corporate Income Tax Law (TRLIS) was in force, when AEAT argued that these amounts of income could not benefit from either the exemption allowed (for dividends) in article 21 of the TRLIS, or the exemption under article 23.3 of the Brazil-Spain tax treaty. AEAT based its view on the fact that JSCPs are regarded as interest under Brazilian tax law, so they should be treated as interest in Spain. This interpretation was overturned by the National Appellate Court and the Supreme Court. The Supreme Court, in judgments dated March 16 and December 15, 2016, concluded that JSCPs were in fact income distributions, and therefore, could benefit from the exemption under article 21 of the Revised Corporate Income Tax Law.

The debate was reopened, however, following the entry into force of the current Corporate Income Tax Law (Law 27/2014, of November 27, 2014). Article 21 of the current Corporate Income Tax Law expressly states that the dividend exemption does not apply to shares in income where the distribution of the income gives rise to a tax-deductible expense, as is the case for JSCPs. The Brazil-Spain tax treaty has not been amended, however, and still determines the exemption method for dividends that are taxable in Brazil pursuant to the tax treaty itself, as is the case for JSCPs. The tax treaty does not contain any restriction on this exception if the above requirement is met. Therefore, even if the domestic legislation does not allow the exemption for types of income including JSCPs, the exemption is still applicable because it is allowed by the tax treaty.

The Directorate General for Taxes (DGT), AEAT and TEAC have not shared this conclusion. The DGT has issued a number of resolutions (V2960-16 and V2962-16) in which, starting out from the legal classification of JSCPs as shares in income, it nevertheless classifies this income as interest for the purposes of the Brazil-Spain tax treaty, so it takes the view that the recipient of the income is entitled to a deduction of a theoretical 20% tax, pursuant to article 23.2 of the tax treaty. AEAT and TEAC have adopted the same approach.

The National Appellate Court, however, has settled this issue by interpreting that JSCPs are exempt. In a new judgment dated May 22, 2025 (in an appeal handled by **Garrigues**), which we discussed in our publication dated June 5, 2025, the National Appellate Court pointed out, first, that tax treaties prevail over domestic laws and that, as a general rule, domestic laws cannot contradict the terms and spirit of tax treaties. It went on to point out that the Brazil-Spain tax treaty clearly classifies JSCPs as dividends not as interest, and therefore, even though the Revised Corporate Income Tax Law disallows application of the exemption it contains in article 21 (because the *juros* are deductible expenses for the Brazilian payer), the exemption is applicable under the tax treaty. The court added lastly that the DGT's resolutions cannot be a source of legislation (let alone contradict the terms of a treaty).

In short, the National Appellate Court clearly concluded that JSCPs are exempt, pursuant to article 23.3 of the Brazil-Spain tax treaty.

1. Corporate income tax

Tax groups

The DGT looks at how to apply the rules on unlimited offset of tax losses where income arose from a write-off obtained before joining a tax group (DGT. Resolution V0551-25 of March 31, 2025)

An entity recorded an amount of income for accounting purposes in respect of a write-off obtained in bankruptcy proceedings, which it adjusted in its tax base pursuant to article 11.13 of the Corporate Income Tax Law and which it had to reverse as and when the associated borrowing costs were recognized (it could offset tax losses against the included income, pursuant to article 26 of the Law). It later became the parent of a tax group, in which several subsidiaries had tax losses generated before joining the group.

The DGT pointed out that, if there are pre-group tax losses, an offset limit must be applied equal to the lower of (i) 70%, 50% or 25% (depending on the individual company's net revenues) of that entity's positive tax base, after taking into account the relevant eliminations and inclusions in respect of the internal operations in which it has participated; and (ii) 70%, 50% or 25% (depending on the group's net revenues) of the group's positive tax base before applying the capitalization reserve and offsetting the unused tax loss. And it concluded that the unlimited offset of tax losses against the income relating to the write-off should only be applied in the group to calculate the first of the limits mentioned above, because the entity obtained the write-off before the tax group was formed.

Analysis of the consequences on tax losses of the liquidation of a subsidiary (DGT. Resolution V0363-25 of March 20, 2025)

The DGT pointed out that, where an entity leaves a tax group, it is entitled to offset the group's unused tax losses in the proportion in which it contributed to its formation. Therefore, if the entity is dissolved, the right to offset losses in the future will be forfeited. Moreover, in its dissolution period, the entity must include in its tax base the difference between the market value of the transferred items and their tax value and the entity's individual tax base will form part of the group's tax base.

To determine the limit for offsetting pre-group tax losses and for offsetting the tax losses generated in the group to which the entity has contributed, the unlimited offset provided for in article 26 of the law must be taken into account in the tax period in which the entity is terminated.

Lastly, any loss that is generated for the shareholder must be reduced by the amount of any tax losses generated by the entity being terminated that were offset by the group and reduced also by the dividends from that entity that were exempt.

The company receiving a line of business can deduct unused borrowing costs generated by the transferor where the tax group is terminated (DGT. Resolution V0289-25 of March 17, 2025)

According to the DGT, where an entity takes over the rights and obligations of another company following the transfer of a line of business subject to the tax neutrality rules this includes the right for the beneficiary of the transfer to deduct the unused borrowing costs generated by the transferor (relating to debts incurred to operate the transferred assets).

Neutrality regime

Simplification of corporate structures can justify application of the tax neutrality rules in a downstream merger (DGT. Resolution V0455-25 of March 25, 2025)

A holding company and its only subsidiary (which carries on an economic activity) are considering a downstream merger, to simplify the group. The DGT confirmed that this transaction can benefit from the tax neutrality rules, after considering that there are valid economic reasons. It accepted that a simplification of corporate structures and elimination of dormant companies are legitimate aims from an operational standpoint.

Other rulings

Supplies of goods produced under a toll manufacturing arrangement and transported to customers from areas of Spain outside the Basque Country and Navarre take place in those areas (Supreme Court. Judgment of May 7, 2025)

An entity resident in an area of Spain outside the Basque Country and Navarre produces goods under a toll manufacturing arrangement for an entity resident in Vizcaya. The products are transported directly from that area to customers of the Vizcayan entity. The arbitration board took the view that the power to levy corporate income tax related to the area outside the Basque Country and Navarre, because the goods must be regarded as supplied where the last transformation process took place. The Supreme Court confirmed this conclusion, because it is the place where the good is made available that counts.

Clarification of various issues in relation to the reserve for investments in the Balearic Islands (DGT. Resolution V0340-25 of March 18, 2025

The rules on the reserve for investments in the Balearic Islands allow the tax base to be reduced by amounts of income allocated to a reserve for certain investments. The DGT clarified that, to apply the reserve in 2024, the sum of all *de minimis* aid obtained in the three years before the accrual date for the period in which the tax benefit is applied (2024, 2023 and 2022), together with any other aid that is regarded as State aid, cannot be higher than €300,000 for each "single undertaking" (as defined in article 2.2 of the General *De Minimis Regulation*). If this limit is overstepped in 2024, in 2025 (when the aid received in that year must be taken into account, together with that obtained in 2024 and 2023) and 2026 (when the aid received in that year must be taken into account, together with that received in 2025 and 2024), no new aid will be allowed to be used pursuant to the General *De Minimis* Regulation. That €300,000 limit must be calculated by reference to tax liability not tax base.

Moreover, the reserve must be recorded for accounting purposes in the year (2025) following the year in which the reduction is applied (2024); and the reserve may be used for any assets contributing to enhancement and protection of the environment in the Balearic Islands and for any other (tangible or intangible) assets meeting the requirements under additional provision 70 of the General State Budget Law for 2023 and its implementing regulations.

Assets of cultural interest are depreciated using the rates for "commercial, administrative, service and residential buildings" (DGT. Resolution V0485-25 of March 25, 2025)

The DGT pointed out that real estate assets declared as assets of cultural interest (BICs) must be reported by separating the value of the land from that of the buildings and other structures, and only air rights can be depreciated, using the rates in the tax tables for "commercial, administrative, service and residential buildings" (maximum rate of 2% and maximum depreciation period of 100 years). The rules provided for used goods can be applied also. Lastly, repairs and fixtures and fittings must be recorded as an expense, except in the case of renovation, extension or improvement of the property, where they must be capitalized and depreciated over the remaining periods in the property's useful life.

2. Personal income tax

Inbound expatriates can benefit from the tax-exempt per diem rules and are not taxed on compensation from share plans related to earlier work not carried out in Spain (DGT. Resolutions V0439-25 of March 21, 2025 and V0425-25 of March 20, 2025)

The DGT confirmed that any workers applying the inbound expatriate rules can benefit from the exempt per diem rules. It concluded further that any compensation obtained from receiving shares on the vesting of an RSU plan awarded while they resided outside Spain, as compensation for work carried out before they moved to Spain, will not be taxed in Spain either.

No minimum vehicle ownership period required to apply the tax credit for purchases of plug-in and fuel cell electric vehicles (DGT. Resolution V0444-25 of March 21, 2025)

The DGT has affirmed that the requirements for applying the tax credit for purchases of plug-in and fuel cell electric vehicles and charging points are those expressly set out in the legislation governing them, which does not require a minimum period of ownership of the vehicle.

Unpaid income to a deceased director must be recognized in the period when the director died (DGT. Resolution V0431-25 of March 20, 2025)

Until his death in 2023 a taxpayer was member of the boards of directors of two companies. The director's compensation earned in fiscal year 2023 until the date of his death was approved in 2024, at the meeting for approval of the accounts. According to the DGT, even though that compensation will be paid to his heirs, there is no change to either the deceased director's status as personal income taxpayer or the classification of the income as earned income. Therefore, that income must be recognized on his personal income tax return for the period in which he died.

An unused and automatically canceled amount on a fuel card does not give rise to earned income in kind (DGT. Resolution V0428-25 of March 20, 2025)

An employee receives an annual fuel allowance on a card. This amount is paid in monthly installments. The unused amount is automatically canceled each month. The DGT concluded that because the canceled amount has not been used by its beneficiary it does not give rise to an amount of income in kind.

The one-third rest period counts as time a vehicle is available for private use (DGT. Resolution V0422-25 of March 20, 2025)

An entity provides saloon vehicles to its employees for their work trips. The DGT pointed out that, where vehicles are used privately and for business purposes, a distribution rule has to be applied that takes into account the nature and characteristics of the tasks performed and only assesses availability for private use. The one-third rest period does not have to be excluded (as a general rule) to determine this availability; and calculation criteria based on hours of actual use or mileage (whereby private use does not arise when the vehicle is at the company's premises in time periods outside working hours) will be acceptable proof of that availability.

Subsistence per diems may be exempt from tax when the worker has a continuous working day (DGT. Resolution V0345-25 of March 19, 2025)

The DGT pointed out that subsistence per diems may be tax exempt (within the legal limits) only where the worker travels to perform tasks entrusted to him by his employer to a municipality that is neither the place of his habitual residence nor of his work; and stressed that this exemption may be applied even if the worker has a continuous working day.

3. Indirect taxes

The issuing and sending to the recipient of a correcting invoice is a substantive requirement for valid amendment of the taxable amount under article 80.4 of the VAT Law (Supreme Court. Judgment of March 31, 2025)

The Supreme Court concluded that, to amend the taxable amount for uncollectible debts, the issuing and sending to the recipient of a correcting invoice is a substantive requirement inherent to the dynamics of the VAT system. However, because, in the examined case, the VAT Regulations did not require the document to be sent using electronic systems on the dates when the correcting invoices were issued, it held that any suitable mechanism under the law that provides proof of satisfaction of that condition is valid, for which the burden of proof lies with the taxable person.

It concluded further that the period of one year and three months from accrual of the tax in which to amend the taxable amount is in line with the sought purposes and therefore is not particularly burdensome for taxpayers.

Finance income obtained from financing provided by a holding company to a subsidiary to acquire an investee must be included to calculate the deductible proportion of VAT (National Appellate Court. Judgment of May 7, 2025)

The court examined whether the finance income obtained by a holding company providing management support services to its investees should be included to calculate the deductible proportion of VAT. In particular, whether the provision of a loan to a group subsidiary to finance the acquisition of an investee, the issuing of convertible bonds to raise the funds needed for that transaction and the obtaining of interest on those bonds and on the loan, together the income from deposits and interest-bearing bank accounts, must be considered habitual for the purposes of that calculation.

The National Appellate Court's view is that these transactions have a commercial purpose, are carried out directly for the benefit of the business group and are fully aligned with the holding company's corporate purpose. It concluded therefore that the finance activities are a direct, permanent and necessary extension of its activities subject to VAT, and therefore that income must be included in the deductible proportion.

Amounts of remuneration received by a company for director services are subject to VAT (DGT. Resolution V0234-25 of March 5, 2025)

The DGT took the view that the conclusions reached by the CJEU in relation to no VAT on the remuneration received by individual directors cannot be broadened to include legal entity directors. Therefore, director services provided by companies that have trader or professional status are subject to VAT.

A purchase option on an unbuilt house is not subject to stamp tax (DGT. Resolution V0488-25 of March 25, 2025)

The DGT took the view that, if the purchase option on a home is not documented in a public deed, it is not subject to stamp tax. Otherwise, this type of purchase must be taxed only if the purchase option can be registered, which is unlikely if the home has not yet been built.

No transfer and stamp tax self-assessment needs to be filed for termination of a loan (DGT. Resolution V0260-25 of March 5, 2025)

The creation of a loan is subject to, but exempt from, transfer and stamp tax. Its termination, however, is not a taxable transaction, so it does not require a transfer and stamp tax self-assessment to be filed.

Transfer and stamp tax. – The taxable event for transfer and stamp tax purposes does not arise from deeds documenting invalid legal transactions without any registration effects (Supreme Court. **Judgment of May 27, 2025**)

After a private lease agreement for nonresidential use was recorded in a deed, that agreement was rendered null and void after it was identified that two co-owners who were minors had not been duly represented. For that reason, the Property Registry suspended registration due to the absence of valid consent. The Supreme Court held that, because the deed had not been validly executed with registration effects, no stamp tax had accrued (besides documenting an invalid transaction, the notarized document never became legally enforceable by express decision of the parties).

4. Wealth taxes

How to report amounts of insurance where their receipt is postponed or they are received in the form of income (DGT. Resolution V0547-25 of March 28, 2025)

The requesting individual is the beneficiary of a retirement insurance policy under which, on the occurrence of this contingency, he will receive a capital sum equal to the mathematical reserve for the contributions made, plus the mathematical reserve that would have been created under the profit share clause; added to this he is beneficiary of a group insurance policy also covering the retirement contingency, which will entitle him to receive a survivor's capital sum (which he will be able to choose to receive in the form of an annuity to be calculated by the insurance company when the time comes). The DGT concluded that the requesting individual must report the insurance policies on his wealth tax return at the value of the mathematical reserve on the accrual date or, if he receives an annual amount of income, by reference to the amounts of income.

The performance by an employee of other activities outside working hours does not stop real estate activities being treated as an economic activity (DGT. Resolution V0409-25 of March 20, 2025)

The DGT concluded that the requirement for there to be an employee with a full-time employment contract for the purposes of exemption from wealth tax will be regarded as fulfilled if that contract is classified as an employment contract under the current labor legislation, provided that the employee works full-time at the entity, regardless of whether they also carry out other activities at other entities outside working hours.

If the reported value of a property is lower than the reference value, a self-assessment can be filed to record this value, although never for a higher value (DGT. Resolution V0388-25 of March 20, 2025)

The DGT pointed out that a supplementary self-assessment can be filed to include the reference value on the accrual date for inheritance and gift tax, if the originally reported amount was lower than that reference value; although not to report a value higher than the reference value (because that reference value acts as taxable amount, unless the reported value is higher).

5. Local taxes

The exemption from real estate tax applicable to "private" railway infrastructure is not precluded by EU law (Court of Justice of the European Union. Judgment of April 29, 2025. Case C-453/23)

The CJEU concluded that the legislation of a member state that exempts from real estate tax land, buildings and structures forming part of railway infrastructure (including private railway branch lines), when this infrastructure is made available to rail carriers, is not a measure that provides a selective advantage to the beneficiaries of the exemption, which may give rise to State aid that is incompatible with EU law.

Interested parties can challenge any "information notices" in which the Cadaster refuses to initiate a procedure to correct discrepancies (Central Economic-Administrative Tribunal. Decisions of April 28, 2025)

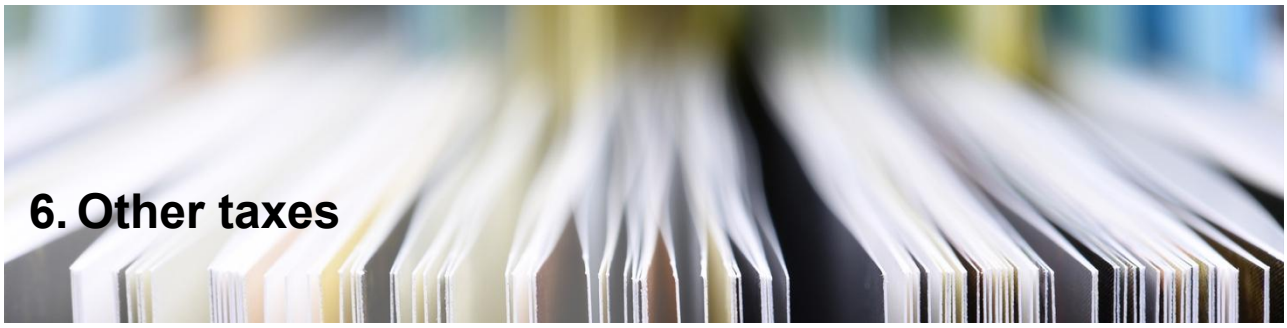
In two claims advised by Garrigues, TEAC concluded that the interested parties can challenge acts by the Cadaster in which it refuses to initiate a procedure for correcting discrepancies, even if the authority says that they are purely "information notices" and expressly mentions that they cannot be appealed. This ruling involves a change of principle from the view previously upheld by TEAC.

The years in which transferred urban land had rural status also count to calculate the taxable amount for the tax on increase in urban land value (DGT. Resolution V0421-25 of March 20, 2025)

The DGT concluded that the calculation of the number of years over which the increase in value of the land took place to determine the taxable amount for the tax on increase in urban land value starts from the date it was acquired by the taxpayer, even if it was not urban land on that date.

Unincorporated joint ventures must be registered for the tax on economic activities (DGT. Resolution V0263-25 of March 6, 2025)

Unincorporated joint ventures carrying on economic activities (organizing means of production and/or human resources on their own behalf, to participate in the production or distribution of goods or services) are subject to, and not exempt from, the tax on economic activities and must be registered for this tax. In a specific case involving an unincorporated joint venture engaged in construction, its activity must be classified in group 508 of the first section, the specifications in the related note must be applied to it, and it must be registered in that group with no payment of tax.



6. Other taxes

TEAC accepts supreme court doctrine on authority, jurisdiction and conditions to obtain a refund of the regional rate for the tax on oil and gas (Central Economic-Administrative Tribunal. Decisions of March 27, 2025 -R.G. 4491/2021 and 6193/2022-)

TEAC changed its criterion to accept the Supreme Court's doctrine reflected, among others, in its judgment of September 20, 2024 (appeal 1560/2021) (October 2024 newsletter) on authority, jurisdiction and conditions in connection with obtaining a refund fund of incorrectly paid tax on oil and gas for which the regional rate was held to be precluded by EU law in a judgment dated May 30, 2024 (publication dated May 30, 2024). It concluded that taxpayers who have paid the tax on oil and gas by reason of a statutory charge are entitled to request and obtain a refund of the tax, unless they have charged the tax to the purchaser of the product, thereby neutralizing its economic effects. The burden of proving that the charge did not take place lies with the tax authorities.

End customers are not authorized to apply for refunds or to be a party in refund procedures for incorrect payments of any amounts paid on purchases of taxable products. The cost may be recovered via a civil remedy for unjust enrichment against the supplier.

7. Tax procedure

The tax authorities cannot ignore the reported facts without using the specific procedures provided in the law (Supreme Court. Judgments of April 29, 2025, May 5, 2025 -appeals 8599/2023 and 4066/2023-, May 6, 2025 and May 12, 2025)

The Supreme Court pointed out that the tax authorities' power to characterize allows them to determine the true legal nature of transactions, regardless of the form given by the parties, although only if they follow the procedures and guarantees provided for cases involving a sham or conflict in the application of tax provisions. It stressed further that anti-avoidance mechanisms are not interchangeable. In other words, characterization cannot be used as a general mechanism for combating artificial, avoidance or sham structures.

A director does not have strict liability and the tax authorities have to prove the grounds for liability (Supreme Court. Judgment of May 20, 2025)

Article 43.1.a) of the LGT provides that any *de facto* or *de jure* directors of legal entities who, following tax infringements, did not take the necessary steps to fulfill tax obligations and duties, consented to the breach or adopted decisions enabling the infringements must be jointly and severally liable for the tax debt. They must also be liable for any penalties. The Supreme Court confirmed its principle and pointed out that this is a punitive regime, meaning that (i) they do not have strict liability, in other words their liability cannot based solely on an individual's director status, because this would be contrary to the principle of presumption of innocence; and, in addition, (ii) the burden of proof cannot be reversed; it is the tax authorities who have to prove the facts determining the enforcement of joint and several liability, rather than the director who has to prove his innocence.

It is not contrary to the principle of proportionality to hold a director liable for failing to comply with his obligation to notify the tax authorities of the inability to pay a VAT tax debt, if the director is allowed to rebut the presumption (Court of Justice of the European Union. Judgment of April 30, 2025. **Case C-278/24**)

The Polish legislation on the collection of taxes provides that a member or former member of the board of directors of a company is jointly and severally liable for tax debts arising during their term of office unless they (i) apply for a declaration of insolvency or adopt a decision to initiate restructuring proceedings, (ii) prove that the failure to apply for an insolvency order was not due to fault on their part, or (iii) identify company assets on which mandatory enforcement will enable the tax arrears to be recovered to a large extent.

The CJEU concluded that the principle of proportionality or the right to property does not preclude the described provisions of national legislation, if the director is given the chance to demonstrate that they were not at fault; for which it will not suffice to submit that, at the time of the insolvency, the Public Treasury was the only creditor, because this would imply unequal treatment with respect to the directors of companies with more than one creditor.

The amendment to the LGT that allows management bodies to verify special tax regimes applies to proceedings initiated on or after January 1, 2023 (Central Economic-Administrative Tribunal. Decision of April 22, 2025)

Royal Decree-Law 13/2022 amended, effective on January 1, 2023, article 117.1.c) of the LGT, to confer on management bodies the power to

recognize and verify compliance with the requirements for special tax regimes. Until then, the power to verify these requirements lay with tax audit bodies. In a conclusion based on the Supreme Court's case law, TEAC held that this amendment is applicable to proceedings initiated on or after January 1, 2023, regardless of the tax period to which the procedure relates.

The basis of a penalty on a shareholder must be reduced by the amount overpaid by the company only if it is declared that the company is a front company and that its activity really relates to the shareholder (Central Economic-Administrative Tribunal. Decision of July 19, 2024)

The Supreme Court concluded in its judgment of June 8, 2023 (appeal 5002/2021) (June 2023 newsletter) that, where the company is held a sham and it is determined that all its activity relates to the shareholder, the basis for calculating the penalty must be the difference between the amount not paid by the individual and the amount paid by the company held to be a sham (unlike adjustments for controlled transactions, where the basis for calculating the penalty must be the amount not paid by the individual). TEAC concluded that the Supreme Court's doctrine is applicable only where the interposition of the company has been held a sham (and therefore, the whole activity is attributed to the shareholder); not where the sham is the commercial relationship between the individual and the company.

8. Other news

Approval of the self-assessment and prepayment forms for the tax on interest and fee income for certain financial institutions

Order HAC/532/2025, of May 26, 2025 (published on May 29, 2025) approved Form 780 for self-assessments and Form 781 for prepayments, which are to be used for the first time for returns with filing periods commencing in 2025.

Publication of the Multilateral Competent Authority Agreement on Automatic Exchange of Information Pursuant to the Crypto-Asset Reporting Framework; and the Addendum to the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information

The Multilateral Agreement and the Addendum, published in the Official State Gazette on May 27, 2025, aim to strengthen compliance with international tax obligations, by deepening mutual assistance in tax matters.

Approval of DAC9 on the contents and exchange of the top-up tax information return

Council Directive (EU) 2025/872 of 14 April 2025 amending Directive 2011/16/EU (known as DAC9) was published in the Official Journal on May 6, 2025. The directive sets out the contents of the top-up tax information return and the system for exchanging its contents between authorities of the EU member states. The deadline for transposing this directive is December 31, 2025. We provided a summary of the main new legislation in a publication dated May 23, 2025.

Administrative time periods have been extended due to the power outage

Order PJC/414/2025, of April 30, 2025, published in the Official State Gazette on May 1, 2025, contains the Decision adopted by the Council of Ministers on April 30, 2025, which extends the administrative terms and time periods affected by the power outage on April 28, 2025 until 0:00 am on May 6, 2025.

More information:

Tax

GARRIGUES

Plaza de Colón, 2
28046 Madrid
T +34 91 514 52 00
info@garrigues.com

Follow us on:

Blog

garrigues.com