# Tax Newsletter

Spain

GARRIGUES

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# Contents

1. Losses could make tax on economic activities bill invalid

2. Judgments

2.1 Form 720 – Penalty regime for Form 720 is disproportionate

2.2 Corporate income tax and tax options. - We now have case law confirming that offsetting tax losses is not a tax option

2.3 Corporate income tax. – To conclude as to whether a group of companies may apply the special regime for entities of a reduced size, what counts is the net revenues figure of the individual who has control over the group

2.4 Corporate income tax. – For the limit on use of transferred rights to offset tax losses to apply in a transaction under the tax neutrality regime the tax authorities do not need to support that dual use of the losses has occurred

2.5 Corporate income tax. - Expenses connected directly or indirectly with the business are not free gifts

2.6 Personal income tax. – Amounts not paid by tenant after eviction claim also have to be taxed as real estate income

2.7 Personal income tax. – Taxpayer cannot be asked to prove work performed abroad by producing contracts between employer and its customers

2.8 Personal income tax. – Directors of Spanish companies may benefit from the exemption for work performed abroad in respect of executive functions for the benefit of subsidiaries

2.9 Transfer and stamp tax. - Nonmonetary contributions of assets made under the neutrality regime, which include debts secured by a mortgage, are subject to transfer tax (under the transfers for a consideration heading) on the portion of assets paid for by assuming the debt

2.10 Inheritance and gift tax. – The family business reduction may be applied to the value of shares relating to the entity's financial assets, if proof is provided that they are used in the business

2.11 Cadastral values. –Cadastral value must be determined using the market multiplier obtained from the official schedule of values

2.12 Cadastral values. – Technical installations serving a property must be valued according to the type of construction category for garages store rooms and enclosed spaces in the structure

2.13 Financial liability of the government. – The one year period for claiming financial liability of the government starts when the judgment dismissing the petition for reversal becomes final

2.14 Procedure for protection of fundamental rights. – It is not necessary to exhaust the administrative jurisdiction to apply for a special proceeding for protection of fundamental rights

2.15 Review procedure. – Economic-administrative tribunals have to settle the issues raised by the interested parties, even if they did not arise in the audit

2.16 Penalty procedure. – The current cassation appeal is sufficient to ensure a dual judicial review of administrative penalties

## 3. Decisions

3.1 Form 720 – Beneficiary of a 'trust' has to provide information, as beneficial owner, on the assets it owns

3.2 Corporate income tax. - In the special regime for entities engaged in residential property leasing, the reduction is calculated by reference to both income and losses

3.3 Corporate income tax. – Revenue relating to a refund of the Spanish health tax must be reported in the period when the right to that refund is recognized

3.4 Corporate income tax. – If all the parties in a controlled transaction are reviewed simultaneously, there is no need to implement the special procedure defined for the pricing of controlled transactions

3.5 Corporate income tax. – TEAC confirms that up to €1 million in tax losses may be offset in any prepayment

3.6 Personal income tax. – Special labor union payments to meet the cost of members' individual situations are not deductible

3.7 Personal income tax. - Indemnification as a penalty clause following termination of a contract is classified as a capital gain and included in the general component of taxable income for personal income tax purposes

3.8 Wealth tax and inheritance and gift tax – To be eligible for family business benefits, the name formally given to the remuneration or whether services are remunerated under the bylaws are irrelevant

3.9 Wealth tax. – Assets under a joint ownership arrangement may benefit from the exemption as assets used in a business

3.10 Transfer and stamp tax. - The taxable amount for stamp tax purposes in respect of transactions for transferring mortgages consists of the outstanding capital when the transfer takes place

3.11 Collection procedure. - In proceedings to enforce secondary liability against the directors, the intention not to fulfill tax obligations is evidenced if later debts owed to third parties are paid

3.12 Extension of liability. – Splitting the tax debt among the various parties with tax obligations is not an exception to the joint and several obligation held by all of them

3.13 Extension of liability. – Following a final decision holding secondary liability, joint and several liability cannot be enforced for the same facts without setting aside the first decision

3.14 Audit procedure. – Refusal to open safety deposit box without first seeing a warrant does not amount to resisting or obstructing the work of auditors

3.15 Penalty procedure. - Reduction for prompt payment can be sought in relation to a penalty after end of period under General Taxation Law for initiating penalty proceeding

3.16 Penalty procedure. - Penalty imposed without considering pleadings submitted within time limit is null and void as a matter of law

3.17 Penalty procedure. – Consent given to proposed penalty cannot be withdrawn

## 4. Resolutions by the Directorate General for Taxes

4.1 Corporate income tax. – Amounts of indemnification must be recognized when the judgment determining them becomes final, regardless of when they become payable

4.2 Corporate income tax. - IAS are not included in the accounting legislation to be taken into account to calculate taxable amount and determine timing of recognition rules

4.3 Corporate income tax. - Work on leased premises paid for by lessor has no impact on lessee's taxable income

4.4 Corporate income tax. - Indemnification for fire at a factory building may be recognized as payments are collected

4.5 Personal income tax. - Forgiveness of a loan between two entities does not have effects on personal income tax returns of individuals who are shareholders of both companies

4.6 Nonresident income tax. – Examination of how a nonresident company is taxed on holding real estate in Spain and giving employees, shareholders and directors the right to use it

4.7 Transfer and stamp tax. – The creation of lots to distribute real estate assets among co-owners is only taxable in respect of stamp tax

5. Miscellaneous

5.1 Approval of the Annual Tax and Customs Control Plan for 2022

5.2 Intrastat return instructions published

5.3 New edition released of transfer pricing guidelines for multinational enterprises and tax administrations

# 1. Losses could make tax on economic activities bill invalid

**In various decisions published over recent months Spanish courts have called into question tax on economic activities assessments for 2020 for reasons related to the necessary fulfillment of constitutional principles of economic capacity and prohibiting confiscatory taxation, due to the exceptional circumstances that arose this fiscal year as a result of the health crisis.**

The most notable of these judgments are described below:

(i) The Extremadura High Court, in a judgment delivered on December 2, 2021, recognized the taxpayer's right to obtain a proportional reduction of their tax on economic activities liability in respect of the mandatory shutdown period for business activities in 2020, confirming the conclusion by Alicante Judicial Review Court number 3, summarized in our November 2021 Tax Newsletter. The court also expressly rejected in this judgment the reasoning (against this conclusion) supported by the Aragon Regional Economic-Administrative Tribunal in a decision on July 22, 2021, discussed in the same newsletter.

(ii) Moreover, in a case handled by Garrigues, Santander Judicial Review Court number 2 delivered a judgment on December 16, 2021, setting aside a company's tax on economic activities bill for 2020, because it had been issued without taking the special circumstances in that period into account.

The court held that the applicant had produced proof that there had been losses throughout the economic sector to which it belongs in 2020, which means that one of the premises in the legislation on the tax on economic activities for being able to charge the tax was not fulfilled.

This decision went a step further than the Extremadura high court judgment, because it set aside the whole tax on economic activities liability instead of reducing it in proportion to the period in which there was a mandatory shutdown of economic activities.

In short, though not yet prevalently, the courts seem to be accepting of the need to (i) take into account the exceptional circumstances that impacted on 2020 as a result of the pandemic; and to (ii) ensure fulfillment of the principles of economic capacity and prohibiting confiscatory tax, which govern the Spanish tax system.

# 2. Judgments

## 2.1 Form 720 – Penalty regime for Form 720 is disproportionate

**Court of Justice of the European Union. Judgment of January 27, 2022, case C-788/19**

The CJEU's judgment on the information return for assets and rights abroad (Form 720) was published on January 27, 2022.

According to the court, the penalty regime applicable for failing to comply or inexact or late compliance with the requirement to provide this information is disproportionate, from the standpoint of the proportional 150% penalty, and of the penalty calculated according to fixed amounts for each item or set of items of information not reported or reported incorrectly or outside the time limit.

The court also underlined that the recognition of unjustified capital gains for personal income tax and corporate income tax, required in the event of failure to file the information return or filing it outside the time limit is not acceptable, basically because in practice it does not allow expiry of the statute of limitations to be pleaded.

We discussed this judgment in our alert on January 27, 2022.

## 2.2 Corporate income tax and tax options. - We now have case law confirming that offsetting tax losses is not a tax option

As we discussed in our alert on December 13, 2021, on November 30, 2021, the Supreme Court delivered a judgment concluding that the offsetting of tax losses is not a tax option for the purposes of article 119.3 of the General Taxation Law, and is instead a right exercised by the taxpayer. The Supreme Court reiterated this principle in later judgments, on December 2, 2021 (appeal number 4006/2020) and December 3, 2021 (appeal number 4300/2020).

The National Appellate Court had already rejected the opposite view supported by the tax authorities, in judgments on December 11, 2020 (discussed in our alert on January 15, 2021 and our blog post on February 23, 2021) and October 29, 2021 (discussed in our alert on December 13, 2021).

In particular, in a judgment delivered on December 11, 2020, the National Appellate Court ruled to set aside the TEAC decision of April 4, 2017, in which this administrative tribunal set out the basic components of its tax option theory in relation to offsetting tax losses for corporate income tax purposes.

That national appellate court judgment was challenged in a cassation appeal prepared by the government lawyer. In a recent ruling, however, the Supreme Court failed to admit the appeal on the ground of a supervening lack of an objective cassational interest, after concluding that the point of law at issue had already been settled by Panel Two of the Supreme Court's Judicial Review Chamber in a decision in the opposite direction to that advocated by the government lawyer. The decision not to admit this appeal made the national appellate court judgment become final.

The Supreme Court has moreover issued two decisions on January 12, 2022 (appeal 4400/2020 and appeal 1875/2021), admitting appeals regarding points of law substantially identical to that settled in its recent judgments (cited above), although the reason given for admitting these appeals is that the contested judgments, from high courts, are in conflict with its case law.

## 2.3 Corporate income tax. – To conclude as to whether a group of companies may apply the special regime for entities of a reduced size, what counts is the net revenues figure of the individual who has control over the group

**Supreme Court. Judgments of January 10, 2022 and December 21, 2021**

The Corporate Income Tax Law contains a special regime for companies of a reduced size, meaning those with net revenues equal to or below €10 million. Where an entity forms part of a corporate group within the meaning of article 42 of the Commercial Code, the net revenues figure relates to all the companies in the group put together. This same principle applies where an individual is in any of the circumstances mentioned in article 42 of the Commercial Code with respect to any of the entities in which it is shareholder.

This case concerned whether, when calculating the net revenues of a group of companies, the net revenues of the individual, trader or professional who has control over the group had to be included, and the Supreme Court replied that they did.

## 2.4 Corporate income tax. – For the limit on use of transferred rights to offset tax losses to apply in a transaction under the tax neutrality regime the tax authorities do not need to support that dual use of the losses has occurred

**Supreme Court. Judgment of December 10, 2021**

As a general rule, in reorganization transactions for which the special neutrality regime has been elected, the transferee may receive the right to offset the transferor's tax loss carryforwards. There are limits on this right, however. Namely, where the transferee owns an interest in the capital of the transferor, or where both form part of the same group of companies, the tax loss carryforwards must be reduced by an amount equal to the positive difference between the value of shareholders' contributions and the value of the interest.

The Supreme Court has clarified that the term "shareholders" includes both the owners of the shares when the transaction takes place (a merger, in this case) and any former shareholder in the absorbed company, because the former shareholders were able to deduct losses when the transfer of the shares took place. This prevents a dual use of losses occurring by former shareholders and at the transferee company.

In view of this, the appellant company contended that, under the principle of ease of access to evidence (*facilidad probatoria*), it lay with the tax authorities to verify whether the former shareholder had used for tax purposes the losses of the transferred entity. The Supreme Court concluded, however, that the tax authorities should automatically apply the limit on offsetting tax losses if the requirements laid down in the law have been fulfilled objectively.

It needs to be remembered, however, that the current wording of the law governing the tax prevents, generally, the use of losses on the transfer of shares, so retaining the limit in the law might be questionable.

## 2.5 Corporate income tax. - Expenses connected directly or indirectly with the business are not free gifts

**National Appellate Court. Judgment of November 25, 2021; and Directorate General for Taxes. Resolution V2684-21 of November 5, 2021**

A property belonging to a related entity was mortgaged to secure a loan made to a company. After the borrower defaulted on the loan, the guarantor entity transferred the property, repaid the outstanding sum, and recorded a debt owed by the borrower. Following an insolvency order issued by a court on this latter company, the guarantor entity recorded a provision equal to the account receivable and deducted the expense on its corporate income tax self-assessment.

The tax authorities rejected the right to deduct the expense after concluding that it was a free gift. In the tax authorities' view, an expense incurred to provide security for a loan does not have matching revenues.

Based on the Supreme Court's case law in a judgment delivered on March 30, 2021 (appeal 3454/2019), the National Appellate Court held that expenses are only free gifts if they do not have any connection with the business activity, and if, additionally, they create a loss of income without consideration. According to the court, on top of this no intention to make a gift could be observed in the examined case, because the mortgage was taken out to secure a step by a related company and groups of companies are a single economic unit in reality. Accordingly, it allowed the expense to be deducted.

The same view was stated by the DGT in its resolution V2684-21 of November 5, 2021, confirming the ability to deduct expenses strictly connected with the business activity, such as (in the case analyzed for the resolution) those incurred to secure customer loyalty.

## 2.6 Personal income tax. – Amounts not paid by tenant after eviction claim also have to be taxed as real estate income

**Supreme Court. Judgment of December 14, 2021**

The appellant filed an eviction claim against its tenant for defaulting on rent payments with a petition for payment, also, of the sums outstanding when the claim was filed, plus any amounts becoming due later in the period until the property was vacated. The claim was upheld and the tenant was ordered to pay the rent becoming due until vacation of the property, which the tenant continued to occupy after the judgment upholding the claim.

At issue was the personal income tax treatment of the rent not paid by the tenant after the eviction claim. Both the lower court judgment and the tax authorities had found that those sums had to be taxed as real estate income. The appellant argued, to the contrary, that, because those amounts of rent were received after termination of the contract, they were actually indemnification to the lessor for the length of time that the tenant unlawfully retained possession of the property.

The Supreme Court concluded that the amounts not paid by the tenant, regardless of whether they had become due before or after the eviction proceeding, are treated as "rent due", and therefore, for personal income tax purposes, they must be classified as real estate income, to be recognized in the tax period in which those amounts are claimable by the lessor.

## 2.7 Personal income tax. – Taxpayer cannot be asked to prove work performed abroad by producing contracts between employer and its customers

**Madrid High Court.** **Judgment of November 17, 2021**

A Spanish resident worker, employed at an entity resident in another country, made trips abroad:

(i) Firstly, trips to Brazil to participate in projects of a Brazilian resident group subsidiary, to be supplied to a customer in that country.

(ii) Secondly, trips to Russia, to take part in a project by its employer for a customer of this entity resident in Russia.

The worker had certificates issued by his employer and by the group's Brazilian subsidiary, describing and explaining the following:

(i) Which projects formed the reasons for his trips.

(ii) How the services had been billed.

The tax authorities nevertheless denied that he was entitled to the personal income tax exemption for the performance of work abroad. According to the tax management office, the Madrid TEAR had not substantiated that the work was performed for the benefit of nonresident entities. The government lawyer summarized the tax authorities' position as follows:

(i) The certificates did not state which specific functions were carried out by the worker abroad. It cannot therefore be concluded from the certificates that the services provided by the worker in Brazil and Russia did not form part of the functions attached to his job.

(ii) Furthermore, it was not mentioned in the certificates that the worker received in respect of his work abroad any compensation other than the amounts he received when he was in Spain.

(iii) Besides, the employee had not produced the contracts between his employer and the customers.

(iv) The company had reported the amounts as non-exempt income, without including them in box "L15", provided for this exemption on form 190.

The Madrid High Court concluded against this that the exemption was indeed applicable. In the court's view, the dispute essentially concerned proof of the reasons for the trips and this was sufficiently proved with the certificates mentioned above. According to the court:

(i) The employee cannot be asked to produce contracts between his employer and customers because this falls outside his ability to produce proof. These are documents that he is not and cannot be expected to possess.

(ii) The produced certificates contain sufficient information on the trips and the reasons for them.

(iii) Moreover, after the certificates had been produced by the taxpayer, the tax authorities should have assumed the burden of proof, and they did not.

## 2.8 Personal income tax. – Directors of Spanish companies may benefit from the exemption for work performed abroad in respect of executive functions for the benefit of subsidiaries

**Catalan High Court**. Judgment of November 4, 2011

Under the prevailing relationship theory, the courts have been holding that directors have an exclusively commercial relationship where they perform functions associated with senior management. The tax authorities have been finding that, for this reason, their salary income cannot benefit from certain incentives that the Personal Income Tax Law allows, according to the tax authorities, only for people who have an employment relationship or statute-based relationship. This is one of the conclusions being put forward in relation to the exemption for work performed abroad (article 7.p)

The National Appellate Court concluded, however, in its judgment of February 19, 2020 (appeal 485/2017), that directors can indeed benefit from this exemption, (i) because the law only asks for "work" to be performed abroad, without stating that it must be performed under an employment or statute-based relationship and, moreover, (ii) there can be no doubt that the income received by directors is salary income (even if this is by "express legal decision").

The Supreme Court, however, noted in its judgment of March 22, 2021 (cassation appeal 5596/2019) that this exemption cannot be applied in respect of income received for participating in board meetings at nonresident entities; although a cassation appeal remains to be settled in which this court has to state whether the exemption applies to the income received by directors in respect of their executive functions (decision on March 11, 2021).

All these judgments have been analyzed in our blog and in various newsletters (April 2020 and April 2021).

Now, the Catalan High Court has examined (in a judgment on November 4, 2021) the case of a director of an entity resident in Spain who performs work for a subsidiary of that entity in Brazil, and it has entered judgment on the issue awaiting judgment by the Supreme Court. The court made the following analysis:

(i) Although the exemptions must be interpreted strictly, this cannot produce an outcome that is counter to logic, to the law and to the objectives of these benefits.

(ii) The objective of the examined benefit is to export human talent resident in Spain. The main requirement therefore is for the service provided by the worker who relocates to another country to bring a benefit or be useful or usable for the entity receiving it, and that the worker physically travels to another country to provide the service.

(iii) The law does not contain any of the following requirements:

(a) The recipients of the services must be their only beneficiaries (including the employer itself).

(b) The relationship must be an employment or statute-based relationship; because “this tax incentive is not designed to benefit companies (…) but rather the workers*”.*

(c) The services must be of a specific type.

(d) The length or stay in the other country must meet a specified time threshold.

(iv) In particular, the law does not prohibit the exemption from being applied in the case of coordination or supervision work or services by the directors of employer companies resident in Spain.

In the case examined by the court, the functions performed by the director at the subsidiary in Brazil consisted basically of (i) analyzing the sales budget for Brazil, (ii) keeping its costs under control, and (iii) carrying out the activities falling within the responsibilities of a general manager (supervising sales and costs, controlling warehouse and stocks, managing and monitoring customers, supervising purchases, hiring new staff, reorganizing departments, etc.).

The court concluded that the income received for these functions qualified for the exemption, even if its recipient is a director of the Spanish parent company.

## 2.9 Transfer and stamp tax. - Nonmonetary contributions of assets made under the neutrality regime, which include debts secured by a mortgage, are subject to transfer tax (under the transfers for a consideration heading) on the portion of assets paid for by assuming the debt

**Supreme Court.** Judgment of December 22, 2021

At issue was whether the creation of a company by contributing properties secured by a mortgage is a single transaction (creation of the company) subject to transfer tax (under the corporate transactions heading) or whether it also consists of another transaction (delivery in payment for assuming debts), subject to transfer tax (under the transfers for a consideration heading) on the properties that are delivered in exchange for assuming the mortgage debt.

The Supreme Court recalled that this issue had already been settled in various judgments and referred to them to conclude that in these cases there are two clearly delineated and separable arrangements: (i) a subscription to capital through the contribution of properties and (ii) an assumption by the newly created entity of the mortgage; if the net value of the properties is either equal to or higher than the subscribed capital.

According to the court, the fact that the value of the debts does not have to be included in the taxable amount for the corporate transaction does not determine that the transfer of those debts is exempt from tax.

This same view was provided recently by the DGT in resolution V2875-21 of November 17, 2021. In this resolution, the DGT analyzed a nonmonetary contribution of assets and liabilities of a hotel business to a newly created entity, in which the beneficiary company assumed the debts secured by a mortgage encumbering the hotel (both the debts incurred to fund the purchase of the hotel purchase and others unrelated to its purchase). The DGT noted the following:

(i) In nonmonetary contributions of a line of business a transfer en bloc or on an inseparable basis of assets and debts takes place, in other words, "*a set capable of operating"* by its own means. In nonmonetary contributions of assets and liabilities that do not amount to a line of business, however, individual transfers of the various assets and liabilities take place.

(ii) Article 7 of the Transfer and Stamp Tax Law states that deliveries of assets in payment and for the payment of debts and express deliveries of assets in payment for the assumption of debts are transfers subject to and not exempt from transfer tax (under the transfers for a consideration heading).

Express deliveries of this type do not occur in contributions of lines of business (because, as mentioned, in these transactions the assets and liabilities are transferred en bloc), whereas they do occur in nonmonetary contributions of elements that do not amount to a line of business.

In these cases, where the entity that is beneficiary of the assets simultaneously assumes debts, an express delivery of assets in payment for the assumption of debts will be deemed to have occurred, which will be subject to and not exempt from transfer tax (under the transfers for a consideration heading). This will be so irrespective of whether the debts were acquired to fund the purchase of the assets or for other reasons.

(iii) The taxable amount is the value of the hotel paid for by assuming debts.

## 2.10 Inheritance and gift tax. – The family business reduction may be applied to the value of shares relating to the entity's financial assets, if proof is provided that they are used in the business

**Supreme Court. Judgment of January 10, 2022**

A taxpayer gifted his shares in a company to his son. Those shares fulfilled the requirements for the family business regime, and were therefore exempt from wealth tax. For that reason, the son included the family business reduction in his calculation of the taxable amount for inheritance and gift purposes.

To qualify for this reduction, the shares must be exempt from wealth tax. The exemption (and therefore, the inheritance and gift tax reduction) may be full or partial, by reference to the degree to which entity's assets are used in the business.

The auditors concluded that he was not entitled to a full reduction because the company had financial investments in its assets. According to the auditors, the Personal Income Tax Law (which is read in conjunction with the Wealth Tax Law) provides that assets representing investments in equity of an entity and the assignment of capital to third parties cannot under any circumstances be regarded as being used in the business.

The Supreme Court concluded, however, that assets of this type may indeed be regarded as being used in the business for the purposes of the wealth tax exemption and inheritance and gift tax reduction. In particular, it held that needs relating to capitalization, solvency, liquidity and access to credit, which may have led to the investments being made, reinforce the idea that they are used in the business. In all cases, it is the taxable person who has to provide proof of that use.

## 2.11 Cadastral values. –Cadastral value must be determined using the market multiplier obtained from the official schedule of values

**Supreme Court.** Judgment of December 14, 2021

An entity substantiated, by providing expert evidence, that the cadastral value of the property owned by it was higher than its market value. For that reason, the lower court ruled to set aside the cadastral value and ordered it to be replaced with another. In relation to determination of the new cadastral value:

(i) The tax authorities supported the view that, where the original cadastral value had been held by a court to be higher than the market value, then the new cadastral value must match the market value, with no reduction whatsoever.

According to the Supreme Court, this view has no legal basis, besides which it would take away any incentive for the authorities to calculate the correct cadastral value, because they would only have to confirm through expert opinions that the market value is clearly below the cadastral value determined by them so as to apply the market value directly. This scenario would, moreover, be made worse where the interested party does not appeal.

(ii) The taxable person argued against this that to determine the new cadastral value the correct method was to find the market value and multiply it by the 0.5 market multiplier.

According to the Supreme Court, this theory is not correct either, because, if the legislature had wanted this to be so, it would have expressly stated that the cadastral value has to be 50% of the market value.

In short, the Supreme Court concluded that the cadastral value is obtained in an objective administrative procedure predetermined in the legislation, and that it is wrong to interpret either that the market multiplier does not apply in certain cases (tax authorities' view), or that it is to be used on the market value (taxable person's view).

Against both interpretations, the court held that, "after the market value has been substantiated and for the purpose of determining the cadastral value, the 0.5 market multiplier must be used on the value obtained from the official schedule of values, after also taking into account any applicable multipliers, which does not mean that the cadastral value so obtained must fulfill a limit equal to half the market value".

## 2.12 Cadastral values. – Technical installations serving a property must be valued according to the type of construction category for garages store rooms and enclosed spaces in the structure

**Supreme Court.** Judgment of December 7, 2021

The cadastral value of structures is determined in part by reference to the type of construction category assigned to them within those set out in the cadastral legislation, by reference to the uses and characteristics of each of the units forming part of the property itself.

This judgment discusses the cadastral value of a property used primarily for offices. The Supreme Court concluded as follows:

(i) That the floors or spaces used solely to house technical installations serving the building itself must be classified in category 1.1.3 relating to “garages storerooms and enclosed spaces in the structure” on the table provided in the cadastral legislation for these purposes.

(ii) This is so regardless of whether these floors or enclosed spaces fulfill an ancillary or instrumental purpose with respect to the general type of construction category assigned to the building.

## 2.13 Financial liability of the government. – The one year period for claiming financial liability of the government starts when the judgment dismissing the petition for reversal becomes final

**Supreme Court.** Judgment of November 29, 2021

The right to claim financial liability of the legislating government for damages becomes statute-barred after the end of a year following publication in the Official State Gazette (BOE) of the judgment holding to be unconstitutional the legislation that caused the loss sought to be indemnified. Furthermore, the claimant has to obtain, at any instance, a final judgment dismissing an appeal against the administrative step that caused the loss in relation to which unconstitutionality was alleged.

This judgment examined the case of an entity that transferred in 2015 a number of properties for prices below their acquisition costs. Despite this fact, the local authority issued an assessment for the tax on increase in urban land value. The assessments became final because they had not been challenged within the time limit.

Following publication in the Official State Gazette (BOE) on June 15, 2017 of constitutional court judgment 59/2017 holding to be partly unconstitutional a number of articles in the legislation governing the tax on increase in urban land value, the entity applied for reversal of its assessments. After its petition for reversal had been rejected in a final decision by a court, the taxpayer filed within a year a claim for liability of the legislating government for damages in the amount determined in those assessments.

The authorities concluded that the claim was outside the time limit because it had been made after the end of a year following publication of the constitutional court judgment in the Official State Gazette (BOE). Against this, the Supreme Court upheld the entity’s appeal and confirmed that the one year period runs from the judgment dismissing the petition for reversal.

## 2.14 Procedure for protection of fundamental rights. – It is not necessary to exhaust the administrative jurisdiction to apply for a special proceeding for protection of fundamental rights

**Supreme Court. Judgment of December 22, 2021**

The background for this judgment arose from the following facts:

(i) AEAT imposed a penalty on the taxpayer in relation to personal income tax for fiscal years in the period between 2014 and 2016.

(ii) The taxpayer considered that the penalty breached his fundamental rights, because it was based on data obtained after entering the taxpayer's home, under court orders later rendered null and void. Therefore, he filed an application for judicial review against the penalty under the procedure for court protection of fundamental rights.

(iii) The Judicial Review Chamber at the La Rioja High Court did not admit the application because the applicant had not exhausted the administrative jurisdiction.

The Supreme Court concluded that it is not necessary exhaust the administrative jurisdiction before applying for a special proceeding for protection of fundamental rights. According to the court:

(i) The fact of lodging this special appeal directly instead of going through the ordinary procedure does not give rise to an abuse of law, as the defendant authority suggested, because there is nothing to prevent the taxpayer choosing one jurisdiction or another to deal with a breach of its fundamental rights.

(ii) The court is required in all cases to determine for the purpose of admitting the appeal (i) that in the notice of appeal the appellant invokes one of the rights qualifying for protection in this special proceeding and (ii) that the harmed right is related, without entering the realm of the absurd, to an act, omission, inactivity or improper use of authority attributable to a public authority.

## 2.15 Review procedure. – Economic-administrative tribunals have to settle the issues raised by the interested parties, even if they did not arise in the audit

**Supreme Court. Judgment of December 16, 2021**

The CNMV notified a collective investment vehicle in 2006 of withdrawal of its collective investment vehicle status, because it had failed to fulfill certain requirements in 2006 and in earlier years. This resulted in the auditors refusing to allow the entity to apply the special tax regime allowed in the Corporate Income Tax Law for entities of this type in all those periods. The entity objected, alleging that forfeiture of the special tax regime was only necessary in 2006, but not in relation to earlier years when its collective investment vehicle status had not been withdrawn.

The Supreme Court held, however, that the special tax regime ceases to be applicable in the tax period in which the circumstances determining the withdrawal occurred, regardless of when notice of withdrawal takes place.

Furthermore, the appellant collective investment vehicle applied on a secondary basis for the special regime for holding companies to be applied to it. It had not made that petition to the auditors, however, only later in the proceeding relating to the economic-administrative claim against the tax authorities' assessment. TEAC rejected this petition precisely because it related to an issue raised for the first time by the entity in the economic-administrative jurisdiction.

Against this, the Supreme Court concluded that in both the economic-administrative and judicial jurisdictions the competent courts or tribunals must satisfy the petitions submitted by the interested parties by adopting a decision in law that deals with all the - factual or legal - issues that are determined to be necessary. In other words, it is not acceptable for economic-administrative tribunals to refuse to settle issues simply because they had not been posed to the auditors earlier.

## 2.16 Penalty procedure. – The current cassation appeal is sufficient to ensure a dual judicial review of administrative penalties

**Supreme Court. Judgment of November 25, 2021**

On June 30, 2020, the European Court of Human Rights (ECHR) delivered a judgment in the Saquetti Iglesias v Spain case, concluding that a second instance has to be guaranteed for reviewing the imposition of serious administrative penalties (as is the case for criminal penalties). In this judgment, the Judicial Review Chamber at the Supreme Court examined (in a plenary session) whether the currently existing judicial review system is consistent with that case law and ensures that dual judicial review of serious administrative penalties.

The issue arose in relation to cases in which the National Appellate Court or the regional high courts were responsible for hearing an application against the penalty in a single instance. In these cases, if those courts confirm the penalty, the applicant's only remaining option for defense is to lodge a cassation appeal to the Supreme Court. However, the current rules on cassation appeals mean that their admission is very restrictive, because, among other requirements, they do not allow a review of the facts or an assessment of the evidence and they require the alleged infringement to have objective cassational interest for the formation of case law.

The Supreme Court concluded, however, that the dual judicial review of serious administrative penalties (in other words, those treated in the same way as criminal penalties) is ensured with the current cassation appeal, which to be admitted requires assessment by the court whether the preparatory document for a cassation appeal substantiates (i) the criminal nature of the infringement that has been penalized and (ii) the ground for the alleged infringements made by the appealed judgment by confirming the administrative penalty decision.

The judgment had a dissenting vote which stressed the difficulty for fulfilling the precedent determined by the ECHR encountered with the current cassation appeal rules, by noting that the solution that the judgment requires can only be provided by the legislature through an amendment to the legislation.

# 3. Decisions

## 3.1 Form 720 – Beneficiary of a 'trust' has to provide information, as beneficial owner, on the assets it owns

**Central Economic-Administrative Tribunal. Decision of November 23, 2021**

The General Taxation Law requires Spanish residents to provide the tax authorities with information on certain assets and rights they own abroad, by filing Form 720. This obligation lies with the owners and beneficial owners of the assets and rights.

In this decision, a case was examined involving a taxpayer who had received assets by inheritance and by gift, and therefore the auditors had concluded that, although Form 720 had not been filed, that unjustified capital gain could not be recognized for personal income tax purposes. The interested party pleaded against this that the taxpayer was not required to include the shares in a specific company on Form 720 because they were not owned directly. The shares belonged to a (dormant) entity whose shares belonged to a trust in which the interested party was only the beneficiary.

Against this, TEAC ruled that the obligation to file Form 720 applies, under the applicable legislation, to anyone who is regarded as the beneficial owner of the assets concerned, as may be inferred from Anti-Money Laundering and Counter-Terrorist Financing Law 10/2010 of April 28, 2010. This law states that, in the case of trusts, the following are regarded as beneficial owners: the beneficial owners or category of persons on whose behalf the legal structure was created or acts. After examining the specific structure concerned, TEAC concluded that the interested party was beneficial owner of the shares in the company owned indirectly by the trust, and therefore that party had to include them on the form.

This obligation to provide information, TEAC noted, is not affected by the fact that these assets did not have to be reported on the wealth tax return (which had been pleaded by the interested party), because this tax only requires assets to be reported if they are owned directly.

## 3.2 Corporate income tax. - In the special regime for entities engaged in residential property leasing, the reduction is calculated by reference to both income and losses

**Central Economic-Administrative Tribunal. Decisions of December 20, 2021 (4754/2021) and January 26, 2021 (817/2020)**

Various requirements have to be fulfilled to be able to apply the special regime for entities engaged in residential property leasing. Among others, at entities carrying on other activities besides the primary residential property leasing activity, at least 55% of their income in the taxable period (excluding any income obtained from transferring the leased properties after the end of the minimum seven-year holding period) has to give entitlement to apply the reduction established in that regime.

TEAC concluded that calculation of that 55% has to include the following:

(i) All the revenues forming part of the tax base for the taxable period have to be considered, including finance income.

(ii) The income subject to a reduction must be calculated by reference to both the income and losses obtained from the leasing of residential properties. In other words, net income is the difference between income and losses.

## 3.3 Corporate income tax. – Revenue relating to a refund of the Spanish health tax must be reported in the period when the right to that refund is recognized

**Central Economic-Administrative Tribunal. Decision of November 23, 2021**

A taxpayer obtained a refund for tax paid over in respect of tax on retail sales of certain oil and gas products (the "Spanish health tax"), on the basis of the CJEU judgment of February 27, 2014, which held that this tax was precluded by EU law.

Originally, the taxpayer included the revenue in the corporate income tax base for the fiscal year in which it obtained the refund (2014), although it later applied (in a procedure for correcting self-assessments) for the refunded amounts to be recognized in fiscal years in which the tax liability had been borne, in other words, in the fiscal years when the incorrect payments had taken place.

TEAC concluded, however, that the refunded amounts are payable from when the right to a refund arises and therefore that is when the revenue should be recognized.

This interpretation runs counter to that adopted by the Galicia TEAR in a decision delivered on October 15, 2021 (November 2021 Tax Newsletter) and finding in favor of the taxpayer in a similar case, by taking the view that the CJEU judgment holding that the Spanish health tax was precluded by EU law has *ex tunc* effects which means that the corporate income tax refunds must be recognized in the fiscal years when the incorrect payments took place.

## 3.4 Corporate income tax. – If all the parties in a controlled transaction are reviewed simultaneously, there is no need to implement the special procedure defined for the pricing of controlled transactions

**Central Economic-Administrative Tribunal. Decisions of October 25 (5589/2019) and June 24 (2002/2018) 2021**

The Corporate Income Tax Law contains special pricing rules for controlled transactions. Among others, where an adjustment is made to the position of one of the parties that participated a transaction, the proposed adjustment must be notified to the other party, so that, if the party so wishes, it may appear in the proceeding and make pleadings.

TEAC examined two cases in which adjustments were made to various controlled transactions, simultaneously, for each of the parties making the transactions, and therefore those notifications were not made.

Applying the principle determined by the Supreme Court in a judgment on May 18, 2020, TEAC noted that:

(i) The special procedural requirements for controlled transactions as contained in the law on the tax apply in cases where the tax authorities decide to commence an audit in relation to only one of the related parties.

In these cases, the defense options of the party to the controlled transaction that has not been reviewed need to be protected, and, for this reason, the assessment made on the audited party has to be notified to the other party to allow this party to appear in the appeal lodged by the audited party.

(ii) This does not mean that the auditors cannot decide to review all the related parties individually or that the same transactions cannot be examined in every audit. In this case it is not necessary to apply that special procedure.

## 3.5 Corporate income tax. – TEAC confirms that up to €1 million in tax losses may be offset in any prepayment

**Central Economic-Administrative Tribunal.** **Decision of September 22, 2021**

Article 26 of the Corporate Income Tax Law places a limit on the offset of tax losses, although it provides that, in all cases, up to €1 million may be offset in the period.

In the case examined in this decision, the auditors found that, when calculating prepayments, that €1 million must be distributed by reference to the proportion between (i) the length of the taxable period for each prepayment (for example, in the first prepayment for the fiscal year, where it is a calendar year, that calculated between January 1 and March 31) and (ii) the calendar year.

TEAC, however, concluded as follows:

(i) The €1 million limit for offsetting tax losses must be distributed proportionally where the taxable period is shorter than a year.

(ii) The taxable period should not be confused with the payment period, however. There is only one taxable period, even if part of the tax must be paid when the prepayments are made.

(iii) In short, that €1 million limit is a limit on the amount that may be offset in a taxable period, and the taxpayer may distribute the figure as it sees fit among the various prepayments to be made towards the tax.

This principle had already been stated by the Cantabria TEAR in a decision delivered on November 24, 2021, discussed in our November 2021 Tax Newsletter.

## 3.6 Personal income tax. – Special labor union payments to meet the cost of members' individual situations are not deductible

**Cantabria Regional Economic-Administrative Tribunal.** **Decision of November 24, 2021**

The Personal Income Tax Law provides that, for determining net salary income, the payments made to labor unions are deductible in the portion relating to the essential purposes of these institutions and subject to the cap specified in the legislation.

This decision examined the ability to deduct an extraordinary labor union payment required to meet the cost of consequences arising from future potential court claims against members resulting from an earlier labor dispute.

The Cantabria TEAR concluded that the legislation does not allow these payments to be deducted because they are not mandatory and they are collected to meet individual needs of their members.

## 3.7 Personal income tax. - Indemnification as a penalty clause following termination of a contract is classified as a capital gain and included in the general component of taxable income for personal income tax purposes

**Central Economic-Administrative Tribunal. Decision of November 23, 2021**

A married couple transferred a property. The purchase deed contained a "condition subsequent" whereby if the purchaser failed to pay the deferred amounts, the contract would terminate and the sellers would keep the partial payments as indemnification.

After the purchaser failed to pay the sums due, the sellers decided to bring civil action to seek termination of the contract. The court delivered a judgment ordering the purchaser to return the property to the sellers and allowing them to keep all amounts paid until that point, as provided in the penalty clause.

TEAC confirmed that the indemnification amounted to a capital gain arising from a breach of contract, not from the transfer of assets, and therefore had to be included in the general component of taxable income for the fiscal year in which the judgment holding that the purchase agreement had terminated became final.

## 3.8 Wealth tax and inheritance and gift tax – To be eligible for family business benefits, the name formally given to the remuneration or whether services are remunerated under the bylaws are irrelevant

**Central Economic-Administrative Tribunal. Decisions of November 23 (1187/2020) and of February 26 (4028/2018) 2021**

In these decisions, TEAC applied the principle determined by the Supreme Court in a judgment delivered on January 18, 2016. In that judgment, relating to inheritance and gift tax, the Supreme Court concluded that, to substantiate fulfillment of the requirement for the performance of management functions, laid down to be eligible for the reduction in respect of transfers of family businesses, the key factor is not the name used in the contract concerned, instead whether management functions are actually performed.

TEAC's exact conclusion consisted of the following:

(i) One point it made was that the exemption for wealth tax purposes applies if the taxable person or any member of their family group perform remunerated management functions (as director, for example), even if it is stated in the bylaws that directors are not remunerated for their services.

(ii) Another was that the inheritance and gift tax reduction in respect of transfers of family businesses applies if the income obtained by one of the individuals in the family group is received for management functions, regardless of the name given in the contract to the amounts paid to them.

## 3.9 Wealth tax. – Assets under a joint ownership arrangement may benefit from the exemption as assets used in a business

**Murcia Regional Economic-Administrative Tribunal.** Decision of September 30, 2021

The Murcia TEAR examined whether it should be interpreted that the assets and rights under a joint ownership arrangement form part, directly, of the individual property of each co-owner, which would give rise to the case in article 4.eight.one of the wealth tax law (exemption for assets and rights used in a business); or, conversely, they are assets held indirectly through a joint ownership arrangement, which would give rise to the exemption in article 4.eight.two of the law (interests in entities).

The tribunal concluded that, in these cases, they are assets owned directly by the co-owners. Which means that they are exempt if they fulfill the requirements in article 4.eight.one of the law, which refers to assets and rights of individuals without specifying, according to the tribunal, the ownership system.

To be eligible for the exemption, it will be necessary for (i) the trading or professional activity to be carried out by the taxable person ordinarily, personally and directly; and for (ii) that activity to be the taxable person's primary source of income, in other words, for the obtained income to represent more than 50% of taxable income (general and savings component) for personal income tax purposes.

## 3.10 Transfer and stamp tax. - The taxable amount for stamp tax purposes in respect of transactions for transferring mortgages consists of the outstanding capital when the transfer takes place

**Central Economic-Administrative Tribunal.** Decision of November 29, 2021

TEAC examined what the taxable amount for stamp tax purposes should be when a mortgage is transferred.

The court referred to the ruling by the Supreme Court in a judgment delivered on October 29, 2020, according to which, for stamp tax purposes, where the notarized document giving rise to the assessment records the transfer of a mortgage in which part of its amount has already been paid to the lender, the taxable amount must consist of the outstanding capital when the transfer takes place (including expenses, indemnification, or other items), in other words, of the amount outstanding on the mortgage security.

## 3.11 Collection procedure. - In proceedings to enforce secondary liability against the directors, the intention not to fulfill tax obligations is evidenced if later debts owed to third parties are paid

**Central Economic-Administrative Tribunal.** Decision of October 18, 2021

Under article 43.2 of the General Taxation Law, one of the requirements for holding the directors liable for a company's debts in respect of taxes that must be charged or amounts that must be withheld is that the filing of self-assessments without payment does not relate to a genuine intention to fulfill the tax obligation in the self-assessment.

In TEAC's view, this requirement relating to intention is evidenced where third parties' claims with due dates falling after the self-assessments filed without payment have been paid and they did not have any priority over the tax claims falling under the decision enforcing secondary liability.

## 3.12 Extension of liability. – Splitting the tax debt among the various parties with tax obligations is not an exception to the joint and several obligation held by all of them

**Murcia Regional Economic-Administrative Tribunal.** Decision of September 30, 2021

Article 35.7 of the General Taxation law lays down (i) joint and several liability for parties with tax obligations sharing the same tax obligation and (ii) the option of splitting the tax debt among those parties. These two provisions may appear to contradict each other:

(i) The first requires joint and several liability for parties holding the same tax obligation.

(ii) The second could be interpreted to mean that those parties with tax obligations are each individually liable for a proportional part (instead of jointly liable for the whole debt).

The Murcia TEAR, however, has clarified in its decision that, where the tax debt is split among the parties holding the tax obligation, they continue to be jointly and severally liable for payment of the tax debt, and therefore, if one of them fails to pay their proportional part within the voluntary payment period, the tax authorities may seek payment from the other parties holding the obligation.

In other words, the position of each liable party is separate from that of others, without precluding them from benefiting from payments made by the other liable parties or any third party.

## 3.13 Extension of liability. – Following a final decision holding secondary liability, joint and several liability cannot be enforced for the same facts without setting aside the first decision

**Murcia Regional Economic-Administrative Tribunal.** Decision of October 29, 2021

The tax authorities initiated against two taxpayers two proceedings for a declaration of secondary liability under article 43.1.a) of the General Taxation Law. One of the taxpayers did not challenge the decision in relation to that taxpayer individually, and so it became final. The other taxpayer did challenge the decision in relation to them, which was ultimately set aside by TEAC, by holding that it should have been investigated further, before declaring secondary liability, whether anyone was jointly and severally liable.

The tax authorities extended TEAC's conclusion to the taxpayer who did not challenge the decision, despite the decision having become final in relation to that taxpayer, although they simultaneously declared that taxpayer jointly and severally liable for the debt.

The Murcia TEAR rejected this step by the authorities. According to the court:

(i) To declare jointly and severally liable a person who had earlier been declared secondarily liable, one of the special review proceedings set out in article 216 et seq. of the General Taxation Law needs to be initiated in relation to the first declaration.

(ii) Moreover, the res judicata principle prevents the authorities from declaring secondary liability and then declaring joint and several liability in relation to the same debts and facts.

## 3.14 Audit procedure. – Refusal to open safety deposit box without first seeing a warrant does not amount to resisting or obstructing the work of auditors

**Canary Islands Regional Economic-Administrative Tribunal.** Decision of December 29, 2020

As part of their examination and verification work, auditors sealed a taxpayer's safety deposit box at a bank, without obtaining a court warrant or the taxpayer's consent. The auditors later asked for the taxpayer's consent for the safety deposit box to be opened, which the taxpayer withheld, advising them of the need for a court warrant. As a result, a penalty was imposed on the taxpayer for resisting, obstructing or refusing to allow the work of auditors (article 203 of the General Taxation Law).

The Canary Islands TEAR concluded in this decision that, by asking for the taxpayer's consent, the auditors made clear that the decision to open the safety deposit box was a right and not an obligation for the taxpayer. It cannot amount to an infringement, therefore, if, by exercising that right, the taxpayer withholds authorization, and so the penalty must be set aside.

## 3.15 Penalty procedure. - Reduction for prompt payment can be sought in relation to a penalty after end of period under General Taxation Law for initiating penalty proceeding

**Central Economic-Administrative Tribunal.** Decision of December 20, 2021

A penalty proceeding was initiated within an audit. The taxpayer had given its consent to the adjustment and to the proposed penalty, and therefore the reductions for agreement and for prompt payment were applied to it. However, the taxpayer failed to pay over the entire amount of the reduced penalty in the voluntary period, and so failed to fulfill one of the requirements laid down to be able to apply the reduction for prompt payment. As a result, the tax authorities delivered a decision requiring the taxpayer to pay over the amount of the applied reduction.

This new decision was appealed by the taxpayer, pleading that the proceeding had become statute-barred due to being outside the time limit provided in article 209.2 of the General Taxation Law. That article states that any penalty proceedings commenced as a result of an examination or audit procedure cannot be initiated after three months have run (currently, six) since the assessment was notified.

TEAC concluded, against this, that the proceeding demanding payment of the reduction for prompt payment was not a penalty proceeding. When the conditions giving rise to the reduction fail to be fulfilled, what takes place is simply a demand for payment of the reduced amount of a previously imposed penalty, not the imposition of any penalty. Therefore, the time period in that article is not applicable to this case.

## 3.16 Penalty procedure. - Penalty imposed without considering pleadings submitted within time limit is null and void as a matter of law

**Central Economic-Administrative Tribunal.** **Decision of November 23, 2021**

In this decision, TEAC adopted the principle determined by the Supreme Court in a judgment on May 18, 2020, to conclude as follows:

(i) From one angle, it held that a penalty decision is null and void as a matter of law if it was delivered without considering the pleadings filed within the time limit, but came into the hands of the body deciding on the penalty after the decision was adopted.

(ii) From another, it took the view that, in non-penalty proceedings, omitting the right-to-be-heard period or the fact of not considering the submitted pleadings can be remedied by reverting the procedure to an earlier point in time. Accordingly, in TEAC's judgment, the tax authorities could remedy this procedural defect by delivering a new assessment decision examining the pleadings submitted against the notice of assessment.

## 3.17 Penalty procedure. – Consent given to proposed penalty cannot be withdrawn

**Asturias Regional Economic-Administrative Tribunal.** **Decision of September 29, 2021**

A taxpayer who was the subject of a penalty proceeding gave his consent to a penalty proceeding and stated his agreement with the proposed penalty, acknowledging liability for the facts giving rise to the penalty. Within a month, however, the taxpayer withdrew the consent given earlier.

Article 211.1 of the General Taxation Law states that after a month has run from agreement with the proposed penalty, the decision imposing the penalty is deemed to be notified, and no express notification is needed.

For that reason, the Asturias TEAR concluded that, if in that period, the taxpayer changes his mind over his initial agreement, the decision imposing a penalty cannot be deemed notified and the tax authorities have to examine their pleadings and deliver a conclusion accordingly.

# 4. Resolutions by the Directorate General for Taxes

## 4.1 Corporate income tax. – Amounts of indemnification must be recognized when the judgment determining them becomes final, regardless of when they become payable

**Directorate General for Taxes. Resolution V2918-21 of November 19, 2021**

An entity filed in 2012 an application to claim financial liability of the government. Finally, in 2018, the right to receive the claimed sum in respect of the losses and damage incurred plus interest at the legal rate was acknowledged.

Following a request for a report on the accounting treatment of this indemnification, the Spanish Accounting and Audit Institute (ICAC) concluded that the associated revenue is earned in the period the judgment becomes final.

According to the DGT, the same principle applies for determining the corporate income tax base (under the provisions in article 10.3 and article 11.1 of the Corporate Income Tax Law), in other words, the indemnification must be recognized in the fiscal year when the judgment becomes final, regardless of whether it becomes payable on a later date.

The same treatment should be given to any late-payment interest that may be acknowledged.

## 4.2 Corporate income tax. - IAS are not included in the accounting legislation to be taken into account to calculate taxable amount and determine timing of recognition rules

**Directorate General for Taxes. Resolution V2787-21 of November 12, 2021**

The DGT reiterated the principle previously stated in earlier resolutions (including resolution V2107-15 of July 10, 2015) on the effect International Accounting Standards (IAS) have on corporate income tax. According to the DGT:

(a) Under article 10.3 of the Corporate Income Tax Law, the starting point for calculating the tax base is income per books, determined under the rules in the Commercial Code, in other laws relating to determining book income and in any provisions implementing these provisions; and this figure must be adjusted as necessary under the articles contained in the Corporate Income Tax Law.

(b) In relation to the timing of recognition and recording for accounting purposes of revenues and expenses, article 11.1 of the Corporate income Tax Law states that revenues and expenses arising from transactions or economic events must be recognized in the tax period when they accrue in accordance with the accounting legislation, irrespective of the date of their payment or collection, and in accordance with the matching principle.

(c) The reference to the accounting legislation made in those articles 10.3 and 11.1 of the Corporate Income Tax Law, does not include the IAS.

## 4.3 Corporate income tax. - Work on leased premises paid for by lessor has no impact on lessee's taxable income

**Directorate General for Taxes. Resolution V2686-21 of November 5, 2021**

Following the termination of a rental agreement, the lessor offered to rent other premises to the lessee, in addition to undertaking to pay the cost of any work needed to fit out these premises. The lessee took care of managing the work, along with paying the contractor's invoices, although the lessor ultimately met the cost of the work, by paying the lessee the amounts on those invoices.

After a report was requested on the accounting treatment of these payments, the Spanish Accounting and Audit Institute (ICAC) noted the following:

(i) The lessee cannot recognize the expenditure on the leased premises, because it is not the person that actually made the expenditure. The lessee is simply an intermediary, because the cost of the work is ultimately assumed by the lessor.

(ii) The payments for the work and refunds of those payments by the lessor do not have to be recorded as expenses and revenues by the lessee, instead simply as cash movements. If the costs are not paid and refunded simultaneously, the relevant account receivable from the lessor needs to be recognized.

According to article 10.3 of the Corporate Income Tax Law, this same accounting treatment applies from a tax standpoint.

## 4.4 Corporate income tax. - Indemnification for fire at a factory building may be recognized as payments are collected

**Directorate General for Taxes. Resolution V2665-21 of November 4, 2021**

In 2020, there was a fire in the building where an entity carried on its activities. Its insurance company indemnified the losses and paid the indemnification in two installments: one in 2020 and another in 2021. The indemnification was used in both fiscal years to fit out the building and replace the property, plant and equipment damaged in the fire.

Under article 10.3 and article 11.1 of the Corporate Income Tax Law, the indemnification must be recognized in the corporate income tax base for the taxable period in which it accrued, in other words, when the right to receive it is acknowledged, regardless of the date when it is collected.

If, however, the period between accrual and expiration of the latest and only payment period is longer than a year, the special rule under article 11.4 of the Corporate Income Tax Law may be applied and the income recognized in the tax base for the taxable period when the payments become due; which in this case were the 2020 and 2021 periods.

## 4.5 Personal income tax. - Forgiveness of a loan between two entities does not have effects on personal income tax returns of individuals who are shareholders of both companies

**Directorate General for Taxes. Resolution V2916-21 of November 18, 2021**

Various individuals who are shareholders hold interests, in the same proportions, in two companies. One of the entities made a loan to the other which they were considering whether to forgive.

The DGT reiterated the conclusions adopted in resolution V3074-13 of October 16, 2013 and resolution V1812-16 of April 25, 2016 by affirming as follows:

(i) As a general rule, the forgiveness of a loan made by one company to another does not have effects on the personal income tax returns of the individuals who are shareholders in one company and the other, because they are not parties to the loan made between the two entities.

In particular, recognition and measurement standard 18 in the Spanish National Chart of Accounts does not apply, which would require to be recognized for the shareholder a greater acquisition cost for its interest in the giver company and a matching revenue in the same amount in respect of dividends from the giver company.

(ii) However, the existing circumstances need to be examined and the grounds for the transaction, for the purpose of determining the potential existence of a different classification for personal income tax purposes. This would occur, for example, in the following cases:

(a) Where forgiveness of the loan is not an isolated transaction, and instead forms part of a complex transaction in which forgiveness serves as consideration for shareholders in respect of supplies of goods or services.

(b) Where forgiveness is an indirect instrument for making transfers of assets between shareholders with different interests in one company and the other.

## 4.6 Nonresident income tax. – Examination of how a nonresident company is taxed on holding real estate in Spain and giving employees, shareholders and directors the right to use it

**Directorate General for Taxes. Resolution V2993-21 of November 25, 2021**

A Polish company owns a property in Spain, which it gives employees, shareholders and directors the right to use. Under the Poland-Spain tax treaty, any type of use of the property could give rise to an amount of income, including own use, which is taxable in Spain, as the state where the property is located.

Starting out from the fact that income obtained from real estate located in Spain is subject to nonresident income tax and that the law provides that income has to be imputed, unless proven otherwise, in respect of supplying or giving the right to use assets capable of generating income for nonresident income tax purposes, the DGT examined the tax arising in respect of giving the right to use the property according to two types of use:

(i) Periods of use by Polish workers as a reward for their employment relationship: the income obtained from giving this right to use property is taxable in Spain, unless the company substantiates the absence of compensation.

(ii) Periods of use by Polish workers when they are sent to perform work in Spain: this income is taxable in Spain, unless the company substantiates the absence of compensation.

(iii) Periods of use by the company's shareholders or directors. In this case the following distinctions are needed:

(a) If the shareholders are not related individuals or entities, proof may be provided of the absence of compensation in respect of the right to use the property.

(b) If the right to use the property is given to directors and to shareholders owning an interest of 25% or more, the right will be treated as a controlled transaction and give rise to a gross amount of income which must be priced on an arm's length basis. Net income is determined by deducting the expenses set out in the personal income tax legislation (read in conjunction with the nonresident income tax legislation), as long as the taxpayer evidences that they are directly related to the income obtained in Spain and that they have a direct and inseparable economic link to the activity carried on in Spain. The standard tax rate is 19%.

(iv) Periods when the property is not used: there will be no liability for tax on imputed income because the legislation does not require this type of income for individuals.

Lastly, the Directorate General for Taxes noted that determining whether the giving of a right to use the property actually occurs and the potential compensation are factual matters, which have to be priced by AEAT's management and auditing bodies.

## 4.7 Transfer and stamp tax. – The creation of lots to distribute real estate assets among co-owners is only taxable in respect of stamp tax

**Directorate General for Taxes. Resolution V2889-21 of November 17, 2021**

The requesting party and two siblings have various real estate assets which they received party by inheritance and partly by purchasing usufruct rights from their mother. For a few of the assets the three siblings have the same ownership interest, and for others their interests differ. Their intention is to share out the assets in lots to stop having to continue sharing ownership. The lots will be prepared by reference to the ownership interest of each sibling in the various assets and the value of each of them.

Based on the assumption that the joint ownership arrangements do not carry on any business activities, the DGT concluded that their dissolution, with transfers of the remaining ownership shares to one of the co-owners, should be treated as follows:

(i) As a general rule, if one co-owner is given more than their share by reference to the interest they hold in the jointly owned asset, it is regarded that they are receiving something they did not previously possess. In other words, there is a transfer of assets, which is for consideration if that co-owner pays the others in cash for the excess they have received. Transfers of this type are generally subject to transfer tax (under the transfers for a consideration heading).

(ii) However, where the jointly owned asset is indivisible (by nature or because it may considerably lose value as a result of division), they will not be taxable in respect of that tax, in line with article 7.2.B of the Transfer and Stamp Tax Law. In these cases, they will only be taxable in respect of stamp tax.

This special rule has to be applied in line with the Supreme Court's case law (judgment 1502/2019 of October 30, 2019), according to which, in a case like the one under consideration, there are as many joint ownership arrangements as there are co-owned real estate assets, because they involve real estate assets that have already been delivered (even if they come from an inheritance). According to this case law:

(i) If the indivisibility, equivalence and proportionality requirements are fulfilled, the simultaneous dissolution of more than one joint ownership arrangement on real estate assets all owned by the same co-owners, (i) with delivery of the assets to one of them (and compensation for the others as necessary), or (ii) by creating equivalent and proportional lots to be delivered to each of the co-ownerships, will be subject to an ad valorem stamp tax charge not to transfer tax (under the transfers for a consideration heading).

(ii) This special rule applies regardless of whether the compensation is in cash, by assuming the other co-owner’s debts owner or by delivering other assets in payment.

In this latter case, transfer tax (under the transfers for a consideration heading) will only be triggered by a transfer of assets owned individually by one co-owner to another, not by a transfer of assets already under joint ownership, because in this case no transfer takes place, instead the dissolution of a joint ownership arrangement with specification of a right that the co-owner keeping the asset already held.

# 5. Miscellaneous

## 5.1 Approval of the Annual Tax and Customs Control Plan for 2022

On January 31, 2022, the Official State Gazette (BOE) published the decision of January 26, 2022 by the Directorate-General of the State Tax Agency, approving the general guidelines for the 2022 Annual Tax and Customs Control Plan.

The main published guidelines are:

(i) **Tax assistance and information**: As in other years, incentives will continue to be given to the use of new technology for assistance to taxpayers, notably including the following initiative:

- Starting in the first quarter of 2022, taxpayers not required to use the immediate supply of information (SII) record keeping system will be given the option to prepare their **303 form** (for VAT self-assessment) automatically using the information contained in their record books.

- In relation to **corporate income tax**, information will be offered in the taxpayer's **Tax Data** on the adjustments for accounting purposes made in the self-assessment for the previous year and on the calculation of unused tax losses by reference to the returns filed by the taxpayer (not only the figure included in the table taken from form 200 for 2020).

(ii) **Monitoring activities on multinational groups, large companies and tax groups:**

- Priority will be given to assessing the tax risks of taxpayers belonging to sectors that were less harmed by the pandemic.

- Actual application of anti-abuse rules will be examined (i.e. limit on the deduction of finance costs or hybrid mismatches), including those provided in tax treaties.

- Preference will be given to examining the correct reporting of nonresident income tax withholdings by large companies that pay dividends, interest and royalties to nonresident individuals or entities without permanent establishments in Spain. Among other elements, it will be verified whether or not the person receiving those amounts of income has beneficial owner status so as to examine whether there has been an abuse of the European legislation aimed at enabling the free movement of capital within the EU.

(iii) **Monitoring activities on withholdings at source**: A comprehensive approach to personal income tax monitoring will be implemented, starting out from the sources of income. In this area, monitoring activities will be intensified on withholdings at source for forms 190 (annual summary return for withholdings from salary income in cash and in kind and income in cash and in kind from economic activities) and form 184 (annual information return for pass-through entities).

(iv) **Information on transactions with cryptocurrencies**: Implementation regulations will be prepared on the new reporting obligations regarding virtual currencies introduced by the Anti-Fraud Law. The first information on these virtual assets will foreseeably be available in 2023, in relation to fiscal year 2022.

(v) **Activities to update the taxpayer register**: Activities related visits for the taxpayer register will resume. Visiting plans will include a monitoring and verification module which will ensure the accuracy of the following particulars: i) economic activity captions, ii) shareholders and investors, iii) directors and iv) addresses where the business activity is carried on. Additionally, the correct allocation of taxpayers to management offices will be checked.

(vi) **Ban on dual-use software**: It has been announced that the necessary implementing regulations will be drawn up to comply with the ban on dual-use software (set out in the Anti-Fraud Law and in the General Taxation Law).

## 5.2 Intrastat return instructions published

On January 28, 2022, the Official State Gazette (BOE) published the decision of January 24, 2022 by the Customs and Excise and Other Special Taxes Department at the Spanish Tax Agency (AEAT), for the preparation of statistics on trade in goods within the European Union (Intrastat).

The Intrastat returns for transactions performed before 2022 are governed by the Decision of May 22, 2018, by the Customs and Excise and Other Special Taxes Department at the Spanish Tax Agency.

## 5.3 New edition released of transfer pricing guidelines for multinational enterprises and tax administrations

As we described in our alert on January 21, 2022, the new guidelines (see here) include novel elements stemming from conclusions reached in the context of the BEPS Project and work of the OECD/G20 Inclusive Framework.

**Tax Department**

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Hermosilla, 3

28001 Madrid, Spain.

**T** +34 91 514 52 00 **F** +34 91 399 24 08