GARRIGUES

NEWSLETTER
TAX

NOVEMBER 2017

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GARRIGUES

TAX

TAX NEWSLETTER

Until recently, the connecting factors for inheritance and gift tax purposes under Spanish law, prevented, among other things, the application of autonomous community legislation (more favorable than central government legislation in some cases) to non-Spanish resident taxable persons even if the deceased had been resident in Spain. The CJEU concluded that this law was contrary to the free movement of capital in its judgment of September 3, 2014, in case C-127/12. In the wake of that judgment, those connecting factors were altered in Spanish law, but only for cases in which the taxable persons reside in the EU or in the European Economic Area.

In this newsletter we discuss the supreme court judgments rendered on October 17, October 23 and October 24 2017, examining cases involving assessments which were already final when the CJEU judgment was published.

The Supreme Court concluded that in these cases it was necessary to refund the excess tax paid as a result of the financial liability of the State, on the basis of the following points:

a) Sufficiently characterized breach of EU law: clear and reiterated case law existed, rendered by the CJEU on similar cases, which the tax authorities should have known and which prevented the central government legislation on the tax from being kept in force.

b) Causal relationship: the direct cause of the damage for which indemnification is claimed is the difference in treatment caused by applying the connecting factors laid down by the central government legislation held contrary to EU law.

And all of the foregoing is regardless of the final nature of the tax assessments. The Supreme Court affirmed in this respect that neither the fact of the right to obtain the refund of incorrect revenues being statute-barred nor the final nature of the assessments prevent a claim for financial liability of the State, with different claims sought in each case.

The Supreme Court also overruled that there had been concurrent fault on the part of the autonomous communities, because the damage was caused by central government legislation (that determining the connecting factors for the tax).

1 Judgments

1 ANTI-ABUSE CLAUSES.- A GENERAL PRESUMPTION OF FRAUD CANNOT JUSTIFY A MEASURE THAT ADVERSELY AFFECTS THE EXERCISE OF A FUNDAMENTAL FREEDOM GUARANTEED BY THE TREATY (COURT OF JUSTICE OF THE EUROPEAN UNION. JUDGMENT OF OCTOBER 25, 2017, CASE C-106/16)

Under Polish law, the removal of a Polish company from the commercial register (when that company relocates its head office to another member state pursuant to a shareholders' decision to continue the legal personality acquired in Poland) requires the winding up of the company.

The Polish government relied on overriding reasons in the public interest to justify this restriction on freedom of establishment, and in particular, on the prevention of abusive practices.

The CJEU, however, held that the fact that either the registered office or the real head office of a company was established in accordance with the legislation of a member state for the purpose of enjoying the benefit of more favorable legislation does not, in itself, constitute abuse. Therefore, the simple fact of a company transferring its registered office from one member state to another cannot be the basis for a general presumption of fraud and cannot justify a measure that adversely affects the exercise of a fundamental freedom guaranteed by the Treaty.

2 CORPORATE INCOME TAX.- A LAW THAT LIMITS THE DEDUCTION OF INTEREST ON LOANS THAT DOES NOT RELATE TO THE FINANCING OF HOLDINGS UP TO AN AMOUNT EQUAL TO THAT OF THE DIVIDENDS RECEIVED FROM SUBSIDIARIES IS CONTRARY TO THE PARENT-SUBSIDIARY DIRECTIVE (COURT OF JUSTICE OF THE EUROPEAN UNION. JUDGMENT OF OCTOBER 26, 2017, CASE C-39/16)

Belgian tax law provides that a parent company cannot deduct the interest paid on its financing, up to an amount equal to that of the dividends received from its subsidiaries, even if that interest does not relate to the financing of its holdings.

Articles 4.1 and 4.2 of the Parent-Subsidiary Directive provide that "*each Member State shall retain the option of providing that any charges relating to the holding and any losses resulting from the distribution of the profits of the subsidiary may not be deducted from the taxable profits of the parent company*". Article 4.1 also provides that, where a parent company receives profits distributed by its subsidiaries, the State of the parent company must (i) refrain from taxing such profits, or (ii) authorize the parent company to deduct from the amount of tax due that fraction of the corporate income tax paid by the subsidiary which relates to those profits and, if appropriate, the amount of the tax withheld at source.

In this context, a request for a preliminary ruling was made to the CJEU for it to rule as to whether a tax law such as the Belgian law described above is contrary to the Parent-Subsidiary Directive. The CJEU concluded that it was, on the basis of the following points:

a) That the wording of article 4.2 of the Parent-Subsidiary Directive is clear and unequivocal so as to mean that the provision allows a member state to preclude a parent company from deducting from its taxable income only "charges relating to the holding of that parent company in the capital of its subsidiary".

b) That rule would negate the effectiveness of the rule set out in article 4.1 if that first rule had to be interpreted as allowing member states to preclude the deduction of all interest charged in respect of loans up to an amount equal to the amount of (exempt) dividends received from a

subsidiary, even if they are not related to the financing of the holdings that pay out those dividends.

3 CORPORATE INCOME TAX.- THE COST OF CONTAINERS AND PACKAGING IS NOT INCLUDED IN THE BASE FOR CALCULATING THE TAX CREDIT FOR PUBLICITY AND ADVERTISING EXPENSES RELATED TO SUPPORT PROGRAMS FOR EVENTS OF EXCEPTIONAL PUBLIC INTEREST (NATIONAL APPELLATE COURT. JUDGMENT OF OCTOBER 18, 2017)

At issue was what “publicity and advertising expenses related to support programs for events of exceptional public interest” means for the purposes of calculating the corporate income tax credit under article 27.3 of Law 49/2002 in the case of containers and packaging bearing the logo of the event.

The National Appellate Court changed its view to adopt that delivered by the Supreme Court in its judgment of July 13, 2017, according to which, in relation to any advertising medium, a distinction must be made between (i) the portion of the medium that fulfills a strictly advertising function (ii) and the portion that has other different functions, so that only the first of these types of costs may be included in the base for the credit.

That supreme court judgment rendered on July 13 was discussed in our September 2017 Tax Newsletter.

4 INHERITANCE AND GIFT TAX.- THE STATE MUST REIMBURSE TAXES THAT ARE STATUTE-BARRED IF ITS PROCEDURES HAVE INFRINGED COMMUNITY CASE LAW. (SUPREME COURT. JUDGMENTS OF OCTOBER 17, OCTOBER 23 AND OCTOBER 24 2017)

The connecting factors for inheritance and gift tax purposes under Spanish law prevented, until a few years ago, among other things, the application of autonomous community legislation to non-Spanish resident taxable persons even if the deceased had been resident in Spain.

Following the CJEU judgment of September 3, 2014 (case C-127/12) and the amendment of the Spanish legislation, the refund of the excess tax paid when the relevant assessments were final was denied.

The Supreme Court concluded that the tax was allowed to be refunded, because in this case the financial liability of the State exists, given that, among other reasons, when that CJEU judgment was rendered there was clear and reiterated case law for similar cases, which the authorities should have known and which prevented the central government legislation contrary to EU law from being kept in force.

5 INHERITANCE AND GIFT TAX.- RELATIONSHIP BY AFFINITY IS NOT EXTINGUISHED WHEN RELATIONSHIP BY CONSANGUINITY DISAPPEARS FOLLOWING A DEATH (SUPREME COURT. JUDGMENT OF SEPTEMBER 25, 2017)

The deceased left his inheritance to the nephew of his spouse, who had died years before the deceased. For this reason, the tax authorities considered that, at the time of the deceased’s death, his nephew in law was no longer entitled to be included in Group III (collateral relatives within the second and third degree), given that his relationship by affinity no longer existed at that time.

The Supreme Court concluded, however, that relationship by affinity does not require the continuing existence of the relationship by marriage or consanguinity, and therefore, in the event of the death of the person related by consanguinity (the spouse of the deceased, in this case), the relationship by affinity is not extinguished.

6 INHERITANCE AND GIFT TAX.- A REPORT BY AN ECONOMIST AND AUDITOR IS VALID TO REFUTE THE LEGAL PRESUMPTION AS TO HOW TO VALUE PERSONAL ITEMS (VALENCIA HIGH COURT. JUDGMENT OF MAY 31, 2017)

It is presumed in inheritance and gift tax legislation that personal items amount to 3% of the value of the

deceased's estate. In the case under examination, the taxpayer submitted with his self-assessment an expert report prepared by an economist and auditor, containing a description and appraisal of the deceased's personal items and determining a value lower than that 3%.

The tax authorities did not allow the evidence produced by the taxpayer by arguing that the expert was not sufficiently qualified to draw up the expert report.

Against this decision, Valencia High Court (as the Asturias High Court had done in its judgment of February 6, 2017) concluded that the taxpayer is allowed to refute the legal presumption by producing an expert report, adding that the appraisal made by an economist and auditor is perfectly valid due to that person being sufficiently qualified to issue an expert report with these characteristics.

7 TAX PROCEDURE.- ON THE LIMITS TO THE AUTHORITIES FINDING EXPIRATION OF THE STATUTE OF LIMITATIONS (SUPREME COURT. JUDGMENT OF OCTOBER 18, 2017)

At issue was the case of a taxpayer who, in the context of an enforcement ancillary proceeding brought against the decision on enforcement of a decision by TEAC (Central Administrative-Economic Tribunal), raised for the first time that the tax authorities' right to make an assessment was statute-barred. The lower court's judgment dismissed the taxpayer's claim by arguing that the taxpayer could have raised this issue (i) either in the economic-administrative claim lodged against the assessment and penalty rendered initially, (ii) or later in the application for judicial review against TEAC's decision.

The issue submitted to the Supreme Court was whether a finding should have been rendered on expiration of the statute of limitations, due to being a public matter which should have been found by the authorities, even if the taxpayer does not plead that it had occurred.

The Supreme Court held that the cassation appeal was baseless and specified that there are limits on the scope of the obligation for the authorities to find expiration of the statute of limitations period, by affirming that an excessive length, besides contributing to an abuse of a right, would harm the right of defense, a right also held by the tax authorities. The Court clarified that the statute of limitations does not have to be applied by the authorities when to do so requires the assessment of facts that were not at issue or the application, after first examining the statute of limitations, of rules, legal concepts or mechanisms which were not questioned at the appropriate time.

8 TAX PROCEDURE.- ON FORMAL RESUMPTION OF PROCEDURE AFTER THE MAXIMUM LENGTH FOR PROCEEDINGS HAS BEEN EXCEEDED (SUPREME COURT. JUDGMENT OF SEPTEMBER 1, 2017)

The maximum length for proceedings was exceeded in an audit. The proceedings were resumed, however, without giving any express notification of that resumption; formally, therefore, the only step that was taken was to issue an "ordinary" notice of findings in the course of the proceeding.

The General Taxation Law determines that where an audit exceeds the maximum length for proceedings, it will not be considered that the statute of limitations has been interrupted unless "*the proceedings were resumed with the formal knowledge of the interested party*".

The Supreme Court confirmed in this judgment its reiterated case law in which it requires, for the effect of interrupting the statute of limitations to take place, that the formal resumption must be notified through a notice to the party with tax obligations in which (i) it is explained that, because the maximum length for the procedure has run, it has been resumed, and (ii) the party is informed of the items and periods that will be included in the proceedings that are resumed. Therefore, in the case examined in this judgment it was confirmed that the authorities' right to determine the tax debt for one of the years being audited had become statute-barred.

9 TAX PROCEDURE.- IF DOCUMENTS ARE NOT FILED DUE TO DEFECTIVE NOTIFICATION BY THE TAX AUTHORITIES THEY MAY BE FILED LATER IN AN APPEAL (NATIONAL APPELLATE COURT. JUDGMENT OF JULY 18, 2017)

The tax authorities denied the refund of items of input VAT paid by the taxpayer. In a later appeal, the taxable person produced documents evidencing the right to deduct those items. The appeal was dismissed because the documents had been produced after the audit process.

The taxpayer therefore pleaded denial of due process rights on the basis that the late production of documents was due to defective notification of the reporting requirements by the auditors. Specifically, the auditors had notified of those requirements by using the mandatory electronic notification system, in some cases, and the notification system through the tax agent, in others.

The National Appellate Court concluded that this practice by the tax authorities gave rise to a denial of due process rights and absence of legal certainty, ordering the reversion of procedure to the audit so that the auditors could reissue their opinion having regard to the documents produced by the taxpayer.

2 Judgments decisions and rulings

1 CORPORATE INCOME TAX.- ALTHOUGH AUDITING THE PRICING OF CONTROLLED TRANSACTIONS MUST BE HANDLED SEPARATELY, AN ASSESSMENT FAILING TO SATISFY THIS REQUIREMENT MAY NOT BE RENDERED NULL AND VOID (CENTRAL ECONOMIC-ADMINISTRATIVE TRIBUNAL. DECISION OF OCTOBER 5, 2017)

Following an audit, an assessment was issued in respect of corporate income tax in which transfer pricing adjustments were proposed to the tax base, together with others resulting from the auditors questioning the deduction of certain expenses, with a breach of provisions in the corporate income tax regulations. The taxpayer applied for the subsequent assessment confirming the notice of assessment to be held null and void.

TEAC affirmed that this was a simple formality which did not give rise to an absolute breach of procedure, and therefore it could not be held that the assessment was null and void as a matter of law. TEAC underlined on this subject that no denial of due process had taken place, because the taxpayer could have pleaded that procedural defect in the phase for inspection of the case file in the proceeding, or in the pleadings to the notice of assessment, which it did not do until the assessment confirming the notice of assessment was issued.

2 CORPORATE INCOME TAX.- THE TAX BENEFIT IN RESPECT OF THE RESERVE FOR INVESTMENTS IN THE CANARY ISLANDS IS MAINTAINED AFTER MERGER AND SPLIT-UP TRANSACTIONS (GENERAL DIRECTORATE FOR TAXES. RULING V1836-17, OF JULY 12, 2017)

Company A held a direct interest in company B and an indirect interest, in company C. Company B owns two, and company C owns four, hotel establishments on the Canary Islands. Both companies (B and C) have recorded sums in the Reserve for Investments in the Canary Islands (RIC). A merger of companies B and C was being considered (with B as the absorbing company) so as, later, to split up the post-merger company into as many companies (six) as hotel establishments it had under its control. A complete split-up of A would later be performed, by hiving off all of A's equity to the six companies resulting from the earlier split-up.

The reasoning behind these transactions was, ultimately, to separate the hotel establishments according to their characteristics and strategic plans, separate the business risks associated with the various assets and prepare for future succession (having regard to the existence of separate management styles among the successors of the owner of A), to enable survival and continuity of the business group.

It was asked:

a) Whether the tax neutrality regime could be elected for the merger and split-up transactions.

b) Whether as a result of those transactions, the rights and obligations attached to the RIC were transferred to the acquirers, without affecting the obligations related to satisfaction of the formal and holding requirements associated with that tax benefit.

The DGT concluded that:

a) The neutrality regime could be elected for the described transactions (merger of B and C and split-up of the post-merger company, and later, of company A); for the split-ups, the requirement for proportionality in the distribution to the shareholders of the shares in the new companies must be observed.

b) Regarding the RIC:

a In the merger between B and C, B would be subrogated to the rights and obligations in connection with the RIC that were held by C.

b. The beneficiary companies in the split-up of the new company following the merger of B and C would also be subrogated to the same rights and obligations related to the RIC.

c.Those beneficiary companies of the split-up would have to satisfy the obligations related to the RIC for the remaining amount of time in the period granted to satisfy those obligations.

3 PERSONAL INCOME TAX.- TAXATION OF A LEASE AGREEMENT WITH A CALL OPTION ON A DWELLING (DIRECTORATE GENERAL FOR TAXES. RULING V2079-17, OF AUGUST 3, 2017)

The request concerned the treatment for personal income tax purposes of a lease agreement on a dwelling in which the lessor did not carry on an economic activity.

The DGT mentioned that the execution of a lease agreement with a call option may give rise to two separate capital losses or gains for the lessor/grantor:

a) The grant of the call option gives rise for the grantor to a capital gain that is disclosed when the option is granted, and amounts to the value actually received in respect of the option. Due to not resulting from a transfer, the capital gain must be characterized as general income and recognized in the tax period in which the call option right on the dwelling is formalized.

b) If the call option is exercised later, the transfer of the building will give rise to a new capital gain. In this case, the amount received earlier by the lessor in respect of a call option on that building, together with the sums paid in respect of the lease of that building until the call option is exercised will be subtracted, if this has been covenanted, from the covenanted aggregate price in respect of the transfer of that dwelling, for the purposes of calculating the capital gain or loss resulting from that transfer.

In relation to this last point, we discussed in our October Newsletter earlier in 2017, a ruling request dated July 18, 2018 (V1895-17), examining the taxation of the sale of a building that had previously been leased, with an agreement including a clause allowing the sums paid in respect of lease payments to be discounted from the price. In that case, the DGT specified that for the purposes of calculating the capital gain or loss arising on the transfer, any discounts covenanted between the parties could not reduce the transfer value.

4 PERSONAL INCOME TAX.- THE TAXPAYER IS ALLOWED TO ELECT THE MULTI-YEAR INCOME FROM WHICH THE 30% REDUCTION WILL BE MADE (DIRECTORATE GENERAL FOR TAXES. RULING V2070-17, OF AUGUST 2, 2017, AND RULING V2081-17, OF AUGUST 3, 2017)

Under the Personal Income Tax Law, salary income generated over a period longer than two years may benefit from a 30% reduction unless in the previous five

tax periods the taxpayer had obtained other income items generated over periods longer than two years to which it had made the reduction.

The DGT concluded in this ruling that if the taxpayer has more than one income item generated over periods longer than two years in five tax periods, that taxpayer may choose to which type of income it will make the reduction.

Moreover, it recalled that Form 145 allows the taxpayer to inform its payer whether, in the period comprising the 5 tax periods prior to the year in which it receives income generated over more than two years, it received income of the same type which was treated as multiyear income when the relevant withholding was made, and the taxpayer did not, however, later apply that treatment on its personal income tax self-assessment return.

5 TRANSFER AND STAMP TAX.- THE APPRAISAL DEED FOR AUCTION PURPOSES IS NOT ASSESSABLE FOR STAMP TAX PURPOSES (CENTRAL ECONOMIC-ADMINISTRATIVE TRIBUNAL. DECISION OF OCTOBER 10, 2017)

It was examined whether stamp tax fell due on the notarized documents recording an appraisal decision for the purposes of an auction. Under the principle settled in the Valencia high court judgment of April 4, 2014 and in its own decision of May 12, 2009, TEAC concluded that the appraisal deed for auction purposes is not subject to stamp tax, on the basis of the following arguments:

a) That document does not include an act establishing a legal transaction but rather a declaration of intention related to an act that has already been registered and which, therefore, had already been taxed when it was established.

b) The appraisal for auction purposes does not have any effect on the registered mortgage. So, regardless of the appraised value of the property for auction purposes, it will continue to be subject to the same liability figure assigned to it.

c) Not every mention of a figure or value in the document implies that it becomes "assessable" for the purposes of the tax.

6 TRANSFER AND STAMP TAX.- TO CALCULATE THE PROPORTION LAND AND BUILDINGS BEAR TO TOTAL ASSETS FOR THE PURPOSES OF ARTICLE 108 OF THE SECURITIES MARKET LAW, AEAT DOES NOT NEED TO VALUE ALL ASSET ELEMENTS (CENTRAL ECONOMIC-ADMINISTRATIVE TRIBUNAL. DECISION OF OCTOBER 10, 2017)

The authorities examined whether a given transfer of shares was taxable for transfer and stamp tax purposes under article 108 of the Securities Market Law (LMV). For these purposes, it replaced the carrying amounts of some items of land and buildings for their actual values but did not do so for all items of land and buildings or for its other assets.

TEAC concluded that the tax body responsible for the audit may only carry out specific appraisal or valuation procedures for real estate assets if their carrying amounts raise serious doubts over their consistency with their actual values.

7 TAX PROCEDURES.- THE ENFORCEMENT OF A DECISION PARTIALLY UPHOLDING A CLAIM WITH REVERSION OF PROCEDURE TO ALLOW THE PERSON RESPONSIBLE TO ELECT THE REDUCTION DOES NOT REOPEN THE DECLARATION OF LIABILITY PROCEEDING (CENTRAL ECONOMIC-ADMINISTRATIVE TRIBUNAL. DECISION OF OCTOBER 26, 2017)

A taxpayer was held secondarily liable for a company's debts. After disagreeing with the declaration of liability, it brought a claim with Castilla-La Mancha Regional Economic-Administrative Tribunal (TEAR), which was partially upheld. Specifically, Castilla-La Mancha TEAR accepted that the procedure had to be reverted to allow the option to reduce the penalties to be granted to the taxpayer as provided in article 188 of the General Taxation Law (reductions as a result of acceptance of the assessment -30%- and as a result of payment of the penalty within

the time limit without lodging an appeal or claim –further 25% -).

In enforcing that Decision, AEAT re-notified the decision declaring liability, recognizing that the 25% reduction applied and granting a new payment period.

In the later ancillary proceeding for enforcement, Castilla-La Mancha TEAR rendered that new decision null and void on the ground that the time period had lapsed, and also held that AEAT's right to claim payment of the debt had become statute-barred. In an application for a ruling on a point of law made by AEAT to TEAC, TEAC concluded that:

(i) In proceedings on the application of taxes subject to strict time bars, as is the case with collection proceedings, if a decision or judgment orders reversion of procedure as a result of formal defects, a further six month period to complete the proceedings is not granted to the authorities.

(ii) The enforcement of a decision partially upholding an economic-administrative claim, and ordering reversion of procedure does not entail a reopening of the declaration of liability proceeding. Therefore, the decision shifting liability may not be rendered null and void and the enforcement of the administrative decision will only imply the notification of a new request for payment so that the person held liable has the option to elect those reductions.

8 TAX PROCEDURES.- A PROVISIONAL ASSESSMENT RENDERED AS A RESULT OF A REQUEST FOR A REFUND OF INCORRECT PAYMENTS MAY HAVE PRECLUDING EFFECTS (CENTRAL ECONOMIC-ADMINISTRATIVE TRIBUNAL. DECISION OF OCTOBER 23, 2017)

As a result of an application for the refund of incorrect payments, the authorities carried out a partial audit in which the documents evidencing an acquisition of a surface right made by the taxpayer were requested. As a result of the review performed, a provisional assessment was issued and signed with acceptance, granting the requested refund to it.

In a later general audit, the tax authorities reassessed the sale and purchase transaction described above.

TEAC concluded that the original partial audit is not allowed to be characterized simply as a formal audit because the auditors did not confine themselves to confirming that the reported data matched those appearing at registries or in documents, but instead carried out a proper review of that sale and purchase transaction. All in all, because a complete review of the transaction was performed in that first audit, the authorities cannot reexamine it in a later audit.

9 TAX PROCEDURES.- IF THE ASSESSMENT IS RENDERED VOID ON PROCEDURAL GROUNDS, A SECOND PENALTY PROCEEDING MAY BE CONDUCTED (CENTRAL ECONOMIC-ADMINISTRATIVE TRIBUNAL. DECISION OF OCTOBER 5, 2017)

It was examined whether after a penalty had been rendered null and void by reason of the assessment that gave rise to its being held invalid, a penalty may be imposed on the basis of the new assessment that is issued.

Under the principle determined in its Decision of November 5, 2015, TEAC recalled that the answer to that question depends on the nature of the defect that gave rise to the assessment and on the contents of the decision rendering it null and void:

a) If a material defect is found in the assessment resulting in its being held completely invalid, and a second assessment is later issued, the conduct of a new penalty proceeding will be disallowed under the *ne bis in idem* principle preventing examination of same facts twice.

b) If, however, the assessment is held invalid on the ground of a procedural defect, the decision to hold the penalty invalid is imposed by that procedural defect, and no decision will be allowed on the facts related

to the penalty; so, when the proceeding is conducted again and a new assessment is issued, that principle preventing examination of same facts twice does not disallow the conduct of a new penalty proceeding.

10 NONRESIDENT INCOME TAX.- THE INCOME RECEIVED BY A BRANCH WILL RECEIVE THE TAX TREATMENT UNDER THE TREATY BETWEEN THE SOURCE STATE AND RESIDENCE STATE OF THE HEAD OFFICE (DIRECTORATE GENERAL FOR TAXES. RULING V2137-17, OF AUGUST 18, 2017).

The Colombian tax resident entity had signed a loan agreement with a branch in the US of a financial institution resident in Spain. The request concerned which tax treaty applied to the payment of interest by the requesting party to the branch.

The DGT concluded that, insofar as the Spanish banking institution is a company with one legal personality, and therefore, its branches do not have a distinct personality, it is an item of income payable by a Colombian resident to a Spanish institution, so the Colombia-Spain tax treaty applied.

That treaty determines that the interest paid by a Colombian tax resident may only be taxed in Spain.

3 Legislation

1 AMENDMENT TO FORM 190 AND THE FILING PERIOD FOR FORMS 171, 184, 345 AND 347

On November 18, 2017, the Official State Gazette (BOE) published Order HFP/1106/2017, of November 16, 2017, amending Order EHA/3127/2009, of November 10, 2009, approving form 190 to report the annual summary of withholdings from payments in cash and in kind on account of nonresident income tax on salary income and on economic activities, prizes and certain gains and types of attributed income and the filing periods for forms 171, 184, 345 and 347.

The following amendments notably apply to the new form 190:

a) The reporting exception for exempt fellowships/grants under article 7.j) of the Personal Income Tax Law below €3,000 has been removed. It will now be required to report all exempt fellowships/grants on form 190.

b) A new field has been added: Email for the person who is to be contacted for the Type 1 Register: Filer Register, to provide an email address.

Additionally the filing periods for forms 171, 184, 345 and 347 have been brought forward to January of each year.

The Order came into force on November 19 and will apply for the first time for the filing of the annual returns for 2017 which will be filed in 2018. The amendment to the filing period for form 347, however, will come into force on January 1, 2018 and will apply to the annual return for transactions with third parties, on form 347, for fiscal year 2018, to be filed in 2019.

2 TAX MEASURES CONTAINED IN LAW 9/2017, OF NOVEMBER 8, 2017, ON PUBLIC SECTOR CONTRACTS

On November 9, 2017, the Official State Gazette (BOE) published Law 9/2017, of November 8, 2017, on public sector contracts, transposing Directives 2014/23/EU and 2014/24/EU of the European Parliament and of the Council of February 26, 2014.

In terms of notable new tax legislation:

a) It recognizes the obligation to update the list of countries and territories having tax haven status, which will be done after the

lists of non-cooperative jurisdiction have been drawn up by the OECD and by the EU.

b) In relation to controlled transactions, the provisions on country-by-country reporting will be amended before December 13, 2017 to bring them fully into line with the international framework and to reduce the administrative burden that falls on multinational enterprise groups, by allowing other enterprises apart from the parent company to file the country-by-country report.

The obligations already laid down for these groups to provide information on revenues, income, taxes, assets or number of employees broken down by country or jurisdiction will stay in place, however. Multinational groups in the banking industry and in mining industries must publish the data related to this country-by-country reporting if this is required in international legislation.

c) On the subject of VAT, it clarifies that certain transactions performed between public entities are not subject and clarifies the definition of price-related subsidy for the purpose of its inclusion in the taxable income for VAT purposes.

d) It also clarifies the legal nature of the tariffs paid by users for the use of works or the receipt of services, in cases of both direct management of these through the authorities themselves, and indirect management through concession holders, in the form of public levies other than taxes.

3 TAX AMENDMENTS IN THE LAW ON URGENT SELF-EMPLOYMENT REFORMS

On October 25, 2017, the Official State Gazette (BOE) published Law 6/2017, of October 24, 2017, on urgent self-employment reforms bringing in the following new developments in the field of personal income tax:

a) Deduction under the direct assessment method of utility costs (water, electricity, phone and internet services) in cases where part of the principal residence is used to carry on the activity and in a percentage calculated by applying 30% to the existing proportion that the square meterage of the dwelling used for the activity bears to the total area (unless a higher or lower percentage may be evidenced).

b) Deduction under the direct assessment method of the taxpayer's own subsistence expenses incurred in carrying on the economic activity provided they are incurred at restaurant and hospitality establishments and are paid using any electronic payment means subject to the quantitative limits provided on per diems for the ordinary subsistence expenses of workers.

The new tax legislation will enter in force on January 1, 2018.

4 EU DIRECTIVE ON TAX DISPUTE RESOLUTION MECHANISMS APPROVED

On October 14, 2017, Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union was published in the Official Journal.

This Directive seeks to create mechanisms that ensure the effective resolution of disputes concerning the interpretation and application of bilateral tax agreements and treaties or of the Union Arbitration Convention, in particular disputes leading to double taxation.

The scope of this Directive is wider than the Union Arbitration Convention, which is limited to disputes over transfer pricing and the attribution of income to permanent establishments. This new Directive will apply to all taxpayers that are subject to taxes on income and capital covered by bilateral tax treaties and the Union Arbitration Convention.

The Directive provides that mutual agreement procedures should be used to resolve disputes and that the member states should be encouraged to use non-binding alternative dispute resolution

forms, such as mediation or conciliation, during the final stages of the mutual agreement procedure period. In the absence of an agreement within a certain time frame, the case should be submitted to a dispute resolution procedure.

In the dispute resolution procedures, an advisory commission or alternative dispute resolution commission will issue an opinion addressed to the competent authorities of the member states concerned, who will have to adopt a final binding decision by reference to the opinion. This decision may depart from the opinion, but if the competent authorities fail to reach an agreement on how to resolve the question in dispute, they will be bound by that opinion.

Moreover, the member states may choose, through bilateral agreement, to use any other dispute resolution process, such as the "final offer" (otherwise known as "last best offer" arbitration) to resolve the dispute in a binding manner.

The Directive came into force on November 3, 2017 and will apply to any complaint submitted from July 1, 2019 onwards relating to questions of dispute relating to income or capital earned in a tax year commencing on or after January 1, 2018. Competent authorities or member states concerned may however agree to apply this Directive with regard to any complaint that was submitted prior to that date or to earlier tax years.

The time limit for transposing this Directive ends on June 30, 2019.

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Tax Department

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