Tax Newsletter

Spain

GARRIGUES

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1. Judgments

1.1 Freedom of establishment. – It is not precluded by EU law to exclude from tax neutrality intra-group transfers to subsidiaries resident in other member states where the aim is to preserve a balanced allocation of taxing rights

Court of Justice of the European Union. Judgment of February 16, 2023. Case C-707/20

Under the legislation in the United Kingdom, the disposal of assets between companies resident in the United Kingdom which are wholly owned by the same parent company resident in another EU member state is not taxable. These transactions are taxable, however, if the asset transfers are made to nonresident subsidiaries. The CJEU concluded as follows:

(a) Firstly, it clarified that a national law such as that described which only applies to groups of companies cannot be examined in the light of the free movement of capital, but rather falls within the scope of the freedom of establishment.

(b) The described law is not precluded by the freedom of establishment from the standpoint of the parent company, because it does not determine difference in treatment for subsidiaries according to whether they are domiciled in the United Kingdom or in another EU member state. However, a potential restriction on the freedom of establishment was observed from the subsidiaries' standpoint, due to disposals made to those residents outside the UK being excluded from the tax-neutral rule.

(c) However, this restriction is justified by the need to preserve the balanced allocation of taxing rights of the member states insofar as, in the examined case, the taxable gain is not really an unrealized gain, but rather a gain that is realized at the time of the transfer. According to the court, it must be ensured that tax is paid in the country where the assets are located, in a case such as that examined, in which an amount of consideration was received for the transaction equal to the market value of the assets which enables the tax to be met (otherwise, if the tax is deferred to the point when the assets exit the group, the risk that the tax will not be paid increases).

1.2 Personal income tax. – Degree of disability may be substantiated by any means of proof allowed by law

Supreme Court. Judgment of March 8, 2023

Article 72 of the Personal Income Tax Regulations states that the degree of disability must be substantiated by a certificate or decision issued by the Immigration and Social Services Institute or the competent body of the autonomous community government authorities.

In the case examined in this judgment, a taxpayer applied the allowance for disability on his personal income tax self-assessments. This was supported by a doctor's report stating the taxpayer's medical conditions. The State Tax Agency rejected the ability to apply allowance, for which it did not assess the produced proof (the doctor's report), on the basis that the disability had to be substantiated by the type of certificate or decision mentioned above.

The Supreme Court concluded, however, that the Personal Income Tax Law (article 60) does not restrict or list the types of proof that taxpayers are allowed to use to evidence a degree of disability, and only includes a reference to the regulations for that disability to be substantiated in line with the "conditions that will be determined by the regulations". Moreover, article 72 of the regulations does not specify that the decisions or certificates it mentions are exclusive and exclude others. Therefore, a degree of disability may be substantiated by other means of proof.

The court underlined that in these cases the tax authorities are not replacing the principles of any technical body in relation to determining or grading a disability, but rather, in the context of safeguarding and promoting the rights of people with disabilities, acting in line with what society expects of a responsible public authority, for which the law recognizes, within the principle of legality and for the sake of protecting the public interest, a clear function to assess the evidence.

1.3 Nonresident income tax. - An anti-abuse provision does not have to be applied to prevent application of an exemption allowed in a tax treaty if the exemption was introduced after the incorporation of the entity which the tax authorities considered to be abusive

National Appellate Court. **Judgment of March 2, 2023**

A company resident in Switzerland owned 40% of the share capital of a Spanish entity. Following a purchase of treasury shares by this entity, with a subsequent capital reduction, the Swiss company reduced its ownership interest to 25%. The Spanish company deferred payment of the price of the treasury shares in three installments. Additionally, alongside the sale price, it paid dividends. From each of the three installment payments of the purchase price of the shares, the Spanish entity made nonresident income tax withholdings (income from movable capital), and the Swiss company later applied for a refund of those withholdings due to considering they were not required.

After examining these transactions, the National Appellate Court concluded as follows:

(a) It first examined how the income obtained by the Swiss company from the sale of its shares should be characterized; in particular, whether it is a capital gain (as the appellant sustained), or income from movable capital. The Court held to be particularly relevant the fact that the purchase and subsequent redemption (with a charge to reserves) of the shares purchased by the subsidiary were performed successively and resulted in a change to the shareholders' ownership interests in the Spanish company's share capital. The one and only aim of this transaction, in its opinion, is the repayment of contributions, and therefore the received payment is income from movable capital.

(b) The second issue under debate was whether the dividend exemption contained in the Spain-Switzerland tax treaty may be applied. This exemption is not applicable where the company receiving the dividends is owned by persons not resident in Spain, Switzerland or an EU member state. The tax authorities stated that the Spanish entity made nonresident income tax withholdings from the dividend payments, and therefore, in the absence of proof in relation to the residence of the recipient of the dividends, those declarations are presumed to be valid and prevent the exemption being applied.

    The Chamber, however, held that that exception to the exemption is, in essence, an anti-abuse provision. Because the Swiss entity was formed a long time before the entry into force of the exemption, it cannot be contended that it was formed purely to obtain a tax benefit which at that time did not even exist (added to which, in court it was indeed evidenced that the sole shareholder of the Swiss appellant was an individual also resident in Switzerland). Therefore, the exemption can be applied.

1.4 Nonresident income tax. - A nonresident's acquisition on death of plots of land in Spain is not subject to nonresident income tax

National Appellate Court. Judgment of February 23, 2023

A Swiss resident individual made a bequest to a foundation (also Swiss resident) of a few plots of land located in Mallorca.

It was examined whether this acquisition on death must be characterized as a capital gain as defined in article 13 of the Spain-Switzerland tax treaty, in which case it would be taxable in Spain; or whether, conversely, it fell within the scope of article 21 of the treaty, which operates as a catch-all clause for "any other income not expressly mentioned" and does not determine that it is chargeable to nonresident income tax in Spain.

The tax authorities supported the application of article 13 because, according to the Commentaries on the OECD Model Convention, the definition of capital gain may also include any obtained from acquisitions on death.

The National Appellate Court concluded that, insofar as the received inheritance entails the inclusion of property in the taxpayer's assets, it does not amount to a capital gain obtained from a disposal and, therefore, article 13 of the treaty does not apply to it. Therefore, the income obtained is not chargeable to nonresident income tax.

According to the court, however, the Commentaries on the Model Convention are only interpretation guidelines and cannot be applied where they contradict the wording of the treaty articles.

1.5 Characterization principle and VAT. – The tax authorities cannot recharacterize a business without considering the parties' true intention, nor can they deny that the decision on deducting input VAT or otherwise may be modified

Supreme Court. Judgments of February 23, 2023 (appeals 5730/2021 and 5915/2021), and judgments of February 23, 2023 (appeals 6058/2021 and 6007/2021)

The tax inspectors took the view that a sports entity could not deduct its input VAT on invoices issued by the players' agents for services related to their recruitment. In the inspectors´ opinion, although the amounts on the invoices were paid by the club, the agents' services were provided for the players' benefit. To make this adjustment, the inspectors relied on the characterization concept defined in article 13 of the General Taxation Law (LGT).

The Supreme Court concluded that the room for choice that the tax legislation gives to the characterization operation is restricted. In this case, according to the court, those limits were overstepped because the tax authorities not only characterized the transaction performed and concluded as to the tax obligations arising from the new characterization, but also isolated the income stream from the transaction and placed it in another parallel transaction business that bears no relation to the one actually intended by the parties.

Moreover, it so happens that, after the tax inspection, and under a conservative principle, the club filed additional returns for subsequent periods not covered by the inspection proceeding to apply the administrative criterion (and therefore reduced the deductible input VAT). However, because in the club's opinion the tax authorities' criterion was not correct (as it was finally concluded by the Supreme Court), it applied for correction of those additional returns so as to recognize its right to deduct the input VAT (requesting a refund of incorrect payments).

The tax authorities denied the applications for correction because they considered that the deduction of input VAT is an elected option which cannot be changed and that the correct procedure for deducting VAT is that set out in article 99 of the VAT Law. The Supreme Court, by contrast, concluded (as it had already done in relation to the use of tax losses for corporate income tax purposes), that the deduction of input VAT is a taxpayer's right, not an elected tax option, because the law does not give an alternative choice among different and mutually exclusive legal tax regimes. Additionally, it held that the correct procedure for recovering VAT and not incurring a breach of tax law was the procedure for correcting assessments which the club had followed.

1.6 VAT. - The filing of form 390 for the province of Guipúzcoa does not interrupt the statute of limitations

Supreme Court. **Judgment of February 14, 2023**

It was examined whether the filing of form 390 for the province of Guipúzcoa (falling under the Economic Accord with the Basque Country) has interrupting effects on the period for the tax authorities' right to determine the tax debt. The particular feature of this form (with respect to the form for the rest of Spain falling under the general tax rules) is that it is not only for summarizing the information for the year, but also for assessing VAT relating to the last period of the fiscal year (quarterly or monthly).

The Supreme Court concluded that, although article 26 of the Economic Accord with the Basque Country gives the competent provincial tax body the authority to approve return and payment forms, that article does not allow the annual summary return regime to be replaced with a self-assessment regime with different rules; especially if this give rises to a different ground for interrupting the statute of limitations for VAT purposes from that attributed to form 390 which is in place in the rest of Spain.

In other words, the principle of equality among all Spaniards (and the right to a common tax procedure) precludes having a statute of limitations period for VAT purposes that is different and less beneficial for taxpayers who have to perform their tax obligations in the provinces of the Basque Country and Navarra than the regime under the general rules.

1.7 Transfer and stamp tax. – Amendment of the concession fee by agreement between the parties does not amount to a refund event for incorrect payments

Supreme Court. **Judgment of February 23, 2023**

It was examined when the statute of limitations period starts to run for applying for a refund of incorrect payments of transfer tax under the transfers for consideration heading, in cases where the terms of an administrative concession were amended by agreement between the parties. More precisely, it was referred to the court whether the start date for the statute of limitations period must be determined at the date on which the tax payment was made or on a later date on which those terms were amended, under the *actio nata* doctrine (the theory whereby the start date is the date when the action can be brought).

According to the Supreme Court, the amendment of the concession fee by agreement between the concession holder and the granting authority does not amount to a refund event for incorrect payments under the applicable legislation. As a result, the start date for the statute of limitations period for applying for a refund of incorrect payments is the date on which the payment was made.

1.8 Transfer and stamp tax. - The release of an explicit condition subsequent designed to secure obligations other than payment of the deferred price is not subject to transfer and stamp tax

Madrid High Court. **Judgment of January 20, 2023**

A sale deed was executed which included a condition subsequent, covering the cases in which the purchaser would not fulfill certain urban planning obligations. Later another deed was executed to release the condition subsequent. The company considered that this second deed was not subject to stamp tax, because there was no “amount or assessable item,” insofar as the released condition subsequent secured obligations with non-economic content. For the tax authorities, however, an assessable item did exist: the price of the transferred property.

Madrid High Court concluded that only explicit conditions subsequent entered into to secure payment of the deferred price are taxable. Because the condition subsequent at issue was not entered into to secure a price, instead to ensure the fulfillment of certain nonfinancial obligations (which were therefore nonassessable and unable to be registered), it was rejected that the taxable event for the tax had occurred.

1.9 Wealth tax. – Only debts existing and payable on the date the tax becomes chargeable are deductible

Supreme Court. **Judgment of February 27, 2023**

In the facts examined in this judgment, the appellant sought to deduct on the wealth tax return for 2013 the personal income tax debts for fiscal years 2011, 2012 and 2013 that arose as a result of administrative assessments made after an inspection proceeding that ended in 2017.

The Supreme Court rejected this option. According to the court, on a wealth tax return for one year debts cannot be deducted that were assessed and notified at a later date; instead only those debts existing and payable on the date the tax is chargeable, including those from administrative assessments existing on that date and which are payable (either because enforcement of the assessment has not been stayed or because it is final).

1.10 Tax on increase in urban land value. - The Constitutional Court endorses use of the “royal decree-law” mechanism to amend the tax

Constitutional Court. **Judgment of March 9, 2023**

The Constitutional Court has dismissed action for unconstitutionality brought against Royal Decree-Law 26/2021 of November 8, 2021, which amended the legislation on the tax on increase in urban land value to adapt it to the court's own case law, following the publication of its judgment 182/2021 dated October 26, 2021, which held to be unconstitutional the method used to determine the taxable amount (alert dated November 9, 2021).

In this new judgment, however, the Constitutional Court pronounced only on the ability to use the "royal decree-law" mechanism to conduct that amendment of the legislation on the tax.

1.11 Tax on economic activities. - The penalty for not reporting a change in tax elements becomes statute-barred four years after the end of the filing period for that return

Valladolid Judicial Review Court no 1. Judgment of March 24, 2022

The legislation on the tax on economic activities requires taxable persons to report any physical, economic or legal changes which go above a specific threshold and occur in the performance of the taxable activities, within one month from when that change takes place.

In this judgment (published recently, although issued in March 2022) the court examined the case of a company which failed to report a change in tax elements which occurred in 2009 and 2010. Later, as a result of a tax inspection initiated in 2020, the tax authorities decided to impose a penalty for that breach.

The Valladolid court, based on an interpretation in a judgment by Madrid High Court, found in the company's favor by holding that, on the start date of the inspection proceeding, the infringement committed by the company was already statute-barred, because more than four years had run since the change in tax elements took place. This is so regardless of the fact that, as the tax authorities had submitted, the tax on economic activities is a periodically collected tax, managed on the basis of a taxpayer roll formed each year.

1.12 Administrative procedure. – Dismissal presumed by silence from the authorities must allow an appeal for judicial review to be filed without exhausting administrative remedies

Supreme Court. Judgment of March 7, 2023

In this judgment the Supreme Court examined a case in which an application for judicial review against dismissal presumed by silence from the authorities was not admitted in relation to an application for refund of incorrect payments brought against a local government entity, due to failure to exhaust the available administrative remedies.

The court concluded that this decision was not valid. According to the court:

(a) Where a dismissal presumed by silence from the authorities occurs, there is no administrative function as such, which includes information on the appeals regime, but rather a fictional event.

(b) The tax authorities cannot obtain an advantage from their own breaches or invoke, in relation to an act arising from their silence, omission of the required administrative appeal.

(c) Moreover, if after the appeal for judicial review has been filed, the authorities deliver an express dismissal decision, it will not be necessary to extend the appeal for judicial review that has already been lodged to include that decision, unless the express decision changes the presumed decision in relation to any point.

(d) Nor should the taxpayer be required to exhaust the available administrative remedies against the express decision by lodging the relevant appeals, where the matter is already in the hands of the courts precisely by reason of a breach of the authorities' duty to deliver a decision.

1.13 Administrative procedure. – The statute of limitations period for requesting a refund of a tax precluded by EU law starts to run when the payment is made

Supreme Court. Judgment of February 28, 2023

The court was asked to determine when the statute of limitations starts to run for the refund of an incorrect payment in relation to a tax which later was held to be precluded by EU law. Namely, it was examined whether the period must start to be computed on the date of payment of the tax or on the date of publication of the judgment holding the tax illegal.

The Supreme Court concluded that the refund procedures for incorrect payments and those for the patrimonial liability of the Administration follow their own legal regimes which are separate and not comparable. Under the regime for the patrimonial liability of the Administration, the period is one year from publication of the judgment holding the tax to be illegal, whereas under the regime on application for refund of incorrect payments the period starts to run when the incorrect payment is made.

1.14 Review procedure. – The complete regularization principle may be applied by the tax authorities of their own initiative in tax management procedures, including in limited reviews

Supreme Court. Judgment of February 28, 2023

The Spanish Accounting and Audit Institute (ICAC) has the right to charge a fee for issuing reports by financial auditors and audit firms. In the case examined in this judgment, the audit firm did not include a number of reports in the assessment of the fee for a fiscal year, whereas it included them in the following year. The tax authorities initiated a limited review in which they increased the fee for the first year, informing the taxpayer that, if it wanted to recover the debt paid over in the following year, it had to initiate an application procedure for refund of incorrect payments.

The Supreme Court concluded that the complete regularization principle is applicable in management procedures (including in limited reviews) rather than only in inspection proceedings. Therefore, if after determining that a taxable event should have been reported in one year, it is verified that it was reported in another year, the tax debt cannot be claimed. The obligation to initiate a refund procedure in these cases is unnecessary and goes against the principles or efficiency, swiftness and proportionality in the application of taxes.

1.15 Collection procedure. – The tax authorities cannot issue an assessment directly to the taxpayer where the party with the payment obligation under the law is the taxpayer substitute

Supreme Court. Judgment of February 17, 2023

The issue referred to the court was whether, in the case of taxes with respect to which the law states that the person required to perform the tax obligation is the taxpayer substitute, the debt may be assessed to the taxpayer.

The Supreme Court denied this option. According to the court, the taxpayer substitute is, by law, required to perform the substantive and procedural obligations related to the tax, and therefore the features characteristic of any taxable person apply to that substitute. Therefore, the substitute displaces the taxpayer in the tax relationship, and takes the taxpayer's place in dealings with the public purse.

1.16 Review procedure. – The decision by a regional economic-administrative tribunal on a claim filed '*per saltum*' is not a ground for being rendered null and void as a matter of law

Supreme Court. Judgments of February 14, 2023 (appeals 3687/2021 and 3897/2021)

Article 229 LGT allows a claim to be filed directly with Central Economic-Administrative Tribunal (TEAC) where the appeal is directed against an administrative act by a peripheral body of the State Tax Agency and the decision on the economic-administrative claim to be filed with the regional tribunal is subject to an ordinary administrative appeal to TEAC. This is known as a *per saltum* appeal.

In the examined case, the taxpayer filed a *per saltum* economic-administrative claim with TEAC. However, the regional tribunal (TEAR) retained and decided on the claim. To dispute the TEAR's decision, the appellant had to lodge an ordinary administrative appeal with TEAC, which delayed settlement of the case.

The Supreme Court concluded that the decision by a TEAR on a *per saltum* claim is not a ground for rendering the claim null and void as a matter of law. This is simply a hierarchical jurisdiction issue, and the superior body heard the claim in the end, despite the delay caused by this. In short, even though there might have been a breach of the principle of good administration, this alone does not render null and void the decisions delivered with a delay.

1.17 Principle of retroactive effect. – A tax that becomes chargeable after the law creating it does not breach the principle of retroactive effect

Supreme Court. Judgment of February 27, 2023

It was examined whether the tax on customer deposits at credit institutions in the Canary Islands (IDEC), which came into force on July 1, 2012, could be chargeable in the 2012 taxable period (which was the tax authorities' view) or, by contrast, could only be charged on or after January 1, 2013, the first year that commenced after the entry into force of the law (as postulated by the appellant entity), bearing in mind that the taxable period for the IDEC is the calendar year.

The Supreme Court recalled that the Constitutional Court makes a distinction between two types of retroactive effect, (i) the “improper” effect, for cases where the law changes the tax for a specific taxable period that had already commenced, although it has not become chargeable (and which may be acceptable); and (ii) the “full” or “true” effect, for scenarios where the tax has already become chargeable before the entry into force of the tax.

In the specific case examined, the tax became chargeable after the entry into force of the law. Moreover, the tax was targeted (according to the law) at taxpayers whose taxable periods had not ended on the date of entry into force. This is therefore a case of an “improper” retroactive effect which is not prohibited and does not pose any constitutionality issues from the standpoint of legal certainty.

1.18 Liability for tax. – A director may be held secondarily liable, even if the director’s term of office has expired

Supreme Court. Judgment of March 7, 2023

The LGT states in article 43.1.b) that *de facto* or *de iure* directors are secondarily liable for the tax debts of legal entities that have ceased operating, in respect of tax obligations that are outstanding when they cease operating, if those directors had not done everything necessary to secure their payment or had adopted resolutions or taken measures which caused the nonpayment.

The Supreme Court concluded that this type of liability is incurred where a director acted negligently in relation to any companies that have ceased operating, by not doing everything necessary for payment of the tax obligations that had fallen due for these companies and were outstanding when they ceased operating, even if the director’s position had expired. The court recalled in this respect that a director is not removed on expiry of their term of office, or due to the calling of a shareholders’ meeting to appoint a new director or managing body, until they are replaced, and that removal is notified to third parties (normally through public disclosure at the Commercial Registry).

1.19 Penalty procedure. – The tax authorities must produce extra support in relation to tax penalties imposed despite the field inspector having stated that no elements warranting a penalty were found

National Appellate Court. Judgment of February 15, 2023

In the notice of assessment drawn up in an inspection proceeding, the field inspector stated that he could not see any indications of a tax infringement. However, the penalty authority issued a decision imposing penalties.

The National Appellate Court concluded that, in a scenario of the type described, the penalty authority must produce specific and sufficient support for the reasons why it departed from the criterion followed by the field inspector.

2. Decisions

2.1 Corporate income tax and procedure. – An elected tax option may be changed where the circumstances behind the election change materially

Central Economic-Administrative Tribunal. Decision of January 23, 2023

An entity filed its corporate income tax self-assessments for two years (2016 and 2017) as subsidiary in a tax group. Because the group recorded a tax loss, it did not apply the unrestricted depreciation tax incentive. Later, starting retroactively on January 1, 2016, it was excluded from the tax group due to being subject to a ground for winding up for two consecutive years.

By applying the individual tax rules, the company recorded taxable income, and therefore applied for correction of its self-assessments to apply that incentive. The tax authorities rejected those applications on the basis that elected tax options cannot be changed outside the voluntary filing period.

After confirming that unrestricted depreciation is a tax option, TEAC recounted that the irreversibility of elected tax options must be interpreted under the *rebus sic stantibus* rule, in other words, in line with the existing circumstances when the election was made, and until a material modification of them occurs.

Having clarified this, the TEAC applied the view established by the Supreme Court in its judgment of October 15, 2020 (appeal 6189/2017) and concluded that, in this case, the change to the tax regime (from the consolidated tax group regime to the individual tax regime) constitutes a material modification which has a decisive effect on the election of the option, and therefore the entity must be given the chance to apply the unrestricted depreciation tax incentive.

2.2 Corporate income tax. – New transfer pricing criteria are determined

Central Economic-Administrative Tribunal. Decision of December 19, 2022 (Criterion 1, Criterion 2, Criterion 3 and Criterion 4)

In the examined case, the inspectors made various adjustments to the corporate income tax base in relation to controlled transactions:

(a) On the one hand, in line with article 9 of the Spain-United Kingdom tax treaty (which requires substance over form), it rejected deduction of the impairment loss on a loan provided by the Spanish subsidiary to its parent company resident in the United Kingdom, because, in the inspectors' opinion, the funds transferred by the subsidiary in the form of a credit facility should have been characterized as a repatriation of profits.

TEAC applied the criterion determined by the Supreme Court in its judgment of November 5, 2020 (appeal 3000/2018) - analyzed in our December 2020 Newsletter- and concluded that it is valid to apply article 9 of the treaty, without needing to apply the methods for determining the market value in controlled transactions and the procedure set out in the domestic legislation. This conclusion has further support, in any event, because in the examined case the inspectors did not rely only on that article 9 of the treaty, but also on article 13 of the LGT (which allows the tax authorities to characterize transactions according to their true legal nature).

(b) Moreover, it treated as non-deductible items certain costs of intra-group services (management fees) paid by the subsidiary to a nonresident group entity, due to considering they were payments for services that did not benefit it.

Concerning this adjustment, the subsidiary submitted that the inspectors had wrongly considered the term “corporate governance,” which does not appear in the applicable edition of the OECD Guidelines (the 2010 edition). It noted also that the Supreme Court, in its judgment of October 19, 2016 (appeal 2558/2015), rejected the legislative nature of those Guidelines and the so-called “dynamic” interpretation of tax treaties (according to which each treaty must be interpreted in the light of the latest edition of the OECD Model and of its Commentaries).

TEAC found that, although the term “good governance” is mentioned in the assessment and that term was introduced in the 2017 edition of the OECD Guidelines, the adjustment is not based solely on this concept. According to the tribunal, the inspectors had correctly supported that the “management fees” had been incurred in the interests of the parent company or of the shareholder and that an independent company would not have been prepared to pay for the services provided.

TEAC clarified, moreover, that although the Supreme Court has declared that the Transfer Pricing Guidelines do not have legislative value, it also concluded that those Guidelines contain a mandate to the tax authorities, and therefore the legislation on controlled transactions must be interpreted in line with those guidelines.

2.3 Personal income tax. – The taxpayer’s center of main interests must be examined from the standpoint of both the value and composition of assets in each territory

Central Economic-Administrative Tribunal. Decision of December 19, 2022 (Criterion 2)

Spanish tax resident status is acquired, among other cases, where the taxpayer’s center of main interests or the base of the taxpayer’s economic activities or interests are located in Spain, either directly or indirectly. This Spanish tax resident status also determines personal income taxpayer status.

In this decision, TEAC took into account its earlier decisions dated February 22, 2021 (2008/2019) and May 24, 2022 (1527/2019) (examined in our October 2022 Newsletter) and affirmed that the location of the taxpayer’s center of main interests or the base of the taxpayer’s economic interests or activities should not be determined only in quantitative terms but also in qualitative terms, in other words, by reference to the specific composition of the assets located in each country. This was the conclusion reached by the Supreme Court in its judgment of July 4, 2006 (appeal 3400/2001).

In the examined case, the assets located in Spain were real estate assets which moreover were used in the performance of the economic activity that the taxable person had been managing and conducting for decades in Spain. The assets located abroad (in Andorra) were simply investments arising from the ownership of listed bonds and securities, which do not create any type of connection with that country.

TEAC held, in view of these circumstances, that more weight had to be given to “active” income and assets than to “passive” financial investments, because the first type reveals a stronger and more stable connection with a place. It concluded therefore that the claimant is tax resident in Spain because that is where the main center or base of the claimant's economic interests and activities lies.

2.4 Nonresident income tax. – To be eligible for the reduced 15% rate for a permanent establishment it is the commencement of the activity by the head office that counts

Madrid Regional Economic-Administrative Tribunal. Decision of November 24, 2022

The Corporate Income Tax Law determines a 15% reduced rate for newly created entities that satisfy certain requirements. On that basis, a permanent establishment located in Spain applied for that reduced rate. According to the claimant, the law does not require, for this rate to apply, that the entity must have a separate legal personality, and therefore, due to being a recently created permanent establishment that had commenced an economic activity in Spain, it should have access to that reduced rate.

The Madrid TEAR denied this claim on the basis that permanent establishments do not have their own legal personality nor one which is separate from that of their head office. Therefore, the commencement date of the activity for the purposes of the reduced rate will be the commencement date for the head office.

2.5 Collection procedure. – Secondary liability events due to an interposed person or entity must be used with caution

Central Economic-Administrative Tribunal. Decisions of May 17 (0773/2020), of September 15 (1010/2020) and of December 13 (6683/2019) 2022

Article 43.1 LGT defines (in letters g and h) two types of secondary liability: (i) that relating to the persons or entities having effective control over legal entities or at which there is shared decision-making with them, and (ii) that held by persons or entities over which the party with tax obligations holds full or partial effective control, at which that shared decision-making exists also; where, in both cases, it is evidenced that those persons or entities were created or used with abuse or fraudulent intent as a means of evading unlimited liability to the public purse.

According to TEAC, the lifting of the corporate veil doctrine on which these two types of secondary liability are based must be applied with caution and only where any type of fraudulent conduct is observed (which will, generally, have to be sophisticated), because they are anti-abuse measures. In other words, these events may only be considered where there is no room for any other reaction, meaning that it is not acceptable for them to be used as a simple alternative; especially if the event concerned falls within joint and several liability mechanisms as occurs in the examined cases, in which the public authorities signaled that the requirements for joint and several liability under article 42.1.c) LGT existed (relating to the persons succeeding to ownership or the performance of economic activities, in respect of the tax obligations acquired by the former owner and arising from the performance of the activity).

3. Resolutions

3.1 Corporate income tax. – Residential properties leased as offices and those that are under construction are not assets included in the regime for entities engaged in residential property leasing

Directorate General for Taxes. Resolution V0102-23 of January 31, 2023

The issue submitted for resolution concerned an entity that wanted to elect the special regime for entities engaged in property leasing. It was asked whether the assets able to generate residential rental income may include (i) properties leased as offices, even though they have certificates of occupancy for residential properties, and (ii) homes developed directly by the entity if their construction is not complete, and therefore no certificate of final completion or of occupancy exists, although it is known that they will be used as rental properties after completion of the building work.

The reply was no. According to the DGT, in the first case their primary use is not to satisfy the renter's permanent need for housing, as required by article 2.1 of Urban Leasehold Law 29/1994 of November 24, 1994; and in the second, they do not satisfy the requirement to be able to generate income with the right to apply the reduction provided in the special regime.

3.2 Personal income tax. - The holding period for bonus shares begins on the date of the last share needed to obtain them

Directorate General for Taxes. Resolution V0045-23 of January 16, 2023

The requesting party acquired in 1988 shares in a listed company which, in the period between that year and 2016, performed a series of capital increases against reserves, with the delivery of new bonus shares to shareholders. In that same period it also acquired shares by exercising subscription rights. The question concerned the holding period for the shares for the purposes of determining income for personal income tax purposes, in the event of a subsequent transfer. The DGT noted the following:

(a) In transfers of securities of the same kind, the FIFO rule applies.

(b) The distribution of bonus shares must be based on the holding periods of the existing shares from time to time, by reference to the proportion applied for delivering them. In this respect, the holding period for each new bonus share will be determined from the holding period for the last existing share needed to obtain it.

The acquisition value of each bonus share is determined by distributing the total cost of the shares giving rise to it among all the shares: the bonus shares plus the shares giving rise to it.

(c) The holding period for any shares obtained in capital increases arising from exercising subscription rights is the date of subscription to these new shares.

3.3 Wealth tax. – Requirements relating to family business relief for a professional who also leases properties are analyzed

Directorate General for Taxes. Resolution V0085-23 of January 23, 2023

A property registrar obtains, on top of the income from his professional activity, income from movable capital from leasing urban properties that he owns. In December 2022 he hired an employee under a full-time contract, who will engage exclusively in managing the property leasing business.

It was asked whether the properties are considered to be assets used for business activities, and if so, whether they may benefit from the family business relief. The DGT concluded as follows:

(a) The property leasing activity must be characterized as an economic activity. For this to be so, the contract with the employee must qualify as an employment contract under the labor legislation in force (an issue falling outside the scope of tax law) and must be for full-time hours.

(b) The professional must carry on the leasing activity on a regular, personal and direct basis, and personally adopt the necessary management decisions for the performance of that activity.

(c) The income obtained from property leasing, together with any obtained from his professional activity as property registrar must constitute his main source of income. In other words, at least 50% of taxable income for personal income tax purposes must come from net amounts of income from those activities.

3.4 Tax on economic activities. - Business taxation status notification forms replace the specific tax on economic activities notification forms where the taxable person is exempt from this tax on all their activities

Directorate General for Taxes. Resolution V0053-23 of January 17, 2023

The DGT analyzed an issue concerning a company that needs to evidence in a tender process that it has been registered for the purposes of the tax on economic activities. Because it is exempt from the tax by reason of having net revenues below €1 million, it had filed a business taxation status notification form (form 036) in which it had classified the activity in the relevant tax on economic activities caption, but not the specific registration form for the tax on economic activities (form 840).

The DGT recalled that, strictly from a tax standpoint (without entering into whether the specific requirements for the tender process are fulfilled), the filing of business taxation status notification forms for registration, change of status or cancellation replace the specific tax on economic activities notification forms for taxable persons who are exempt from this tax. In these cases, therefore, it is not necessary to file these tax on economic activities notification forms.

3.5 Real estate tax. – Bare owner of a property is not the taxable person for real estate tax purposes

Directorate General for Taxes. Resolution V0071-23 of January 20, 2023

It was asked who the taxable person for real estate tax purposes must be in the case of a property in which the requesting party owns a 50% share as bare owner. The usufructuary of that 50% share is also absolute owner of the other half of the property.

After analyzing the real estate tax legislation and, in particular, the articles on the taxable event for the tax and the definition of the taxable person, the DGT concluded that in the case submitted for resolution, the usufructuary in respect of 50% and the absolute owner of the other half will be the taxable person for the tax in respect of the whole property.

3.6 Tax on the value of electricity output. - In bilateral physical or forward contracts markets, the taxable amount is the price agreed between the parties

Directorate General for Taxes. Resolution V0028-23 of January 12, 2023

A company engaged in the generation, distribution, purchase and sale of electricity executed an agreement with a selling agent to place electricity on the market. Under the agreement, there will be various settlements in respect of future differences based on the price expressly agreed by the parties, regardless of the electricity price on the market at the time of the settlement. They are both independent parties.

Under the electricity industry legislation, the pricing of electricity traded on the bilateral, physical or futures markets is determined by reference to the price of fully completed transactions on the markets in question.

Therefore, the price of that electricity, for the purpose of determining the taxable amount for the tax on the value of electricity output, is the price agreed by contract between the parties, regardless of how that price is calculated.

3.7 Annual summary returns. – Only one annual summary return has to be filed for each tax, even if the company's fiscal year has changed in the year

Directorate General for Taxes. Resolution V0060-23 of January 18, 2023

A not-for-profit entity determined that its fiscal year ran between September 1 and August 31 of the following year. Before then its fiscal year was the calendar year. As a result, in the year the fiscal year changed there were days that belonged to two taxable periods: (i) the period between January 1 and August 31 and the period between September 1 and August 31 of the following year.

According to the DGT, in these cases the taxable person only has to file one withholdings annual summary return (form 190), one VAT annual summary return (form 390) and one information return on transactions with third parties (form 347), in other words, the annual summary returns are not affected by the change of fiscal year or by the fact that for corporate income tax purposes, in the calendar year there may have been periods belonging to two fiscal years.

4. Legislation

4.1 Approval of the 2022 personal income tax and wealth tax return forms

Order HFP/310/2023 of March 28, 2023, approving the forms for 2022 personal income tax returns and wealth tax returns was published in the Official State Gazette (BOE) on March 31, 2023, and most notably specifies the following:

(a) The tax data and draft personal income tax return may be obtained on or after April 11, 2023.

(b) The filing periods for the returns for both taxes (including confirmation of the draft personal income tax return) start on April 11 and end on June 30, 2023, inclusive. However, orders for payment by direct debit may only be made until June 27, 2022 (inclusive); although if only the second installment is to be made by direct debit, the order may be made until June 30.

(c) In relation to the personal income tax return, the following may be highlighted:

- Inclusion of new boxes in the capital gains sections, to report the 200 euro support for individuals with low levels of income and wealth, the support relating to the *Bono Cultural Joven,* a young people's voucher for cultural events, or rent support aimed at enhancing management of the guaranteed minimum income.

- Inclusion, in the section for capital gains and losses derived from transfers of other assets, of specific subsections for reporting separately (i) transfers of real estate assets and rights in rem over them, (ii) transfers or exchanges of virtual currencies; and (iii) those relating to other assets.

- In the sections relating to reductions to taxable income in respect of contributions and payments into employee welfare programs, it provides that it has to be expressly specified which amounts contributed by the employer arise from a decision by the employee (these are not subject to withholding tax).

- Lastly, new boxes are included to cover the increased scope for applying the maternity tax credit in taxable periods 2020, 2021 and 2022, under the amendment to this tax credit described below.

(d) In relation to the wealth tax return the structure used in previous years has been retained. Notably, however, a new "country code" field has been introduced for identifying foreign securities traded on organized markets, so as to be able to provide better identification of these securities where they do not have an ISIN (*International Securities Identification Number*) and the issuer's identification number in the country of residence is not known either.

4.2 Forms 792 and 793 are approved

Order HFP/309/2023 of March 28, 2023 was published in the Official State Gazette on March 31, 2023, and approves the following forms:

(a) Form 792: "Self-assessment of the contribution to be made by providers of television audiovisual media services and by providers of video sharing services on platforms serving geographic areas falling within an area under central government or areas larger than that belonging to an autonomous community".

(b) Form 793: "Advance payment in respect of the contribution to be made by providers of television audiovisual media services and by providers of video sharing services".

This order came into force on April 1, 2023, and applies for the first time to form 792 relating to fiscal year 2023 and to form 793 relating to the first advance payment for fiscal year 2023.

4.3 Approval of forms 490 and 604 for self-assessment of the digital services tax and the financial transactions tax

On March 31, 2023 the Official State Gazette (BOE) published Order HFP/307/2023 of March 28, 2023, amending Order HAC/590/2021 of June 9, 2021, approving form 490 for "Self-assessment of the digital services tax and determining the manner and procedure for filing it; and Order HFP/308/2023 of March 28, 2023, amending Order HAC/510/2021 of May 26, 2021, approving form 604 for "Financial transactions tax. Self-assessment" and determining the manner and procedure for filing it.

The order relating to form 490 comes into force on April 1, 2023, and applies for the first time to self-assessments relating to the first quarter of 2023 for which the filing period starts on April 1, 2023. The order relating to form 604 comes into force on September 1, 2023, and applies for the first time to self-assessments of the financial transactions tax relating to assessment periods commencing on or after that date.

The new forms 490 and 604 include the effects of the accord on the taxes with the Basque Country and Navarra, in relation to the financial transactions tax (see our alert) and with Navarra, in relation to the digital services tax (see our alert). For the digital services tax a form had already been approved which included the effects of the accord on the tax with the Basque Country (see our May 2022 newsletter).

4.4 The prepayment forms have been amended to adapt them to new legislation introduced in 2023

On March 31, 2023 the Official State Gazette (BOE) published Order HFP/312/2023 of March 28, 2023, which introduces amendments to form 202 (corporate income tax and nonresident income tax prepayments relating to permanent establishments and pass-through entities formed abroad with presence in Spain), and form 222 (corporate income tax prepayments under the consolidated tax regime). An amendment is also made to Order EHA/1658/2009 of June 12, 2009, providing the procedure and conditions for orders for payment by direct debit of certain debts from accounts opened at credit institutions which provide services for handling the collection of taxes for the State Tax Agency.

Namely, the following amendments have been introduced:

- It has included as an additional item of information a checkbox identifying entities with net revenues for the immediately preceding taxable period below €1 million, because, starting on January 1, 2023, they are taxed at a reduced rate.

- The detail of corrections to earnings for accounting purposes on form 222 is modified to include the temporary measure applicable starting on January 1, 2023, under which in the aggregation of the individual taxable income or loss figures in the tax group only 50% of the individual tax loss of each company is to be taken into account.

Moreover, payment by direct debit is introduced as a payment method for the debt assessed on form 309 "Non-periodical VAT return/assessment" where assessments are filed quarterly, in other words, assessments which are filed for reasons other than intra-Community acquisitions of new means of transportation or allocations in administrative or judicial mandatory enforcement proceedings.

This order came into force on April 1, 2023, and forms 202 and applies for the first time to returns for prepayments (forms 202 and 222) with filing periods commencing in April 2023.

4.5 The exempt limit for the obligation to provide security in applications for deferred or split payment is raised to €50,000

Order HFP/311/2023 of March 28, 2023, raising the exempt limit for the obligation to provide security for deferred or split payment to €50,000 (previously €30,000), was published in the Official State Gazette (BOE) on March 31, 2023.

This order came into force on April 15, 2023, and any applications for deferred or split payment which are being processed on that date will continue to be governed by the provisions in the legislation in force on the filing date of the application concerned.

4.6 Publication of the annual equivalent rates for second calendar quarter of 2023, for the purpose of characterizing certain financial assets for tax purposes

On March 27, 2023, the Official State Gazette (BOE) published the Decision of March 22, 2023 by the Office of the General Secretary for the Treasury and International Finance, which sets out the effective annual interest rate for the second calendar quarter of 2023, for the purpose of characterizing certain financial assets for tax purposes. The rates are as follows:

- Financial assets with a term equal to or shorter than four years: 2.746 percent.
- Assets with terms higher than four, but equal to or shorter than seven years: 2.386 percent.
- Assets with ten-year terms: 2.689 percent.
- Assets with fifteen-year terms: 2.562 percent.
- Assets with thirty-year terms: 3.048 percent.

In all other cases, the reference rate for the period closest to the period when the issuance is made will be applicable.

4.7 Changes have been introduced to the maternity tax credit and other tax measures have been approved

On March 18, 2023, the Official State Gazette (BOE) published Law 6/2023 of March 17, 2023, on the Securities Markets and on Investment Services. The main amendments in the tax field are as follows:

(a) The **maternity tax credit** for personal income tax purposes is changed to protect women who between 2020 and 2022 acquired legally unemployed status.

Namely, although to apply this tax credit the law requires, among other conditions, an activity carried out as an employee or on a self-employed basis for which the individual is registered for the relevant social security or mutual insurance company regime, it will now be considered that this condition was fulfilled in those years if, on or after January 1, 2020, the individual had (i) obtained legally unemployed status as a result of suspension of an employment contract, (ii) entered a non-working period for workers under permanent contracts for intermittent work, or (iii) received any type of income support benefit in the case of self-employed workers, as a result of suspension of her economic activity.

In these cases, the maternity tax credit may be applied in respect of the months in which that situation continues to exist, and the other requirements laid down in the law governing the tax credit in the wording in force when the tax becomes chargeable are fulfilled.

The maternity tax credit relating to months in 2020 and 2021 with respect to which the foregoing requirements are fulfilled has to be applied separately on the return for 2022.

(b) **CNMV's (Spanish National Stock Market Commission) fees:** Law 16/2014 has been amended to remove the fee charged for verifying the requirements for admission to trading of non-equity securities and includes domestic financial advisory firms within the scope of a few fees required in the law.

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