Tax Newsletter

Spain

GARRIGUES

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1. Exemption for work performed abroad: Directors can apply the exemption for their executive activities

The Supreme Court has concluded that directors are entitled to the exemption for work performed abroad as part of their executive activities. Also, the courts are placing limits on the documents that the tax authorities are allowed to request from the taxpayer to prove that the tasks were performed for the benefit of nonresidents companies or entities.

The Personal Income Tax Law (article 7.p) allows an exemption for income in respect of work performed abroad. To be entitled to the exemption, the individual must travel abroad, and this must be done to provide services for the benefit of a nonresident entity or of a permanent establishment located abroad and the destination country must charge a similar tax to Spanish personal income tax. The Law does not say that directors receiving income characterized as salary income cannot benefit from the exemption.

However, in a judgment dated March 22, 2021 (cassation appeal 5596/2019), the Supreme Court concluded that the exemption could not be applied where directors travel abroad to take part in subsidiaries' board meetings (see our blog dated April 20, 2021 and our April 2021 newsletter, both discussing this judgment).

The court did not pronounce in this judgment, however, on cases where directors travel to conduct their executive activities (and, under the overriding contract doctrine, they only have a contract for services). It has now done so in its recent judgment dated June 20, 2022 (appeal 3468/2020), finding in favor of the exemption. According to the court:

(i) Article 7.p does not expressly refer to article 17 of the law (defining salary income), although nor does it provide a specific definition of salary income for the purposes of the exemption. It therefore has to be considered that article 7.p implicitly refers to article 17.

Article 17.1 provides a general definition of "salary income." And article 17.2 includes other obligations not falling within the general definition of salary income in article 17.1, such as the income of directors and income relating to special employment relationships. The inclusion of special employment relationships in article 17.2 is an unambiguous indication that not all employment relationships can clearly be considered to be included in article 17.1 and that therefore, there are no reasons for excluding application of the exemption to the cases included in that article 17.2.

(ii) To conclude as to whether the exemption applies to directors the category of the work performed abroad needs to be examined. If the work involves executive and management activities, the exemption cannot be disallowed because as the court itself has concluded in other judgments, the law does not prohibit the trip being made to conduct supervision and coordination work.

(iii) It cannot be ignored for these purposes that the exemption is allowed as part of a tax policy designed to encourage international operations for Spanish companies and improve their ability to compete by lowering the tax burden of the taxpayers concerned.

The court expressly underlined that this case is different from that examined in its earlier judgment in appeal 5596/2019.

Furthermore, the courts are restricting auditors' powers in relation to proof of the right to apply the exemption. A sample of this may be seen in the contents of the Madrid high court judgment of April 27, 2022 (appeal 506/2020).

In the case examined by the court, the worker had produced a certificate from his employer, stating that the worker worked as in-house lawyer for the company and that, as part of those activities, he traveled abroad (basically, to "hold meetings"). That document listed the trips and work performed and stated the dates. For the auditors, this certificate was not proof of services being provided for the benefit of a nonresident entity and rejected the exemption.

To support their position, the auditors added that it is not sufficient for there to be trips to finalize certain elements of a specific project, instead the project must mostly be performed outside Spain. These circumstances, according to the auditors, cannot be considered to be met if the trips are short (three or four days on each trip, including outward and return journey, in the examined case) and the reason for the trips is basically to "hold meetings." The auditors also underlined that in the examined case the company did not include the exemption when calculating its withholdings, and there was no record of worker objecting to the excess withholdings.

The Madrid TEAR added that to prove that the service had been provided for the benefit of nonresident entities the worker should have produced to the auditor's management contracts signed between the parent company and its subsidiaries, proof of the invoices between these entities or evidence of the request for services by the nonresident entities.

Conversely, Madrid High Court allowed the exemption, stating that:

(i) Firstly, with regard to the law and earlier conclusions by the Supreme Court, it allowed the exemption regardless of the length of the trips and the taxpayer's greater or lesser participation in the projects or of whether they are mostly performed abroad.

(ii) Secondly, it affirmed that the employee cannot be required to produce contracts between the entity where the employee provides services and the entities at the destination country, because the employee does not necessarily have access to these types of documents. It further pinpointed that the Madrid TEAR should not have requested these documents, because they were not requested in the audit.

(iii) Lastly, the court considered that the certificate issued by the employer is sufficient to evidence that the trips were made and that their purpose was to provide services for the benefit of nonresident entities, by substantiating the number of days spent away and the beneficiary entity in each case.

(iv) In relation to the discrepancy between the taxpayer's return (which left a portion of his income exempt) and the withholdings made by the company (calculated without counting the exemption), the court recalled that, where the company does not certify the trips and the reasons for them, the existence of that discrepancy may be an indication that the trips were not made; but if there is a certificate issued by the company of the type produced in this case, the taxpayer has a right for it to have it taken into account as proof of fulfillment of the requirements for the exemption.

2. Judgments

2.1 Civil liability. – The requirements laid down by Spanish legislation are incompatible with EU law

Court of Justice of the European Union. **Judgment of June 28, 2022, delivered in case C-278/20**

The Court of Justice of the European Union (CJEU) has concluded that Spanish law on civil liability infringes the principle of effectiveness (although it found against infringement of the principle of equivalence which had also been alleged by the European Commission).

For further information on this judgment, see our alert dated June 28 and our commentary dated June 30, 2022.

2.2 Form 720 – Unjustified capital gains cannot be attributed in relation to assets acquired in statute-barred periods

Supreme Court. Judgment of June 20, 2022

Based on article 39.2 of the Personal Income Tax law, the auditors attributed to taxpayers an unjustified capital gain in respect of the value of a building reported tardily on Form 720, even though it had been evidenced in the procedure that its acquisition took place in a statute-barred year.

In its judgment, the Supreme Court concluded that personal income tax cannot be assessed without being subject a statute of limitations and for that reason concluded that the assessment that gave rise to the cassation appeal is null and void. This conclusion is in line with the CJEU judgment dated January 22, 2022, in case C-788/19 (January 2022 newsletter).

The Court did not rule as to what effect the CJEU judgment has in cases where the tax authorities' assessments are final, or as to whether, under that judgment, courts may order a reversion of procedure to verify the statute of limitations.

2.3 Corporate income tax. – Interest on stayed debt obligations must be treated in the same way as late-payment interest regarding their deduction

Supreme Court. Judgment of May 3, 2022

The Supreme Court has confirmed (as it did in a judgment delivered on February 8, 2021, discussed on our February 2021 newsletter) that late-payment interest was deductible for corporate income tax purposes when the Revised Corporate income Tax Law (TRLIS) was in force.

In doing so it underlined the following points:

(i) The purpose of late-payment interest is to compensate the tax authorities for a delay in the performance of an obligation to give and therefore they are compensatory in nature. Consequently, it cannot be included under letter c) of article 14 of the TRLIS

(now article 15 c) of the Corporate Income Tax Law -LIS-), relating to criminal and administrative fines and penalties, surcharges in the enforced payment period and surcharges for late filing without a prior request.

(ii) Nor can it be considered a gift or gratuity (letter e) under article 14 TRLIS, now article 15 e) LIS), because it is not paid as a result of the debtor's intention to make a gift or *animus donandi*, instead it is imposed by the law.

Moreover, although in the case examined in the judgment the applicable corporate income tax law was the TRLIS not the LIS, the court added that late-payment interest cannot be characterized either as an expense incurred to carry out activities that are against the law (letter f) under article 15 LIS), because that article must be interpreted narrowly to mean activities such as bribery and other similar types of conduct.

Lastly, in a new interpretation, the court treats interest on stayed debt obligations (arising on a stay of enforcement of a challenged administrative act) in the same way as late-payment interest, in relation to the ability to deduct it.

2.4 Nonresident income tax. - EU law precludes the laying down of stricter requirements for nonresidents than residents for refunding tax paid as a result of receiving dividends

Court of Justice of the European Union. Judgment of June 16, 2022, case C572/20

German law lays down as a condition for a refund of the tax levied on the payment of dividends to nonresident companies in Germany (owning "free float" shares) that it must be proven that the tax cannot be deducted in one way or another in that year or in later years by the company receiving them or its shareholders. That requirement is not laid down where the recipient of the dividends is resident in Germany.

The CJEU held that this legislation is precluded by the free movement of capital, due to laying down stricter requirements for nonresident than for resident companies.

2.5 Real estate tax. – Where the cadastral value for a property is modified, the authorities must notify the following assessment of the tax separately

Catalan High Court. Judgment of January 20, 2022

In relation to taxes collected periodically, as is the case with real estate tax (IBI), the legislation states that after the first assessment relating to registration on the relevant register, municipal register or roll has been notified, subsequent assessments may be notified collectively, if the essential elements of the tax do not change, such as, for example, the taxable amount.

In the case examined in this judgment, a new cadastral value for a property was notified (which was higher than the previous value), taking effect in relation to real estate tax for fiscal year 2019. Despite this fact, the assessment of the tax for 2019 was notified to the taxable person using the collective notification procedure.

The Catalan High Court concluded that, in a case of the type described, the local authority should have notified the assessment for 2019 separately. Because this was not done, the assessment is null and void.

2.6 VAT. - Any type of communication sent through a notary is sufficient to change the taxable amount for irrecoverable debts

Supreme Court. Judgments of June 2 and June 9, 2022

Modification of the VAT taxable amount in the case of fully or partially irrecoverable debts is subject to a number of requirements. Among others, Article 80. Four of the VAT Law provides that payment of the debt must be requested via a judicial claim or request sent through a notary.

In the case underlying this judgment, the tax authorities had considered that by "request sent through a notary" the VAT Law means a specific type of notarized document, which contains a request made by the notary. The entity argued against this that the phase has a general and broader meaning that includes notarized documents forwarding case records and is not confined to documents containing demands for payment.

The Supreme Court concluded that the authorities' interpretation is precluded by the neutrality principle governing VAT, by making modification of the taxable amount depend on a specific type of notarized document. For further information on this judgment, see our blog entry dated July 5, 2022.

2.7 Transfer and stamp tax. – A contract for the provision of a public service that determines a transfer of property to the recipient of the contract may be treated as an administrative concession

Madrid High Court. Judgment of February 8, 2022

Article 7 of the Revised Transfer and Stamp Tax Law requires administrative concessions to be subject to transfer tax under the transfers for a consideration heading. Article 13 of the same law includes in this category any administrative acts and transactions by which, "as a result of the grant of powers to manage public services or the attribution of private use or special rights for goods in the public domain or for public use", a transfer of property to private parties arises.

On the basis of these articles, the authorities considered that a management agreement for a facility for the elderly between an entity and the Madrid autonomous community government was subject to transfer tax under the transfers for a consideration heading. For the appellant, however, it was a services agreement subject to VAT.

The National Appellate Court concluded that the covenanted transaction had to be treated in the same way as an administrative concession, among other reasons, because the agreement attributed to the taxpayer powers that were owned by the Madrid autonomous community government, which unambiguously determines that it involves a "grant of powers to manage public services." According to the court, where areas of government activity (having the nature of a public service) are transferred to a private party, and a particular benefit is obtained, there can be no doubt that a transfer of property takes place to the recipient.

Accordingly, the National Appellate Court confirmed that the transaction was subject to transfer tax under the transfers for a consideration heading.

2.8 Tax on increase in urban land value. - For the purposes of applying the time limit in the constitutional court judgment that voided provisions on the tax, any assessments that had not been validly notified are not considered to be final

Toledo Judicial Review Court no 1. Judgment of January 19, 2022

The constitutional court judgment delivered on October 26, 2021, which held to be unconstitutional a number of articles governing the tax on increase in urban land value determined that among others, assessments that had become final due to not having been challenged on the date the judgment was delivered could not be reviewed on the basis of this judgment.

In our April 2022 newsletter we discussed that numerous questions have emerged in recent months regarding the time limit for the effects of the judgment, which are already being resolved by the tribunals and the Directorate General for Taxes (DGT).

The specific case examined by the Toledo court concerned an entity that had not learned within the time limit that a number of assessments had been notified to it by official notice (following unsuccessful attempts to serve notice at its domicile), and this was why it failed to pay the assessed amount and the assessments became final. Later, notices were served on it of orders initiating enforced collection proceedings, this time electronically, and it had access to them within the time limit.

The court recalled that, in this case, the entity had a legal obligation to communicate with the tax authorities electronically, and therefore notification of the assessments by official notices due to not being able to serve notice in person was not valid. As a result, assessments of the tax cannot be considered final for the purposes of the time limit in that constitutional court judgment, despite not having been challenged on a timely basis.

For this reason, the court recognized the taxpayer's right to a refund of the paid amounts.

2.9 Administrative procedure. – A warrant for entering and searching premises must provide adequate information on the consequences of refusing entry

Canary Islands High Court. Judgment of July 1, 2021

In the examined case, auditors entered an entity’s premises, based on a warrant from the Regional Director attached to the Finance Ministry. The warrant stated that the purpose of the entry and search was to obtain accounting and nonaccounting information or information on the entity’s economic relationships with third parties, and it allowed access to programs and files on magnetic media and, if necessary, the use of keyboards, the viewing of information on screens or the printing of data. It also stated that access had to be authorized by the person with the highest authority at the company.

During the visit, the auditors attempted to gain access to the company’s accounting program, but the company refused to allow that access, until the entity's accountant could be present. As a result of this refusal, the auditors imposed a fine on the entity for resistance and obstruction (article 203 LGT).

The Canary Islands High Court set aside the fine for a number of reasons:

(i) Firstly, the entry and search warrant should have mentioned clearly that the only valid consent for entering the premises had to be given by the taxpayer's director or representative. It is not valid, therefore, to attempt to obtain this consent, as specified in the warrant, from the person with the highest authority at the company at that time.

(ii) Moreover, the taxpayer was not properly informed that the premises could qualify as constitutionally protected premises (in which case, a court warrant would have been needed to gain entry).

(iii) Nor did the warrant provide information on the consequences of refusal to allow entry (which included a fine).

The court added that, in any event, the company did not really object to access to accounting documents within the meaning required by the legislation on penalties, because it simply mentioned that it would not allow access until the entity's accountant could be present.

2.10 Extension of liability procedure. – The statute of limitations for claiming payment of tax debts from persons with secondary liability starts before the declaration of default by the main debtor

Supreme Court. **Judgment of June 08, 2022**

Article 67.2 of the General Taxation Law (LGT) states that the statute of limitations for claiming payment of tax debts by persons with secondary liability will start to run from notification of the latest collection step taken against the main debtor or any of the persons with joint and several liability.

The issue examined in this judgment was the meaning of "notification of the latest collection step." In the examined case, if the date of the declaration of default by the main debtor were taken as the start date (10/6/2009), action against the persons with secondary liability (notified on 9/4/2014) would be statute-barred. However, if the period started to run from notification of the latest collection step against the main debtor made after the declaration of default (an attachment interlocutory order dated 9/30/2010), it would not have become statute barred.

The Supreme Court applied its earlier judgment delivered on February 7, 2022 (summarized in our March 2022 newsletter) and concluded as follows:

(i) The start date of the period for the authorities to exercise their power to claim payment of tax debts from persons with secondary liability must be set as the date when the latest collection step is made against the main debtor or persons with joint and several liability before the declaration of default by the main debtor.

(ii) Collection steps against the main debtor made after the declaration of default do not have the effect of tolling the statute of limitations for claiming payment from the person with secondary liability.

2.11 Penalty procedure. - For infringements consisting of resistance or obstruction, specific reasons are required for imposition of maximum penalty

National Appellate Court. Judgment of May 18, 2022

In an audit, auditors made up to four requests for certain tax-relevant documents to be produced by the person with tax obligations, but the entity could not produce them because, according to its statements, they were very old documents.

The auditors imposed a penalty for resistance or obstruction under article 203.5.c) LGT. According to that article, where the requested documents have not been provided after three requests, if the amount of the transactions to which those documents relate is higher than 75% of the transactions that should have been reported, the penalty must be 2% of the entity's net revenues (INCN), in an amount between €10,000 and €400,000. In this case, because the amount relating to the data not produced by the company was higher than 2% of its net revenues, the auditors set the penalty at €400,000. However, they did not state the reasons for deciding to impose the maximum penalty.

The National Appellate Court concluded that, for the penalty to be levied at the highest amount provided in the law, specific reasons needed to be given based on the seriousness of the acts or on the particular degree of fault on the part of the person subject to tax obligations. The court underlined that, in the examined case, the auditors simply quantified the penalty objectively, because of the net revenues figure without stating which other specific reasons were able to justify imposing the highest penalty amount.

It therefore upheld the appeal and ordered the penalty to be reduced to the lower limit provided in the law (€10,000).

3. Decisions

3.1 Corporate income tax. - Transactions conducted in statute-barred years before entry into force of the 2003 General Taxation Law cannot be audited, even if they take effect in non-statute barred years

Central Economic-Administrative Tribunal. Decisions of May 24, 2022 (5175/2019 and 7314/2019)

The 2003 General Taxation Law provided for the first time that the tax authorities can review transactions performed in statute-barred years where they have effects in non-statute barred years.

In the cases underlying these decisions, the tax authorities intended to review transactions conducted before 2003. Applying the principle set by the Supreme Court in its judgment of November 4, 2020 (appeal 7716/2018), TEAC concluded as follows:

(i) The date determining the legislation applicable to the tax authorities' right to audit statute-barred years is not that of the review or audit work, instead the date when the reviewed acts, transactions and circumstances took place.

(ii) Therefore, because the transactions in the examined cases were conducted when the repealed 1963 General Taxation Law was in force not the current 2003 law, the tax authorities could not examine those transactions.

3.2 Corporate income tax. - Interim dividends out of income for the year do not have to be included to calculate capitalization reserve

Central Economic-Administrative Tribunal. Decision of May 24, 2022

At issue was how the capitalization reserve needs to be calculated where it has been decided to distribute a divided out of income for the same year.

TEAC concluded that to determine the increase in equity for the purposes of the capitalization reserve any amounts distributed as interim dividends do not have to be included in equity at the start and end of the period. According to the court, the law is not designed to give an incentive to retaining the increase in equity for the current year, but rather for the previous year, and for that reason the interim dividend out of income for the year (which is nothing more than an early distribution of that income) does not have to be included to determine the change in equity.

This same view was taken by the DGT in resolution V1952-21.

3.3 Corporate income tax. – For a tax credit to be used it must be reported in the self-assessment for the year it is generated

Central Economic-Administrative Tribunal. Decisions of March 23, 2022 (4379/2018 and 0514/2020)

In these decisions, TEAC applied the principle determined by the Supreme Court in a judgment delivered on July 22, 2021 (appeal 1118/2020) and concluded that a corporate income tax self-assessment for a statute-barred period does not need to be corrected to recognize, in that period, international double taxation credits generated in statute-barred periods which were not reported by the person with tax obligations in the self-assessments relating to those statute-barred periods.

According to the tribunal, finding otherwise would mean altering the information reported and applied at the time and using to do this an ingenious correction mechanism consisting of recognizing a new tax credit generated in statute-barred periods which were not properly reported by taxpayers in their tax returns.

Adopting the principle coming out of these decisions, DGT concluded as follows, in resolutions **V1510-22** and **V1511-22**, of June 24, 2022:

(i) A tax credit may only be used if its amount has been reported on the corporate income tax return for the tax period in which it was generated.

(ii) If a tax credit was not reported in the relevant self-assessment and is intended to be used, a correction of that self-assessment must be requested, within the legally stipulated period in the LGT and its implementing legislation. Therefore, that correction will not be possible in relation to tax credits generated in statute-barred periods.

3.4 Personal income tax. - TEAC determines new principles for unjustified capital gains

Central Economic-Administrative Tribunal. Decisions of May 12, 2022 (3467/2020, Principle 1, Principle 2, Principle 3 and Principle 4) and (4244/2021, Principle 1, Principle 2, Principle 3 and Principle 4)

Article 39.2 of the Personal Income Tax Law provided until recently that the following would amount to unjustified capital gains (to be included in the general component of taxable income for the earliest non-statute barred period): the holding, reporting or acquisition of assets and rights with respect to which the period for the obligation to file 720 (for assets and rights abroad) has not ended. In a judgment delivered by the CJEU on January 27, 2022 in case C-788/19 (discussed in our alert prepared on the same date), this court concluded that these rules were precluded by the free movement of capital, among other reasons, because the taxpayer could not rely on expiry of the statute of limitations**.** Following this judgment, the Personal Income Tax Law has been amended to remove that presumption.

However, TEAC is taking the view that the judgment does not set aside these rules (while they were in force) absolutely. It has so stated in various decisions delivered on March 4, 2022 (discussed in our March 2022 newsletter) and now in new decisions in which this conclusion is brought to bear. According to TEAC:

(i) The CJEU judgment delivered on January 27, 2022 confirmed the validity of the unjustified capital gains presumed to be obtained under article 39.2 of the Personal Income Tax Law, but lays down an obligation to consider the statute of limitations for the right to assess hidden income that is discovered.

The legal characterization of the income as an unjustified capital gain is not altered by subsequently reporting the true source of income.

(ii) The absence of rules on expiry of the statute of limitations in that article must be combined with application of the rules in the LGT, which determine the following:

- Article 39.2 does not delay the start of the statute of limitations for the periods in which the amounts of income were obtained. Therefore, the taxpayer may substantiate the expiry of the statute of limitations that has taken place by evidencing that the assets not reported within the time limit on Form 720 were funded out of income obtained in statute-barred periods.

- The rules on tolling the statute of limitations need to be considered to examine expiry of the statute of limitations.

In relation to this, according to the interpretation determined by the Supreme Court in judgments delivered on May 18, 2020 (appeal 6583/2017) and (appeal 5962/2017), the filing of Form 720 does not toll the statute of limitations for the right to assess, because this form is purely an information return which is not used to assess any tax.

(iii) Article 39.2 cannot be applied to mean that the taxable amount must include, despite originating in a non-statute barred year, the portion of the value of assets located abroad which relates purely to an increase in value of the assets in a statute-barred year.

3.5 Tax on economic activities. - The tax liability needs to be reduced where it is evidenced that there was a complete shutdown of operations due to the pandemic

Central Economic-Administrative Tribunal. Decisions of May 18, 2022 (0461/2021 and 3084/2022)

The legislation on the tax on economic activities allows a proportional reduction to the tax liability where a "halting of the business" occurs for a number of defined reasons (prohibition order by a court, fires or floods, among others).

TEAC confirmed that a shutdown of operations due to the pandemic matches the concept of a "halting of the business." Therefore, the reduction to the tax liability should be allowed for the days in which the taxpayer did not operate due to the health crisis.

The tribunal also clarified, however, that the right to that proportional reduction can only be recognized where a complete (rather than a partial) shutdown of operations is evidenced.

3.6 VAT. - Cancellation of a mortgage entitles the creditor to modify the taxable amount outside the period stipulated in the law

Central Economic-Administrative Tribunal. Decision of May 18, 2022

The claimant had a special priority claim against a debtor subject to an insolvency proceeding, which was recognized by the insolvency practitioner. The commercial court with jurisdiction for the insolvency proceeding ordered cancellation of the mortgages securing the debt concerned, and as a result the insolvency practitioner certified that the debt was irrecoverable.

For that reason, the company modified the taxable amounts for the outstanding transactions in respect of the amounts not paid by their debtor. The tax authorities denied the right to that modification because it was made after the end of the period stipulated in article 80 of the VAT Law running from when the debt expired. According to the company, however, the modification had been requested in the time limit, because it had to run from when the debt was declared irrecoverable.

TEAC found in the company's favor and affirmed that the period stipulated in the law for modifying the taxable amount starts to run when the claim becomes irrecoverable not when the debt matures. In the examined case, which is the point when the mortgage arranged for the entity is canceled.

3.7 Administrative procedure. - Spanish tax authorities cannot make a request for information to a non-established entity that does not have connections with Spain

Central Economic-Administrative Tribunal. Decision of May 18, 2022

The tribunal analyzed the validity of a separate request for information made by the Spanish tax authorities, through the National Anti-Fraud Office (ONIF), to a non-established entity in Spain, which does not have any connection or connecting factor with Spain determining the

existence of a tax and legal relationship, and which, therefore, is not subject to Spanish domestic law.

TEAC concluded that the tax authorities do not have authority to make requests of this type as far as they cannot exercise administrative powers (in this case, powers to obtain tax-relevant information) outside their borders, unless the addressed person has a tax and legal relationship with the Spanish authorities. In these circumstances, the information must be obtained via mutual assistance instruments relating to the exchange of information.

3.8 Administrative procedure. - Notification by a tax agent on courtesy days is valid if justified by efficiency reasons

Central Economic-Administrative Tribunal. Decision of May 18, 2022

Audits must be performed within a maximum period defined in article 150 LGT. That period runs from notification of the start of the work until the resulting administrative decision (the assessment) is considered to have been notified. One of the consequences of going over that period is that the work does not toll the statute of limitations for the taxes reviewed in the audit.

This decision examined an audit against an entity under obligation to receive notifications and communications electronically, which was notified of the assessment in person (via a tax agent). This notification was made on one of the "courtesy days." The term "courtesy days" is used for days specified by persons with tax obligations who are included in the enabled electronic address system on which no notifications may be sent to them at the enabled electronic address.

The person with tax obligations argued that, for this reason, the date of completion of the work cannot be the date of the notification via the tax agent.

TEAC concluded that the notification made via the tax agent is valid because the LGT stipulates that the authorities may use non-electronic notifications for reasons of efficiency in the work of the authorities, where the use of electronic means is incompatible with the immediacy and speed required in the activities of the public finance authority.

3.9 Collection procedure. – TEAC examines a number of issues in relation to the attachment of assets

Central Economic-Administrative Tribunal. Decisions of May 17, 2022 (1975/2022 and 2039/2019) and April 19, 2022 (2654/2019) and (0381/2020)

TEAC pronounced in these decisions on how to calculate the limit stipulated in the legislation on the attachment of wages, salaries and pensions. According to the court:

(i) Where, along with their ordinary monthly payment, a bonus or nonregular payment is received, the limit must be twice the monthly amount of the minimum wage. In other words, the scale provided in the Civil Procedure Law applies to the excess received over and above that amount.

(ii) Where the monthly wage includes the proportional part of nonregular payments or bonuses, the unattachable limit consists of the minimum wage calculated over a year (monthly minimum wage multiplied by 14 payments and divided into 12 monthly amounts).

(iii) The unattachable limit is determined only by reference to the latest wage, salary or pension paid into the person's account.

In other words, the balance available in the account on the date of the attachment, less the amount calculated in respect of the unattachable limit, will be considered savings and the full amount of that balance will be able to be attached, regardless of whether it originates from salary payments received for earlier months.

Lastly, the tribunal recalled that the assets of business companies are attachable in all cases, and the limit relating to the inability to attach books and tools needed to exercise a profession, craft or trade as set out in the legislation is not applicable.

3.10 Collection procedure. - Deferred or split payment requested in the period granted following refusal of a request for a stay stops commencement of the enforced payment period

Central Economic-Administrative Tribunal. Decision of April 19, 2022

Up until this new decision, TEAC had been finding that, if a tax debt was not paid within the payment period granted after refusal of a request for a stay, the enforced payment period started running even if deferred or split payment had been requested in that period. According to the tribunal, this request did not stay the collection procedure.

Based on the principle determined by the Supreme Court in a judgment delivered on October 28, 2021 (appeal 4743/2020), TEAC has changed its earlier principle and concluded that a request for deferred or split payment within the new payment period granted following refusal of a request for a stay stops commencement of the enforced payment period, and as a result, it set aside an order initiating enforced collection proceedings rendered in these circumstances.

3.11 Collection procedure. - In the case of assessments related to an offense, the admission for consideration of the report of an offense determines denial (not dismissal) of the stay, so a new voluntary payment period must be granted

Central Economic-Administrative Tribunal. Decisions of April 19, 2022 (1168/2019 and 3434/2019)

After assessments related to offenses were issued in relation to customs debts, the person with tax obligations requested a stay of the obligation to enforce the debt until the potential report of an offense was admitted for consideration by the court and provided various real estate assets as security. When the report of an offense had been admitted, the tax authorities dismissed the request for a stay and issued orders initiating enforced collection proceedings in respect of each assessment.

After examining this scenario, TEAC concluded as follows:

(i) The special rules on staying enforced collection proceedings in cases involving assessments related to an offense are not complete. Therefore, to examine the case underlying this decision the general rules on appeals and stays in the LGT and its implementing legislation need to be applied.

(ii) Under these general rules, the managing office should not have simply ordered dismissal of the request, it should instead have ordered denial of the request and granted a new period for voluntary payment (ten calendar days due to being assessments of customs debts).

(iii) The failure to offer that voluntary payment period prevented that period from expiring and therefore the enforced payment period did not commence.

As a result, the order initiating enforced collection proceedings had to be set aside.

4. Resolutions by the directorate general for taxes

4.1 Corporate income tax. – Tax neutrality rules can be applied even if the absorbed entity is a holding company

Directorate General for Taxes. Resolution V0871-22 of April 22, 2022

The submitted issue concerned application of the tax neutrality rules in a merger in which a company would absorb a wholly owned entity which could be considered a holding company under article 5.2 of the Corporate Income Tax Law.

The DGT concluded that an absorbed company potentially being considered a holding company is not an obstacle to applying the tax neutrality rules to the merger, even though other requirements have be fulfilled to be able to apply those rules; among others, the transaction must not be carried out simply to achieve a tax advantage without any economic reasons (which is a question of fact).

4.2 Corporate income tax. - Decrease in voluntary reserves as a result of a tax adjustment and an entity being wound up may affect the capitalization reserve

Directorate General for Taxes. Resolution V0745-22 of April 5, 2022, and V0752-22 of April 6, 2022

Article 25 LIS allows a reduction to the corporate income tax base equal to 10% of the increase in equity. A condition for the reduction is that the increase must be retained for 5 years from the end of the taxable period to which the reduction relates, except as regards the existence of book losses.

According to the DGT, this requirement to retain the increase demands that, in each of those 5 years, the difference between equity at the end (not including the earnings figure for that year) and at the beginning (not including the earnings for the previous year) of each year must be equal to or higher than the increase in equity that gave rise to the reduction.

Accordingly, this requirement would not be fulfilled in the following cases:

(i) Where there is a decrease for accounting purposes of the voluntary reserve caused by a corporate income tax adjustment.

(ii) Where the company is wound up within 5 years.

In these cases, the entity will have to pay, together with the liability for the year in which the requirement failed to be fulfilled, the total tax liability relating to the tax benefit applied in earlier periods plus the relevant late-payment interest.

4.3 Personal income tax. - Beneficiary of an inheritance agreement may apply the abatement multipliers to which the transferor would have been entitled

Directorate General for Taxes. Resolution V0771-22 of April 11, 2022

An individual is going to receive from their mother a building that she had acquired in 1970, under an inheritance agreement.

In relation to acquisitions for no consideration on death under living inheritance agreements or contracts, the personal income tax legislation provides that the beneficiaries of those agreements who transfer the acquired assets within five years from when the inheritance agreement was concluded or from the death of the giver, if sooner, will have allocated to them the giver's position in respect of the value and acquisition date of the assets (where that value is lower than that calculated by applying the inheritance and gift tax rules at the point when the agreement took place).

It was asked whether, in these cases, the recipient may apply the reduction (abatement) stipulated for assets and rights acquired before December 31, 1994.

The answer is yes. According to the DGT, in these cases, the allocation to the beneficiary involves the value and the date of acquisition, and therefore, if this date is earlier than December 31, 1994, the recipient will be able to apply the abatement multiplier rules.

4.4 Personal income tax. - DGT allows depreciation of properties acquired for no consideration to be calculated by reference to actual value at the time of acquisition

Directorate General for Taxes. Resolution V0716-22 of April 1, 2022

One of the expenses that may be deducted to calculate the net income obtained from leasing properties is the depreciation of those properties. Under the Personal Income Tax Regulations, this depreciation expense is calculated as 3% of the higher of "paid acquisition cost" and cadastral value, not including the value of the land.

In the past, the tax authorities have taken the view that, in cases involving properties inherited or received as gifts, the paid acquisition cost is 0 (except for any taxes and expenses incurred on the acquisition) and therefore, the depreciation expense will generally be 3% of the cadastral value. However, the Supreme Court (in judgment 3483/2021 delivered on September 15, 2021, discussed in our alert dated September 29, 2021) concluded that, in

these cases, the acquisition cost is the value of the asset for inheritance and gift tax purposes plus the taxes and expenses associated with the acquisition.

The DGT has now adopted the principle determined in the decision of April 1, 2022 (as did AEAT in its 2021 personal income tax program).

4.5 Wealth tax. - Exemption is not applicable to pension plans arranged in other countries

Directorate General for Taxes. Resolutions V0875-22 and V0878-22 of April 25, 2022

The wealth tax legislation allows in relation to pension plans an exemption for the vested rights of members and the economic rights of beneficiaries.

No definition of the term "pension plan" appears in the Wealth Tax Law. According to the DGT, the industry legislation must be applied to determine whether a specific product may be characterized as a pension plan for these purposes. Under that legislation, the DGT concluded that the exemption would be restricted to:

(i) The pension plans defined in chapters I through II of the revised Law on Pension Plans and Pension Funds.

(ii) Those appearing in Section two of Chapter X of that law (Spanish occupational pension funds in other member states) subject to the legislation of other member states.

The exemption will not apply, by contrast, to the vested rights and economic rights of:

(i) Pension plans arranged in non-EU member states.

(ii) Pension plans arranged with an entity domiciled in another EU member state (Malta, in the examined case) and subject to that country's legislation.

The DGT noted further that a principal residence is not considered to be a non-productive asset, for the purposes of the combined income/equity limit.

5. Legislation

5.1 Publication of the annual equivalent rate for third quarter of 2022, for the purpose of characterizing certain financial assets for tax purposes

The June 27, 2022 Official State Gazette (BOE) published the Decision of June 21, 2022, by the Office of the General Secretary for the Treasury and International Finance, which sets out the annual effective interest rate for characterizing certain financial assets for tax purposes, this time for the third calendar quarter of 2022. The rates are as follows:

- Financial assets with a term equal to or shorter than four years: 0.824 percent.
- Assets with terms between four and seven years: 1.876 percent.
- Assets with ten-year terms: 1.637 percent.

- Assets with fifteen-year terms: 2.608 percent.
- Assets with thirty-year terms: 1.831 percent.

5.2 New tax measures approved to mitigate the effects of the economic crisis and the pandemic

On June 26, 2022 the Official State Gazette published Royal Decree-Law 11/2022 of June 25, 2022, adopting and extending certain measures to respond to the economic and social consequences of the war in Ukraine, to confront social and economic vulnerability, and for economic and social recovery on the island of La Palma.

Additionally, on June 27, 2022 the Canary Islands Official Gazette published Decree-Law 8/2022 of June 23, 2022, which (among other measures) extends the period for making zero rate charges of the Canary Islands general indirect tax to combat the effects of COVID-19.

For a summary of tax measures in these two pieces of legislation, see our alert dated June 27, 2022.

5.3 Spain confirms conclusion of the necessary internal procedures for Multilateral Convention provisions to take effect

On June 21, 2022 the Official State Gazette (BOE) published Spain's Notification to the secretary-general of the OECD, pursuant to article 35.7 of the Multilateral Convention.

The notification contains a list of the jurisdictions with respect to which Spain confirms that it has completed its internal procedures for the entry into effect of (i) the provisions of the Multilateral Convention, and (ii) the provisions of Part VI (Arbitration) of that convention.

5.4 Modification of the voluntary payment period for the tax on economic activities in 2022

On June 15, 2022 the Official State Gazette (BOE) published the Decision of June 8, 2022 by AEAT's Revenue Department, amending the voluntary payment period for the tax on economic activities in 2022 (national and provincial components).

The set period is between September 15 and November 21, 2022, both dates included.

The national and provincial charges must be paid through authorized credit institutions, with the payment document that will be sent to the taxpayer for this purpose. If the payment document is not received or is mislaid, the payment must be made using a duplicate, which can be obtained at the provincial or local AEAT tax offices for the province where the taxpayer's tax domicile is located, in the case of national charges, or the offices for the province where the domicile at which the activity is conducted, in the case of provincial charges.

5.5 Tax measures approved to boost energy efficiency in homes

Royal Decree-Law 19/2021, of October 5, 2021, on urgent measures to boost the renovation of buildings in the context of the Recovery, Transformation and Resilience Plan was published in the official State Gazette on October 6, 2021.

A range of personal income tax measures were approved in that royal decree-law. Three new tax credits were introduced in relation to amounts spent on renovation work contributing to improving the energy efficiency of the principal residence or rented home and it was determined that the support granted in Royal Decree 691/2021 of August 3, 2021, Royal Decree 737/2021 of August 4, 2021 and Royal Decree 853/2021 of October 5, 2021 will not be taxable in 2021, as we discussed in our alert dated October 6, 2021.

Now, via Law 10/2022 of June 14, 2022, on urgent measures to boost renovation building activity in the context of the Recovery, Transformation and Resilience Plan (published in the Official State Gazette (BOE) on June 16, 2022), those measures have been written into a law and the non-taxable transactions provided in Royal Decree 477/2021 of June 29, 2021 have been increased.

5.6 Conditions broadened for partnerships in the application of taxes

On June 11, 2022 the Official State Gazette (BOE) published Order HFP/534/2022 of June 6, 2022, amending Order HAC/1398/2003 of May 27, 2003 establishing the cases and conditions in which partnerships may enter into effect for the management of taxes, and these partnerships are extended to the remote filing of certain returns forms and other tax documents.

5.7 Modification of Form 369

On June 2, 2022 the Official State Gazette (BOE) published Order HFP/493/2022 of May 30, 2022, modifying the order approving self-assessment form 369 for the special VAT regimes applicable to supplies of services and distance sales of goods.

The order makes changes to the procedure for tax payments by transfer by traders and professionals not established in the European Union who do not have a bank account at any of the institutions approved by the Tax Agency.

6. Miscellaneous

6.1 Modification of the principles on the basis for the tax credit for promotional and advertising expenses for publicizing events of exceptional public interest

Article 27 of Law 49/2002, of December 23, 2002, on the tax regime for not-for-profit entities and for tax incentives to patronage, defines the support programs for events of exceptional public interest as the set of tax incentives specifically applicable to activities conducted to ensure the smooth running of any of the events determined by the law.

Article 27.3 sets out the maximum tax benefits applicable to sponsors, corporate income taxpayers, personal income taxpayers, or nonresident income taxpayers who incur multiyear promotional and advertising expenses serving directly to promote those events of exceptional public interest, under the plans and programs established by the consortium or public authority body concerned. Among these incentives a tax credit is allowed equal to 15% of those advertising and promotional expenses.

By decision on January 25, 2018, the DGT approved a manual setting out the principles for applying the rules in that article 27.3. The manual stated that where the main purpose of the media is not advertising (several types of packaging, cans, bottles, food packaging and bags), the purely advertising expense had to be calculated and included in the basis for the tax credit. So only that cost may be used in the calculation on which the tax credit is based.

Under this principle, the Tax Agency has been finding that, where an event of exceptional public interest is publicized by placing an event logo on the packaging items that businesses use for their products, the basis for the tax credit is not the purchase cost of the packaging items, instead the cost required for businesses to place the event logo on those packaging items. Because this is usually a negligible amount, this principle is tantamount to denying the right to the tax credit.

The Supreme Court has concluded however in a number of recent judgments (including the judgment of July 20, 2021, summarized in our alert dated July 27, 2021) that the basis for the tax credit has to include the whole cost of packaging items bearing logos of the events.

Based on this case law, a decision of June 9, 2022 by the DGT updating that manual was published in the Official State Gazette on June 11, 2022. It provides in particular that the rules determining the basis for packaging items not having advertising as their main purpose will be those applicable to other advertising media.

Tax Department

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