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1. A request for information may be regarded as the commencement of an audit

According to the Madrid High Court, if it is shown that the request was directed at determining the taxable amount, the later audit should be considered to have commenced when the request was made, something that will affect the period allowed for completion of audit work.

In a recent **judgment delivered on March 2, 2022**, the Madrid High Court examined a recurring case relating to administrative procedures.

The tax authorities had made a request for information after which a VAT audit was commenced, which ended with an assessment.

According to the taxpayer, the audit should have been considered to have started with the request for information, which in this specific case, meant that the period allowed for completion of the audit work had ended when the assessment was issued.

For the tax authorities, however, the sole and exclusive purpose of the request was to obtain specific information from the taxpayer and not to make an assessment, and therefore it was simply a prior act unrelated to the audit itself.

The court concluded, after analyzing the request, that its purpose was to collect data related to the economic activity conducted by the company (record keeping books, outgoing and incoming invoices, etc.), and therefore it had to be seen as a step directed at determining the taxpayer's taxable amount; especially in view of the assessment ultimately issued, which was based precisely on the data and on the documents collected as a result of the request.

Therefore it concluded that the right to audit had expired and voided the assessment.

2. Judgments

2.1 State aid. - A domestic provision that allows taxes paid abroad to be deducted in the recovery of an amount of state aid is not precluded by European Law

Court of Justice of the European Union. Judgment of September 15, 2022. Case C-705/20

By decision of the European Commission it was declared that the Gibraltar corporate income tax scheme was precluded by European Union law, due to the exemption of passive interest and royalty income. Therefore the tax that should have been collected in the absence of the exemption had to be recovered.

The decision did not however address the possible discretion, when calculating the amounts to be recovered, to rely on deductions and reliefs laid down in Gibraltar legislation, which could have been applied when calculating the tax due. In the recovery of the aid, the United Kingdom took those deductions and reliefs into account in that calculation.

The CJEU concluded that European Union law does not preclude the national authorities from using to calculate the recoverable amount of aid which is unlawful and incompatible with the internal market the mechanisms for deducting taxes paid abroad, where it appears that those mechanisms existed on the date of the operations in question.

2.2 Characterization / Corporate income tax. – A person cannot be presumed to be a director; they must have been appointed by the company

Castilla-La Mancha High Court. Judgment of June 30, 2022

A limited liability company's bylaws did not state that directors were compensated for their services. On that basis, the tax authorities rejected the deduction for corporate income tax purposes of personnel expenses in respect of two of the company's workers. In the first case, the worker concerned was a director; in the second, the tax auditors considered that although she was not a de jure director she was one de facto, because she carried out activities related to management of the company.

In this judgment, the court examined the circumstances of the two employees separately:

(a) In relation to the first employee (who was a de jure director), the court recalled that, for a director to be able to provide services as employee of a limited liability company, those services have to be clearly defined in a resolution adopted by the shareholders' meeting (article 220 of the Capital Companies Law). If no such resolution existed, the employee could not provide services associated with an employment relationship. It added that all the functions carried out by this worker were inherent to her office as director.

For this reason, the chamber rejected deduction of the personnel expenses related to the director.

(b) In relation to the second employee (who was not a director, but in the tax authorities' view carried out the functions belonging to that position), the court concluded that this worker could not be considered a de facto director, because director status cannot be presumed, and the person must have been appointed by the company.

Additionally, the fact that, for a few of her functions she had to work with the manager of the company, does not determine that they are functions inherent to director status, because functions of this type may be performed under an employment relationship.

Therefore, by contrast, this employee's compensation was deductible.

2.3 Corporate income tax. – The relationship between the parties to a loan must be examined on the date the loan was provided

Madrid High Court. Judgment of May 25, 2022

An entity provided a loan to one of its shareholders (who had an ownership interest higher than 5% in the company). Following his death, the company sent a letter through a notary to his widow and offspring requesting repayment of the loan. Later, after the loaned sum had not been recovered within the six month period, the entity recorded a bad debt expense, which was deducted. The company considered that, because those who had not repaid the loan were not related to it, the rule preventing the deduction of bad debt expense in respect of debts with related parties did not apply.

The court, however, adopted the administrative principle and held that the company's claimed right to deduct the impairment loss was unjustified. According to the court, the crucial point for determining the existence of a relationship between the parties to the loan has to be the time it is provided, not when the impairment loss on the loan is recognized, as the appellant had argued.

2.4 VAT. - A written agreement may be regarded as an invoice if it allows satisfaction of the substantive requirements for the right to deduct VAT to be determined

Court of Justice of the European Union. Judgment of September 29, 2022. Case C-235/21

It was examined whether a sale-and-lease back agreement, the conclusion of which was not followed by the issue of an invoice by the parties, may be regarded as an invoice, for the purpose of allowing the customer to deduct its input VAT.

The court concluded as follows:

(a) In order to be recognized as an invoice (document needed to exercise the right to deduction), the VAT Directive requires the document to contain certain specific information and details.

(b) However, as had already been concluded in earlier judgments, the right to deduct VAT cannot be denied simply because the invoice does not satisfy any of the requirements on its content, if the authorities have the information necessary to establish that the substantive requirements to exercise that right have been satisfied.

(c) Therefore, an agreement containing all the information necessary for the tax authorities to establish that the substantive requirements for the right to deduct VAT have been satisfied may be regarded as an invoice.

2.5 VAT. – Deduction of input VAT for the purchaser of a property cannot be denied, even if the purchaser knew that the taxable person was in financial difficulty and was not likely to pay its output VAT liability

Court of Justice of the European Union. Judgment of September 15, 2022. Case C-227/21

Following the transfer of a property on which VAT was charged, the vendor did not pay the collected VAT to the public purse. The tax authorities denied the purchaser's right to deduct input VAT because the purchaser knew that the vendor was in financial difficulty and therefore should have foreseen that the collected VAT was not going to be paid. The CJEU did not accept this decision by the authorities. According to the court:

(a) Firstly, a taxable person cannot automatically be considered guilty of VAT fraud simply because they cannot pay all or part of the VAT due which has been properly declared as a result of financial difficulty.

(b) Similarly, the knowledge by the purchaser of the vendor's financial difficulty and the potential effect that such difficulty may have on the payment of the VAT to the public purse is not sufficient by itself to consider that the purchaser participated in an abusive practice.

(c) There must be two conditions to conclude that an abusive practice exists:

(i) First, the transactions must result in a tax advantage the grant of which is contrary to the objectives of the VAT Directive.

(ii) Second, it must be apparent from a number of objective factors that the essential aim of the transactions concerned is solely to obtain that tax advantage.

(d) The court found that these requirements do not exist in the examined case:

(i) Even though the deduction sought by the purchaser may be classified as a tax advantage, that advantage cannot be regarded as contrary to the objectives of the VAT Directive.

(ii) Moreover, in the specific case examined, the primary aim of the purchase was not to obtain a tax advantage, but rather to recover all or part of the debt owed to the purchaser in respect of the mortgage loan, using the available legal mechanisms.

The court therefore concluded that a national practice consisting of denying the right to deduct input VAT simply because the purchaser knew or should have known that the vendor was in financial difficulty is precluded by the VAT Directive and the principle of tax neutrality. In its view, that practice has the effect of making purchasers bear the burden of the risk that the vendor's insolvency entails for actual payment of the VAT to the public purse, a risk which is, however, in principle for the public finance authority to take on.

2.6 VAT. – Surcharges cannot be imposed under the deferred import VAT scheme where full right to deduction exists

National Appellate Court. **Judgment of June 30, 2022**

A taxable person failed to include in box 77 of their self-assessment (for VAT payable on imports where the deferred VAT scheme has been elected) the VAT assessed by the customs authorities. For that reason, AEAT set in motion the enforced collection period and assessed an enforced collection surcharge, even though the taxpayer had the right to full deduction of input VAT.

The National Appellate Court denied that an enforced collection surcharge could be imposed on an import VAT debt where taxable persons have elected the deferred import VAT scheme and have full rights to deduct input VAT.

The court relied on the Supreme Court's case law determining (based on the complete adjustment principle) that late-payment interest cannot be issued on nonexistent debts. This principle has to be applied, according to the National Appellate Court, to cases of the type examined, and therefore an enforced collection surcharge cannot be imposed where the taxable person has a full right to deduct input VAT.

This view signals a change of policy from previous judgments (December 2, 2019 and December 23, 2019 judgments).

This issue is now going to be examined by the Supreme Court (which has admitted an appeal related to this subject for consideration - Decision 16251/2021 dated December 15, 2021-).

2.7 Nonresident income tax. – Transfer of customers' data and operating data to a nonresident is classified as royalties

Supreme Court. Judgment of June 24, 2022

At issue in this judgment was whether the transfer of customers' data and operating data by a German resident entity to a Spanish resident entity is subject to nonresident income tax, and if so, whether the paying entity must make withholdings.

The Supreme Court took the view that this transfer relates to information classified as confidential which has emerged from earlier commercial processes. It therefore matches the definition of royalty in article 12.3 of the Germany-Spain tax treaty. In other words, it is not a sale agreement (contrary to the taxpayer's arguments), even if that term is used to classify the transfer of customer data. The court underlined the following points:

(a) Based on the case law in its judgments of February 19, 25 and 26, and December 19, 2002, the transfer of ownership cannot take place "where legal and undisputed possession of the sold item cannot be ensured". This is what happens here, in a case where data or secret formulas are transferred, which are valuable in the confidential environment of a given business activity.

(b) Furthermore, for intangible assets to be able to be sold and to be transferred with absolute ownership, they will have to be included in or represented by an instrument authorizing the owner's right, which does not occur either in the examined case.

(c) Lastly, in any sale the seller has to forfeit its ownership of the sold object or right completely which is acquired by the purchaser. In the case of data on electronic media it is difficult to ascertain that legal effect.

2.8 Tax on increase in urban land value. – An assessment having become final before the Constitutional Court set aside the tax on increase in urban land value does not prevent subsequent enforcement of liability becoming null and void

Supreme Court. Judgment of July 27, 2022

In a judgment delivered on October 26, 2021, the Constitutional Court held to be unconstitutional and null and void certain articles of the legislation on the tax on increase in urban land value, although it determined that, among other cases, assessments or self-assessments that had not been challenged on the date the judgment was delivered could not be reviewed on the basis of that judgment (in our April 2022 Tax Newsletter we summarized later pronouncements by the courts on a few issues raised in this judgment).

In this case the Supreme Court examined an enforcement of liability in relation to an assessment of the tax on increase in urban land value for a company which had not been challenged or paid within the time limit. Following the winding up and liquidation of the company, the tax authorities declared that one of its liquidators was secondarily liable for the debt. Both the (unchallenged) original assessment and the decision to enforce liability took place before the Constitutional Court's judgment; however, the proceeding initiated by the person with secondary liability had not ended when that judgment was delivered.

The Supreme Court overturned the decision to enforce secondary liability, due to considering that the final nature of the original assessment does not amount to a "final act" or an "unalterable situation" in relation to the decision to enforce liability. All of which is regardless of the final nature of the assessment of the tax on increase in urban land value for the debtor company.

2.9 Tax on economic activities. - A notary office which adopts the legal form of a partnership may be a taxable person for the tax on economic activities, rather than the notaries using the office for their activities

National Appellate Court. **Judgment of June 21, 2022**

The tax authorities adjusted the status on the register for the tax on economic activities of a notary office that had the legal form of a partnership (*sociedad civil*), due to considering that it was that entity (rather than the notaries) that carried on the notary office's activities.

The company countered that the activities were carried on by each of the notaries individually (as public officials and exercising their authority), and not by the company. According to the entity's arguments, the only purpose behind forming a partnership was to determine equal revenues and expenses and facilitate accounting and organizational matters for the notarial activity. Therefore, because the activity is carried out by individuals no payment whatsoever was due in respect of the tax on economic activities.

The National Appellate Court held that this specific case had to be resolved by having regard to the following elements:

(a) The partnership was entered with taxpayer status on the AEAT register under caption 841 *"Legal services"*. The notaries, however, were not entered individually with taxpayer status.

(b) The corporate resolutions showed that in addition to the expenses the partnership also took care of the revenues, because it was the company that billed the firm's clients.

(c) The company had filed the annual information return required for pass-through entities (form 184).

Therefore, the National Appellate Court concluded that it was the partnership that had taxpayer status for the purposes of the tax on economic activities, because, although the notarial public service was delivered by the notaries individually, the activity is performed from the entity.

2.10 Real estate tax. - The term "permanently vacated property" for the purposes of the real estate tax surcharge cannot be defined in a local government rule

Galician High Court. Judgment of June 15, 2022

The real estate tax legislation grants local councils the power to impose a surcharge equal to up to 50% of the net tax payable in relation to residential properties that have been permanently vacated. The legislation adds in this respect that properties will qualify for this status if they have been permanently vacated according to the provisions in the relevant autonomous community or central government primary sectoral legislation on housing.

In the case examined in this judgment, a local council approved an amendment to the local real estate tax rules to impose a 25% surcharge on the net tax payable for "permanently vacated residential properties", in addition to which this term was defined in the rules themselves.

The Galician High Court held that the amendment to the local rules was null and void. According to the court, the conditions that a residential property must meet to be classified as "vacated" for the purposes of the surcharge must be laid down in primary sectoral (autonomous community or central government) housing legislation.

2.11 Mutual agreement procedure - The legislation applicable to mutual agreement procedures on the accrual of late-payment interest is that in effect at the start of the procedure

National Appellate Court. Judgment of June 01, 2022

Law 4/2008 of December 23, 2008 amended additional provision one of the Nonresident Income Tax Law and, among other provisions, provided that late-payment interest cannot accrue while mutual agreement procedures are in progress. The previous wording of this provision did not contain any such specification, and therefore it had been interpreted that this type of interest did accrue.

This judgment examined a mutual agreement procedure relating to corporate income tax commenced in 2010 and related to fiscal years 2004 through 2007, which ended with a refund of the tax paid incorrectly. The tax authorities recognized late-payment interest for the entity, but did not include in the calculation of that interest the period in which the mutual agreement procedure was in progress.

The National Appellate Court held that the calculation of interest was correct because, in its opinion, the rule to be taken into account with regard to mutual agreement procedures was that relating to the period when they start and not to the period to which those procedures related.

2.12 Administrative procedure. – The voiding of an assessment for an heir must include the other heirs, even if they did not challenge their own assessments

Galician High Court. **Judgment of January 28, 2022 (appeal 15154/2020)**

Several siblings inherited an estate and filed the relevant inheritance tax returns. Later, the tax authorities conducted an audit of reported values for a few of the inherited assets and issued assessments to each of the siblings, claiming tax on the higher audited value. One of the siblings did not appeal although another did and the Galician TEAR upheld her claim and voided her assessment.

In view of the content of the decision issued in relation to her sister, the heir who did not originally appeal applied for her own assessment to be voided, even though it had already become final, and requested an extension of the effects of the decision regarding her sister.

In this judgment, the court voided the assessment regarding this sister. In the court's view, acting otherwise would be in breach of the right to equality. In fact, the court continued, the tax authorities should have acted with good faith and notified the correct value (following the TEAR's decision) to all of the heirs, irrespectively of whether they had challenged their assessments.

2.13 Collection procedure. - Surcharges cannot be imposed for late filing if it is due to a reasonable interpretation of the provision on the voluntary filing period

National Appellate Court. **Judgment of July 22, 2022**

The corporate income tax legislation provides that the corporate income tax return has to be filed within the first 25 calendar days in the month following the end of six months after the taxable period. Basing itself on this provision, a company whose fiscal year ended on June 30, 2015 filed its self-assessment for that fiscal year on January 25, 2016. According to its interpretation of the provision, the six month period ended on December 31 of each year, and the following 25 day period ended on the 25th day of the following year.

The tax authorities, however, supported that monthly periods are calculated from date to date, and therefore in this case the six month period should have ended on December 30 of each year, and the following 25 day period, on January 24 the following year. This was explained, they added, in an example in the manual for the tax, which was included for the first time in the 2016 release.

The General Taxation Law (LGT) contains rules on the surcharges applicable for the late filing of returns. The surcharge is automatically imposed simply as a result of the late filing outside the voluntary period (with a few exceptions). And, in this case, this is what the tax authorities did, by considering that the self assessment filed on January 25 was filed a day late.

The National Appellate Court, however, considered that no surcharge had to be imposed when the late filing of documents was due to a reasonable interpretation by the taxpayer regarding the filing period for the tax, as occurred in this case, in which the legislation is not clear and the first time that an example was included with another interpretation in the manual for the tax published by AEAT was 2016 (after the year to which the surcharge related).

2.14 Review procedure. - If Lexnet fails on the day of grace, an appeal may be lodged the following day

Supreme Court. **Decision of July 5, 2022**

The Lexnet electronic system (under Royal Decree 1065/2015 of November 27, 2015) is a tool for filing submissions and documents, transferring copies and making procedural communications. Its use is mandatory for lawyers and court procedural representatives (*procuradores*), among others.

In the case settled by the labor chamber at the Supreme Court, a lawyer attempted to lodge a cassation appeal within the time limit (on what is known as the "day of grace") using the Lexnet system, but was prevented from doing so by failures in the system, and he therefore filed the submission the following day. The lawyer had a filing receipt issued by the General Directorate for Digital Transformation in the justice system following the failed attempt to file the appeal within the time limit. That filing receipt expressly stated that there had been failures in the service that had prevented it from running properly.

After the Andalusia High Court held that no cassation appeal had been filed within the time limit, the lawyer filed a complaint, but failed to attach that filing receipt to it.

The Supreme Court accepted the lawyer's position, held that the appeal was filed within the time limit and shared the following thoughts:

(a) The Lexnet system has been creating numerous questions for professionals and courts and tribunals, and therefore the courts, as guarantors of the right to an effective remedy, must take particular care when adopting decisions affecting this right.

(b) As the Constitutional Court has concluded, the modernization of the justice system through widespread use of new technology does not constitute an end in itself, but rather a tool to facilitate the work of the courts and the persons brought before the courts who act in processes through their lawyers and court procedural representatives. Therefore, technology cannot become an obstacle to obtaining an effective remedy before a court.

(c) The same Constitutional Court has affirmed that, to give the fullest effect to that right of effective remedy, the judges and courts must apply the rules governing the procedural requirements and conditions sought by the legislature when they were established, and avoid any formalities that become procedural obstacles preventing that effective remedy.

(d) It is not acceptable, therefore, to find to be outside the time limit an appeal filed a day after the day of grace for its filing, for reasons attributable to interruptions in the Lexnet service on the day of grace. Where these system failures occur in a case of the type examined, it has to be interpreted that the time limit has been extended until 15:00 hours on the following business day. In these cases, the appeal must be accompanied with the filing receipt proving interruption to the service.

(e) However, it does not prevent the appeal from being considered to be lodged if it is filed within that new time limit, even if it was not accompanied by that filing receipt. Although article 135.2 of the Civil Procedure Law and article 12.2 of Royal Decree 1065/2015 state that the filing receipt has to be filed, it has a few particular characteristics that have to be taken into account:

(i) Filing receipts of this type are proof of system failures generally, in other words, not just with respect to the lawyer, but for all users, including the courts.

(ii) Its contents are public, because they are on the website of the Ministry of Justice.

Therefore, the court should or may know the extent of the incident. As a result, this is a remediable defect.

The court recalled that, in its decision of October 18, 2017 (appeal 39/2017), it reached another conclusion, although it explained that in that case the system was only down for several hours, in addition to which it happened the day before the day of grace.

3. Decisions

3.1 Corporate income tax. - Offset of tax losses is not an electable tax option, but rather a right that may be exercised even if the self-assessment is filed outside the time limit

Central Economic-Administrative Tribunal. **Decision of July 20, 2022**

In this decision TEAC changed its earlier interpretation and applied the principle determined by the Supreme Court in its judgment of November 30, 2021 (analyzed in our Commentary dated December 13, 2021), in which this tribunal concluded that the offset of tax losses is not an electable tax option for the purposes of article 119.3 LGT, instead an autonomous right of the taxpayer, and is therefore not subject to any restriction, except for those expressly provided in the law.

Specifically, TEAC recognized that the right is not affected by the fact that the self-assessment was filed outside the time limit.

3.2 Corporate income tax. – In tax groups, the option of offsetting a minimum amount of tax losses equal to one million euros also applies to those generated before the consolidated group was formed

Valencian Regional Economic-Administrative Tribunal. **Decision of March 31, 2022**

Article 26 of the Corporate Income Tax Law restricts the offset of tax losses to 70% of the previous tax base (or lower limits for companies with net revenues of at least €20 million), but provides that up to one million euros may be offset in all cases. Although the consolidated tax group rules apply the same limits across the board, when they determine that the tax losses created by an entity before it joined a group may be offset subject to the general limit equal to 70% of the individual tax base of that entity, it does not mention the minimum amount of one million euros.

The Valencian TEAR, however, (adopting TEAC's principle, summarized in our Tax Newsletter dated November 2020), also allows tax groups to use, at least, one million euros of tax losses generated by each entity before they joined the group. This avoids having a limit on the offset of individual tax losses where the entity is taxed individually and another different limit for "pre-consolidation" losses where the entity is taxed in a consolidated tax group.

3.3 Controlled transactions. – Statute bar on right to assess a tax obligation as a result of a valuation adjustment prevents assessment of the other related party's obligation

Central Economic-Administrative Tribunal. Decision of June 28, 2022 (Principle 1 and Principle 2)

The personal income tax and corporate income tax assessments (both for fiscal year 2010) examined in this decision originated in audit work commenced simultaneously in relation to a company and its sole shareholder (an individual). The adjustment made consisted, in short, of an adjustment to the market value of controlled transactions between shareholder and company, which determined an increase in salary income reported on the shareholder's return and, as a result of a bilateral adjustment, a matching increase in the expense at the company paying the income.

TEAC voided the personal income tax assessment because the right to assess had become statute-barred. Accordingly, although the corporate income tax for 2010 had not become statute-barred, it voided the assessment in respect of this tax. Otherwise, the tribunal noted, a breach of the mandatory bilateral nature of adjustments for controlled transactions would take place, which may result, either in non-taxation, or in double taxation and unjust enrichment for the public purse.

To reach that conclusion, TEAC referred to the principle determined by the Supreme Court in a judgment delivered on June 6, 2022 (appeal 2608/2020) (which in turn reiterates the findings in the earlier judgment dated May 18, 2020 (appeal 6187/2017), and concluded that the special procedural requirements for controlled transactions apply in cases where the tax authorities decide to commence an audit in relation to only one of the related parties.

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

The tribunal added, however, that these rules do not apply to cases where the tax authorities have commenced simultaneous audits on both related parties.

3.4 Personal income tax. – Severance due to material modification to working conditions of senior executives cannot benefit from any exemption

Central Economic-Administrative Tribunal. Decision of September 22, 2022

Article 7 of the Personal Income Tax Law provides that severance payments are exempt, in the amount determined in the labor legislation, if they do not arise under a collective labor agreement, covenant or contract. Under article 50 of the Workers' Statute, termination of an employment contract at the will of the worker due to a material modification to working conditions, gives entitlement to the severance provided for unjustified dismissal. For this reason, this severance payment is exempt from personal income tax.

TEAC concluded however that this exemption is not applicable where the worker affected by that modification and resulting termination of their employment relationship is a senior manager. According to the court:

(a) Royal Decree 1382/1985 of August 1, 1985 on senior management, does not expressly provide for terminations of this type.

(b) Article 12 of that royal decree, however, provides that the senior management employment relationship may be terminated on grounds not stated in that royal decree, under the procedures set out in the Workers' Statute.

(c) Accordingly, the senior management relationship may be terminated under the procedure set out in article 50 of the Workers' Statute.

(d) Despite this, because the senior management royal decree itself does not determine severance for these cases, the exemption cannot be applied.

This conclusion is questionable in that the reference by the senior management royal decree to the Workers' Statute for cases not expressly regulated in that royal decree determines full inclusion and, as mentioned, that article 50 provides that, in these cases of termination, the worker is entitled to the severance payments provided for unjustified dismissal. For senior management, this severance payment is determined at 20 days and is capped at an amount equal to an annual payment.

3.5 Cadastral valuations / Tax on increase in urban land value. - The taxes calculated on cadastral values which are held to be incorrect must be refunded

Madrid Municipal Economic-Administrative Tribunal. Decision of June 28, 2022

Following a process for correcting discrepancies, the Cadaster corrected the cadastral value of a property due to an error in its area measurement. On the basis of this modification, the owner of the property requested a refund of the tax on increase in urban land value calculated by reference to the original cadastral value, even though the assessment of the tax was already final.

The Madrid Municipal Economic-Administrative Tribunal recognized the taxpayer's right to obtain a refund of the amount incorrectly paid, even though the assessment had already become final, by applying the interpretation provided by the Supreme Court in its judgment of June 2020 (discussed in our July - September 2020 Newsletter).

3.6 Connected tax obligations. - Audit work on personal income tax tolls statute of limitations for filing nonresident income tax return

Central Economic-Administrative Tribunal. Decisions of March 23 (7065/2019) and of May 24 (0359/2020) 2022

A taxpayer filed a personal income tax return for fiscal year 2013. In March 2016 she filed a submission stating that in 2013 she had not been resident in Spain, so she should not have filed a personal income tax return, requesting a refund of the amount by which the amount of tax withheld exceeded the amount of tax due.

The tax authorities commenced a limited review in which they confirmed that the taxpayer was not resident in Spain in 2013, and therefore issued an assessment (in October 2016) in which they rendered void all the income reported in the 2013 personal income tax self-assessment. Instead of recognizing the related refund to the taxpayer, however, they invited her to file nonresident income tax return form 210 and request the refund that way. Form 210 was finally filed in October 2018, but the tax authorities denied the nonresident income tax refund because they considered that on that date the right to obtain a refund of nonresident income tax had become statute-barred.

In its decision of March 23, 2022 (based on a principle it reiterated the following May 24) TEAC concluded that the work conducted by the tax authorities in relation to personal income tax tolled the statute of limitations for filing form 210 in relation to nonresident income tax, for the reason that both taxes are incompatible and therefore the elimination of the income reported in one of them implies the requirement for that income in another.

It clarified, however, that the simple fact of filing the personal income tax self-assessment for a given year does not toll the statute of limitations period for the right to request the refund of nonresident income tax for that period because, in these cases, no intervention by the authorities takes place.

3.7 Tax notifications. – Even where the notification of removal of taxpayer status on the register is not filed, the tax authorities cannot ignore the winding up and dissolution of an entity that appears on public registers

Murcia Regional Economic-Administrative Tribunal. **Decision of April 29, 2022**

Following the winding up and dissolution of an association, this was noted on the National Associations Register. However, the association forgot to notify the removal of the entity's taxpayer status by filing form 036 to notify changes to the register. Months later, the tax authorities served notice on the association of an assessment and penalty. The administrative acts were made available to the association at its enabled electronic address, but the notifications were not opened because by then the association had been dissolved. Consequently, the assessment and the penalty were not paid and the debt was claimed from a person with secondary liability, who challenged the decision enforcing liability on the ground of defects in notification of the original administrative acts.

Murcia TEAR accepted the taxpayer's arguments. According to the tribunal, the tax authorities should have known about the dissolution of the association, after it had been entered on the National Associations Register, because it is a public register. Therefore, they should have notified the assessment and penalty administrative acts to the association and they could only have tried to enforce liability after it had failed to pay them.

3.8 Audit procedure. - The invalidity of an entry and search at an address renders void any adjustments resulting from the information obtained by acting illegally

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

TEAC recalled in this decision that, where an entry and search at a taxpayer's address is declared null and void (in this case due to absence of properly informed consent by the company's director), any adjustments made in the authorities' assessments that result from information obtained in that operation must be rendered void.

In TEAC's view, however, there is nothing to prevent the remaining in force of any adjustments not resulting from the information obtained in this way, and made instead on the basis of information collected by the auditors through other channels (due to having been produced by the person with tax obligations in the audit for example).

3.9 Penalty procedure. – TEAC determines new principles in relation to the period for completion of penalty proceedings

Central Economic-Administrative Tribunal. Decision of July 11, 2022 (Principle 1 and Principle 2)

In this decision, TEAC determined the following principles in relation to penalty proceedings:

(a) On the one hand, under the principle determined by the Supreme Court in a judgment dated November 4, 2021, it concluded that the date on which the period for delivering a decision on the penalty proceeding starts to run for the purpose of determining whether the time limit has expired, is the date of notification of the notice of the commencement of the proceeding and not the date of adoption of the decision, which runs counter to its earlier conclusions.

(b) It stated, moreover, that where an economic-administrative tribunal finds formal defects in a proceeding of this type and rules that the penalty is void and that the proceeding must be reverted, the body responsible for the application of taxes has to enforce the decision within the remaining period allowed for completion of the penalty proceeding. It clarified in this connection that:

- this period is obtained by subtracting from the time period for completion of the penalty proceeding (six months) the time that had run until the point to which the proceeding was reverted, which is when the invalidating defect occurred;
- the time period starts to run from the date when the decision is entered on the register held by the body responsible for its enforcement;
- a breach of the time period means expiry of the right to decide in the proceeding.

4. Resolutions

4.1 Corporate income tax. – The transfer of a company which has been operating a wind farm is exempt provided that it is not classed as an asset-holding entity

Directorate General for Taxes. Resolution V1880-22 of August 9, 2022

An entity has sold an ownership interest in a Spanish company which engages in the production of wind power and has been operating and marketing this product for a number of years.

According to the DGT, the capital gain resulting from such transaction is 95% exempt provided that the shareholding percentage is greater than 5% and such holding has been owned for more than one year as at the date on which the transfer takes place. Nevertheless, although according to the description of the facts provided, the investee engaged in an economic activity, the DGT has pointed out that, in addition, the exemption is only applicable if the entity transferred was not classed as an asset-holding entity.

4.2 Corporate income tax. – Distributions from the share premium account generate no income for the shareholder provided they do not exceed the acquisition value of the holding, even where income is required to be recognized for accounting purposes

Directorate General for Taxes. Resolution V1879-22 of August 09, 2022

An entity with a 50% shareholding in another company acquires the remaining 50%. Following this, the investee distributes dividends against the share premium account. The DGT has concluded that the treatment corresponding to such distribution from the shareholder's perspective is as follows:

(a) The distribution of the share premium corresponding to the initial holding percentage must be recorded as income for accounting purposes in the income statement.

(b) The remainder of the share premium is required to have reduced the acquisition value for accounting purposes of the shares acquired from the other shareholder.

In any event, to the extent that the amount distributed is less than the value for tax purposes of the holding, it will gives rise to no taxable income, and a negative non-accounting adjustment is therefore required to be made (for the income recorded for accounting purposes) when calculating the tax base. It is only the excess over and above the tax value that constitutes income to be counted for Corporate income tax purposes.

4.3 Corporate income tax. – Subsidies to offset past expenses are to be imputed for tax purposes in accordance with accounting legislation.

Directorate General for Taxes. Resolution V1878-22 of August 9, 2022

An entity received an amount as a grant in December 2021, although the decision to award such grant was not notified and published until January 2022. According to the decision, the grant does not become final and non-refundable until, among other requirements, the party concerned demonstrates that the amounts received have been used for the purposes established in the call for applications, and it has 4 months as from the date of publication of the decision in which to do so; in other words, it does not become non-refundable until 2022.

The grant has been used to offset fixed expenses incurred between March 1, 2020 and September 30, 2021.

Regarding the treatment of the grant for Corporate income tax purposes, the DGT has established that:

(a) A grant cannot be recognized as income for accounting purposes until it has become non-refundable. For this reason, from the point at which the grant is received up to the point at which it can reasonably be concluded that the amounts received are non-refundable (which will not be until 2022), it must be recorded as a liability.

(b) Since the grant will meet the requirements to be considered non-refundable once the expenses which it is financing have accrued or the assets acquired with it have been depreciated/amortized:

  (i) The amount of the grant linked to the expenses must be taken to income when the conditions for its recognition are met (i.e. when it can be concluded that it is non-refundable).

  (ii) If the grant has been used for the partial financing of an asset and, at the point at which the grant is recorded as income, the accounting value of the asset is greater than the sum awarded, the general criterion for the imputation of the grant to income is applicable, in proportion to the appropriation made for depreciation/amortization of the asset, but on a prospective basis only. In other words, the grant is not required to be imputed in respect of depreciation/amortization in prior years.

(c) From a fiscal perspective, the grant is to be imputed in accordance with the accounting criteria set out above.

4.4 Corporate income tax. – Certain requirements in relation to the rule on the valuation of services provided by a professional member are analyzed

Directorate General for Taxes. Resolution V1873-22 of August 8, 2022

Article 18.6 of the Corporate Income Tax Law establishes a special valuation rule for transactions taking place between member and company in the case of professional companies. Specifically, it stipulates that the taxpayer shall be able to consider that the agreed value coincides with the market value in cases of provision of services by a professional member (an individual) to a related entity, provided that certain requirements are met.

In this resolution, the DGT analyses the application of this valuation rule in the case of a professional company which is going to transfer one of its business units, generating a profit.

According to the DGT:

(a) To apply the valuation rule in question, more than 75% of the entity's income must derive from the pursuit of professional activities and it must have at its disposal the human and material resources needed to carry out its activity.

This requirement would not be met in the situation described, in which the sale of the business unit gives rise to revenues which account for more than 25% of the entity's income.

(b) Similarly, for this rule to be applicable, the amount of compensation corresponding to all of the professional members for services provided to the entity must be not less than 75% of the result prior to deduction of the compensation corresponding to all such members for the provision of their services.

In this respect, the expression "...the result for the year prior to the deduction of compensation corresponding to all of the professional members for the provision of their services..." refers to the accounting result based on which the Corporate income tax base is determined.

4.5 Corporate income tax. – The expense deriving from the delivery of shares in the parent company is deductible in the subsidiary, even though the cost of the plan is not passed on to it

Directorate General for Taxes. Resolution V1807-22 of July 29, 2022

The UK parent company of a multinational group offers the workers of its Spanish subsidiary a remuneration plan whereby, subject to compliance with certain requirements, they will receive shares in the parent company. The cost of the plan is assumed in its entirety by the parent company and is not passed on to the subsidiary.

The DGT has reiterated in this resolution that the treatment for Corporate income tax purposes depends on the accounting treatment:

(a) From the accounting perspective, the subsidiary must recognize the services received as a personnel expense, at the point at which the remuneration plan is offered, and they should be credited directly to equity (under the caption "other shareholder contributions").

(b) They must be recognized at the fair value of the equity instruments assigned as at the date of the award resolution.

(c) In the case of transactions in which completion of a specified period of service is required, they must be recognized in line with the provision of the services.

(d) The personnel expenses recognized for accounting purposes by being credited to equity qualify for deduction for tax purposes, but only when the equity instruments are delivered to the workers.

4.6 Corporate income tax. - Various questions relating to the deduction for film productions are clarified

Directorate General for Taxes. Resolutions V1811-22 of July 29, 2022 and V1736-22 of July 20, 2022

Article 36 of the Corporate income tax law regulates the tax credit for investment in film productions, audiovisual series and live performing arts and music shows. In addition, article 39 of the law in question envisages the possibility of the producer transferring the tax credit (subject to certain limits) to a party who provides financing but is not involved in the production.

In relation to this tax credit, the DGT has clarified the following points:

(a) The total production cost forming part of the tax credit base is to be determined in accordance with the provisions of accounting legislation.

(b) Regarding the requirement that 50% of the tax credit base correspond to expenses incurred in Spanish territory:

(i) Expenses are understood to have been incurred in Spanish territory, irrespective of the nationality of the supplier (or of the actors):

- In the case of services, when they are effectively rendered in Spain. If the service is provided only partially in Spanish territory, the expense considered to have been incurred in Spain is to be determined on a proportional basis.

- For supplies of goods, when such supplies are made in Spanish territory.

(ii) This territorial spending requirement is to be assessed taking into account all the expenses of which the tax credit base is made up (production, obtaining of copies and advertising and promotional expenses borne by the producer).

(c) The tax credit generated may be claimed by the producer in its Corporate income tax self-assessment return for the period in which the production comes to an end, provided that the corresponding certificates have been applied for (even if, at the end of such period, they have not yet been received).

Insofar as relates to the transfer of the tax credit to the finance provider, the DGT has confirmed that:

(a) The producer may transfer the tax credit it has generated in the year to the finance provider, as from the signature date of the financing agreement and in respect of disbursements made by the finance provider which have been used by the producer to meet production costs. The costs will be those met as from such date up to the point at which the nationality certificate is obtained.

Contributions are understood to be disbursed when the transfer of the sums in question to the producer takes place.

(b) According to the law, the tax credit which can be transferred is subject to a limit equal to the sum of the amounts disbursed by the finance provider multiplied by 1.20. For these purposes, if the finance provider, during the tax period, disburses amounts which make it possible to transfer a tax credit of an amount which is greater than that generated by the producer, the excess can be used by the finance provider in the following tax period, provided that that tax credit is generated in the producer and the requirements and conditions stipulated in the law are met.

(c) The requirement relating to the certificates necessary to generate entitlement to the tax credit and to transfer it are deemed met if it can be demonstrated (and is communicated to the tax authorities) that they have been applied for. A further communication is required to be sent when they are finally obtained.

Finally, the DGT has clarified that the producer is required to account for contributions received from the finance provider in accordance with the criteria for the recognition of grants established in recognition and measurement standard no. 18 of the National Chart of Accounts. The treatment for Corporate income tax purposes must follow that applied for accounting purposes, meaning that no adjustments will be necessary to determine the tax base deriving from the receipt of the financing.

4.7 Corporate income tax. – A collection of urban plots pending development does not constitute a line of business

Directorate General for Taxes. Resolution V1084-22 of May 17, 2022

A company engaging in (i) the extraction of sand and gravel for the construction industry (ii) the extraction of rock and slate for construction and the natural stone sector, owns various plots of land which it acquired for the purposes of this latter activity. The plots have been classed as industrial land and will be included in forthcoming actions for the execution of the municipal council's zoning plan. It also owns other urban plots on which it plans to construct buildings from which to pursue a real estate development activity.

It plans to carry out a spin-off whereby the land not used in the company's activities would be segregated.

The conclusion reached by the DGT is that this transaction cannot be classed as a partial spin-off for the purposes of applying the tax neutrality regime given that the assets segregated do not constitute, per se, a separate line of business with the corresponding material and human resources, consisting instead of a collection of isolated assets.

4.8 Personal income tax - The special “exit tax” rules envisaged for changes of residence to another European Union Member State are applicable to changes of residence to Switzerland

Directorate General for Taxes. Resolution V1781-22 of July 27, 2022

A Swiss national resident in Spain for tax purposes changed his/her residence to Switzerland towards the end of 2020. His/her assets included shares with a value in excess of four million euros.

According to the Personal income tax law, the regime for capital gains due to change of residence (exit tax) would apply. However, when the change of residence is to another Member State of the European Union or state belonging to the European Economic Area (EEA) with which there is an effective exchange of tax information, the corresponding capital gain is only required to be self-assessed if, in the ten fiscal years following the last year for which Personal income tax is required to be self-assessed, any of the following circumstances arises:

(a) The shares or ownership interests are transferred in an inter vivos transaction.

(b) The taxpayer ceases to be classed as an EU or EEA resident.

(c) Non-compliance with the obligation to communicate to the tax authorities the fact that the taxpayer has opted to apply this special regime.

According to the DGT, this suspension regime is also applicable when the change of residence is to Switzerland, pursuant to the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, formalized in Luxembourg on June 21, 1999.

4.9 Personal income tax - The transfer value for Personal income tax purposes is not bound by the reference value applicable for the purpose of other taxes

Directorate General for Taxes. Resolution V1607-22 of July 4, 2022

In relation to the transfer of a real estate asset, it was asked whether the transfer value used to calculate the capital gain or loss for Personal income tax purposes can be that established for the purposes of other taxes.

According to the DGT, this is not possible:

(a) Interpreted literally, Personal income tax legislation stipulates that the acquisition value must be determined based on the actual sum for which the acquisition in question was made.

(b) Similarly, the transfer value must be determined based on the actual amount for which the sale is made, which is understood to be the amount actually paid, provided that it is not lower than the normal market value, in which case it is the normal market value which is to be considered, all of this being irrespective of the value considered for the purposes of other taxes.

4.10 Administrative procedure. – The tax authorities are required to provide copies of returns filed even when they relate to years which have become statute-barred

Directorate General for Taxes. Resolution V1290-22 of June 07, 2022

The question analyzed in this resolution was whether taxpayers are entitled to demand that the tax authorities provide them with copies of their own returns, even when such returns relate to years which have become statute-barred pursuant to articles 66 and 66 bis of the LGT. The answer was that they are.

According to the DGT:

(a) The right to obtain copies of returns is expressly established in article 34.1.g) of the LGT.

(b) Moreover, article 99 of the LGT stipulates that:

(i) Taxpayers are entitled to demand that the tax authorities issue certificates of their self-assessments, returns and communications or specific aspects contained therein (subarticle 3).

(ii) Persons who are party to a tax procedure or proceeding can obtain, at their own expense, a copy of the documents in the case file, unless such documents affect the interests of third parties or the privacy of other persons, or they are prevented from doing so by the applicable legislation (subarticle 4).

These rights are expanded upon in greater detail in articles 95 and 96 of the regulations for the application of taxes.

(c) Bearing in mind that article 66 bis of the LGT stipulates that the statute-barring of the authorities' right to review a tax debt (generally after 4 years) does not block their right to carry out audits and investigations in respect of statute-barred periods (subject to certain time limits in relation to the verification of bases or tax charges offset or pending offset or credits applied or pending application), the conclusion to be drawn is that the right to obtain copies of one's own tax returns or self-assessments cannot (as a general rule) become statute-barred.

5. Legislation

5.1 Electronic invoicing between businesses and professionals becomes obligatory

Law 18/2022 of September 28, 2022 on the creation and growth of businesses, which broadens the subjective scope of the obligation to issue electronic invoices, was published in the Official State Gazette of September 29, 2022.

Up until now, electronic invoicing had been obligatory in relations with private individuals for businesses and professionals which provide services to the general public and operate in certain economic sectors. This law broadens this obligation to make it applicable to trading operations between businesses and professionals.

In our alert dated September 30, 2022 we summarized the main changes introduced by this rule.

5.2 The effective annual interest rates for the fourth quarter of 2022, for the purpose of characterizing certain financial assets for tax purposes, are published

On September 27, 2022, the Official State Gazette published the Decision of September 21, 2022 of the Office of the General Secretary for the Treasury and International Finance, which sets out the effective annual interest rate for the fourth quarter of 2022, 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: 1.446 percent.
- Assets with terms between four and seven years: 1.782 percent.
- Assets with ten-year terms: 2.250 percent.
- Assets with thirty-year terms: 2.667 percent.

5.3 VAT on gas and certain fuels used in heating systems is reduced temporarily

Royal Decree-law 17/2022 of September 20, 2022, whereby urgent measures are adopted in relation to energy, in the application of the remuneration regime for cogeneration facilities, and the VAT rate applicable to supplies, imports and intra-Community acquisitions of certain fuels is temporarily reduced, was published in the Official State Gazette of September 21, 2022.

In our alert of that same date, we summarized the operations to which the reduced VAT rate of 5% is applicable.

5.4 New events of exceptional public interest are approved

Law 17/2022 of September 5, 2022, amending Law 14/2011 of June 1, 2011 on Science, Technology and Innovation, was published in the Official State Gazette on September 6, 2022.

In its additional provision no. eight, the holding of the "South Summit 2022-2024" is declared an event of exceptional public interest for the purposes of article 27 of Law 49/2002, of December 23, 2002, on the tax regime for not-for-profit entities and tax incentives for patronage.

The support program will run from September 7, 2022 through to December 31, 2024.

5.5 A new regime for deferrals and the payment by installments of tax debts is approved

Law 16/2022, of September 5, 2022, reforming the revised Insolvency Law was published in the Official State Gazette on September 6, 2022.

Its additional provision no. eleven sets out a **new regime for deferrals and installment payments** applicable to tax debts which are managed by AEAT.

Specifically, debts which are in the voluntary payment period or the enforced payment period may be deferred or paid by installments, following an application to this effect presented by the taxpayer, when its economic-financial situation prevents it temporarily from paying within the stipulated periods.

The relevant concession agreements formalized shall envisage the periodic payment of equal installments maturing on a monthly basis, and such periods may in no circumstances exceed those indicated below, counted as from the end of the original voluntary payment period:

(a) Six months, (i) when the deferrals and installment payments are secured by a mortgage, lien or guarantee with personal and joint and several liability (article 82.1 paragraphs two and three of the LGT); and (ii) when the debts are of an amount which is below the threshold stipulated in the tax rules (article 82.2 a) of the LGT).

In this respect, the status of the provision envisaging the **possibility of providing no guarantee** is raised by Law 16/2022 to that of primary legislation, provided that the amount of the tax debt does not exceed 30,000 euros and it is in the voluntary or enforced payment period (although in the latter case, the constraints over the assets and rights of the debtor at the time of presenting the application shall continue to apply).

This possibility had been envisaged, previously, in Order HAP/2178/2015 of October 9, 2015.

The amount of the debt will be calculated as the sum of the debts to which the application refers, plus any other debts owed by the same debtor for which an application for deferral or payment by installments has been made but not decided upon, plus any outstanding past-due debts which have been deferred or are payable by installments, unless they have been appropriately secured.

(b) Nine months for cases in which the deferrals and installment payments are secured with a joint and several guarantee provided by a credit institution or mutual guarantee society or a surety bond certificate (article 82.1 paragraph one of the LGT).

(c) Twelve months for cases in which, pursuant to article 82.2.b of the LGT, the following requirements are met simultaneously: (i) where the taxpayer has insufficient assets to secure the debt, and (ii) enforcing payment against the taxpayer's assets could have a material adverse effect on the maintaining of the production capacity and level of employment of the economic activity, or could have a serious adverse impact on the interests of the public purse.

6. Miscellaneous

6.1 DAC6. - The period for filing Form 236 has begun

AEAT has published on its website a reminder that October 1 is the commencement date of the period allowed for filing Form 236, for reporting information on the use of certain cross-border tax planning arrangements; the period ends on January 2, 2023.

This form must be filed when use is made in Spain of cross-border arrangements which were previously required to be reported using form 234 (or to a tax authority other than the Spanish administration pursuant to the directive). See our alert of April 13, 2021 for a summary of the main features of this form.

6.2 The EU list of non-cooperative countries and territories for tax purposes is updated

In its meeting of October 4, 2022, the Council of the European Union reached a set of conclusions on the revised EU list of countries and territories deemed to be non-cooperative for tax purposes. Specifically (see Annex I to the Conclusions), it has been decided to add **Anguilla, the Bahamas** and the **Turks and Caicos Islands** to the list of non-cooperative countries and territories.

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