# Tax Newsletter

GARRIGUES

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# 1. Pro-taxpayer DGT resolutions are binding for tax application bodies

**TEAC notes that the tax authorities have to observe the principles provided given in the DGT's resolutions, meaning that any assessments that depart from those principles are null and void, without any need to examine the facts of the case.**

Under article 89.1 of the General Taxation Law (LGT), Directorate General for Taxes (DGT) replies to written requests for resolutions are binding for tax authority bodies and entities responsible for the application of taxes.

It is not uncommon, however, for these bodies to issue assessments that overlook the DGT's principles provided in its resolutions, in cases that are identical or similar to those analyzed in those resolutions.

This occurred in the case examined by TEAC in its **March 23, 2021 decision**. Namely, as part of a limited review procedure on a taxpayer, the tax authorities analyzed whether the exemption for absolute permanent disability or comprehensive disability could be claimed in relation to a non-contributory disability pension. They concluded that the exemption was not allowed, even though the DGT had confirmed in a number of previous resolutions that the exemption was indeed claimable in these circumstances.

TEAC therefore concluded that the assessment was null and void. According to the court:

(a) The tax authorities cannot adjust a taxpayer's position where the DGT has issued binding resolutions that support the content of the taxpayer's self-assessment.

(b) This is automatically the case and it is not even necessary to examine the facts of the case. According to the court, were it to undertake such an examination, it would be opening the door for tax application bodies to potentially disregard the binding nature of the DGT's resolutions.

In short, TEAC considers that it cannot open up an avenue (in this case, through a special appeal to a higher administrative body) for those bodies that are entitled to file such appeals to attempt to dispute any of the DGT's principles that they disagree with and that favor taxpayers. Instead, these principles are binding on those bodies and generate for taxpayers genuine personal rights to expect those principles to be applied to them.

# 2. Judgments

## 2.1 European Union legislation. – A tax regime that imposes a heavier tax burden on nonresidents constitutes a restriction on the free movement of capital even if taxpayers have the option of applying the regime applicable to residents instead

**Court of Justice of the European Union. Judgment of March 18, 2021. Case C-388/19**

A taxpayer resident in France purchased a building located in Portugal, which it later sold, obtaining a capital gain.

Under Portuguese law, residents of other European Union (EU) member states may choose to have their gains from immovable property taxed under either the standard tax rules or the special rules established for nonresidents (which impose a greater tax burden). This possibility was introduced into Portuguese law following the October 11, 2007 judgment of the Court of Justice of the European Union (CJEU), which declared that the special rules for nonresidents were discriminatory.

On the taxpayer's return, he had elected to be taxed under the rules applicable to nonresidents, and the Portuguese tax authorities applied this choice in their corresponding assessment. However, the taxpayer later appealed the assessment, having verified that the nonresident regime was unfavorable to him.

The CJEU was asked whether EU law precludes the legislation of a member state that, in order to permit the capital gains from the sale of immovable property located in that member state, by a resident of another member state, to not be subject to a tax burden greater than what would be applied to capital gains obtained by a resident of that first country, makes the taxation regime applicable dependent upon the choice made by that taxable person.

The CJEU concluded that EU law does preclude such legislation, declaring that the choice allowed for under Portuguese law is not capable of excluding the discriminatory effects of the tax regime applicable to nonresidents.

## 2.2 Corporate income tax. - In a verification procedure, tax authorities must recognize all the taxpayers' rights associated with their post-assessment tax position, including their right to offset tax loss carryforwards

**National Appellate Court. Judgment of February 18, 2021**

The tax authorities adjusted the tax position of a taxpayer, by increasing its corporate income tax base for 2005. During the tax authorities' verification work, the taxpayer made a request for this increase to the company's tax base to be reduced by offsetting the company's tax loss carryforwards. The tax losses had already been offset by the taxpayer in its 2008 self-assessment (that fiscal year had already ended in the fiscal year the adjustment was made to the 2005 return).

However, the tax authorities rejected this request, arguing that the offset of tax losses is an elected tax option that cannot be changed after the end of the period for filing a return.

The National Appellate Court cited its judgment of December 11, 2020 (rec. 439/2017), in which it concluded that it is not allowable to use the rules set out in article 119.3 of the General

Taxation Law to restrict taxpayers' rights to offset in their self-assessments the tax loss carryfowards to which they are entitled (or to request the correction of such self-assessments where they consider that the offset has had an adverse effect on their legitimate interest or rights).

The court noted that the offset of tax loss carryforwards is not an elected tax option but rather a right of the taxpayer that cannot be subject to time limits.

In addition, the National Appellate Court adopted the Supreme Court's view that where an adjustment is made to a taxpayer, under the complete adjustment principle, all the rights associated with its new tax position following the adjustment must be recognized.

It needs to be underlined that when the events occurred, article 119.4 of the General Taxation Law was not in force. As the tax auditors have (questionably) interpreted up until now, this article does not allow taxpayers to claim, in a procedure for applying taxes, tax assets which had not been used in the year being adjusted but had already been used on the date the assessment was issued.

## 2.3 Corporate income tax. - Client and supplier entertainment expenses and interest on a loan used to finance the purchase of treasury shares are deductible, even if they may be classed as gifts or gratuities

**Supreme Court.** **Judgment of March 30, 2021**

In its judgment, the court analyzed how to interpret article 14.1.e) of the Revised Corporate Income Tax Law (Legislative Royal Decree 4/2004, of March 5, 2004), which preceded the current corporate income tax law (Law 27/2014, of November 27, 2014).

Under letter e) of article 14.1, gifts and gratuities were not deductible, and it was further specified that letter e) did not include: (i) customer or supplier public relations expenses; (ii) expenses which, under usage and custom, are incurred in relation to the company's employees; (iii) expenses incurred to promote directly or indirectly the sale of goods and provision of services; or (iv) expenses that have matching revenues.

In the case examined by the court, the tax authorities had stated that the requirement for expenses to have matching revenues was an essential condition for the deduction of any expense, even those other than gifts or gratuities. The tax authorities therefore considered that interest on a loan to finance the purchase of treasury shares for subsequent redemption was not tax deductible. According to the tax authorities, the same legal outcome would have been achieved through the sale and purchase of shares between shareholders, so the transaction performed was designed that way for the sole purpose of generating deductible expenses (i.e., the interest) at the company. However, instead of classifying this as a sham or similar type of transaction, the tax authorities directly concluded that the interest was a gift or gratuity and therefore not deductible.

In support of the tax authorities' view, the National Appellate Court emphasized that the purpose of the loan was not to benefit the company but rather its shareholders. This absence of matching revenues and, therefore, of the generation of wealth at the company led the appellate court to conclude (as the auditors had) that the interest was a nondeductible gift or gratuity.

The Supreme Court, however, took a radically different view and allowed deduction of the interest expense, based on the following arguments:

(a) Firstly, it noted that insofar as an expense is recognized for accounting purposes, it is tax deductible unless the law indicates otherwise.

(b) When the law says that a gift or gratuity is not deductible but that certain types of expenses do not fall under that rule (such as expenses for client or supplier entertainment), what the law intends to say is that those expenses, while they may very well be classified as gifts or gratuities, are actually deductible because they seek to improve the company's economic capacity (whether directly or indirectly and in the short or long term).

In other words, it is not that expenses for client or supplier entertainment or promotional expenses are not gifts or gratuities under the law, but rather that, being gifts or gratuities, they are deductible because they contribute to the generation of income for the company.

(c) Gifts or gratuities that have matching revenues are those "provided within the business activity itself, aimed at achieving greater business profits; they are expenses which are purely expenses, expenditure that does not seek a direct and immediate increase in profits (although in some of the myriad circumstances in which they appear they could have such an immediate impact), but rather, the most common thing (...) is that they seek an indirect and future result". The requirement to have matching revenues is simply an essential condition.

## 2.4 Personal income tax. - Real estate income must be attributed to rental properties during the period they are not rented out, without deducting any expenses

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

In this judgment, the Supreme Court concluded that real estate income must be attributed to rental properties during the period they are not rented out, even if there is an expectation that they will be rented.

Furthermore, in these case, net losses cannot be reported due to the amount of expenses incurred in connection with those properties. In other words, these expenses will only be deductible in proportion to the time the properties have been rented out and generated rental income.

Furthermore, the court analyzed the scope of the expression "income reported by the taxpayer" in article 23.2 of the Personal Income Tax Law in connection with the reduction for rental of residential properties, concluding, as in the previous judgments cited, that this limit only applies to tax returns and not to the verification of self-assessments.

## 2.5 Personal income tax. - Tax free expenses of a pharmaceutical company in respect of inviting doctors to conferences, specified by law since 2017, can be claimed for prior years

**National Appellate Court. Judgment of November 24, 2020**

A pharmaceutical company paid another entity amounts for sponsorship, which were converted into grants allowing certain doctors (non-employees) to attend conferences. The auditors treated these payments as compensation in kind for the doctors and assessed a debt for the company in respect of the tax not withheld on payments in kind.

Under article 42.2.a) of the Personal Income Tax Law, amounts used for updating, skilling, or upskilling employees are not treated as salary income in kind if they are required for the performance of the employees' activities or the characteristics of their jobs. Article 44 of the Personal Income Tax Regulations specifies that courses provided and financed (directly or indirectly) by institutions, companies or employers to update, skill or upskill their employees qualify as income free from personal income tax where the courses are required for the performance of the employees' activities or the characteristics of their jobs, even if they are given by other specialized entities or persons. As a change effective January 1, 2017, this article adds that, for these purposes, courses will be treated as provided and financed indirectly by employers if the funds come from other entities selling products that employees must be trained to use, provided the employer approves the employees' participation.

Based on this change to the legislation (effective after the year to which the judgment relates), the National Appellate Court concluded that the examined grants are not income subject to personal income tax. The court considers that the new wording of article 44 must be applied to previous years, because it provides an interpretation method.

Consequently, no withholding tax on payments in kind were required and the assessment should be voided.

## 2.6 Personal income tax. - Income for attending board meetings at foreign subsidiaries are not tax exempt

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

Article 7.p) of the Personal Income Tax Law allows, albeit with certain limits and requirements, an exemption for salary income for work actually performed abroad.

In its judgment of May 17, 2019, the Catalan High Court (TSJC) concluded that this exemption cannot be claimed where the income was received for attending board meetings of subsidiaries located abroad.

In the cassation appeal filed against that judgment, the Supreme Court upheld the TSJC's conclusion, based primarily on an evidence issue (the taxpayer had not evidenced that their services created income at the nonresident company). Nevertheless, the court added that for the exemption to be claimable, the income must arise from an employment or public worker relationship, not from a contract for services.

A ruling has yet to be handed down in the cassation appeal filed against the National Appellate Court's judgment of February 19, 2020 (discussed in our April 2020 newsletter) which upheld the exemption for directors' executive activities performed abroad, according to the court order of March 11, 2021 admitting the appeal.

## 2.7 Nonresident income tax. - Taxing (and not exempting) dividends from investments in Spain by Norway's central bank as nonresident income is contrary to the free movement of capital

**Supreme Court. Judgment of March 2, 2021**

The court analyzed whether Norges Bank (Norway's central bank) having to pay nonresident income tax on dividends from Spanish companies restricts the free movement of capital, when the Bank of Spain is exempt from corporate income tax for the same type of income.

The Supreme Court cited an earlier judgment delivered on February 24, 2021, in which it examined the same issue but in connection with the Spanish social security system and investments made by Norges Bank as manager of a collective investment undertaking used to cover future pension obligations in Norway. In both cases, the court confirmed that the different treatment afforded to comparable entities (i.e., Norges Bank and the Spanish social security system in one case, and Norges Bank and the Bank of Spain, in the other) restricts the free movement of capital and, accordingly, Norges Bank is entitled to request a refund of the nonresident income tax paid in connection with its investments in Spain.

## 2.8 Inheritance and gift tax. - No gift tax applies to the contribution of separately owned property to a community property matrimonial arrangement

**Supreme Court. Judgment of March 3, 2021**

An individual contributed separately owned buildings to community property without requiring any consideration.

In its judgment, the Supreme Court concluded that:

(a) Community property is a separate set of assets from the assets owned individually by each spouse and, as such, has no legal personality.

(b) Although article 35.4 of the General Taxation Law does envisage that entities without a separate legal personality may be taxpayers, this is only possible if expressly allowed in a law.

(c) Consequently, the contribution, free of charge, of separately owned property by a spouse to community property is not subject to inheritance and gift tax, because individuals and institutions or entities can only be taxable persons for this tax if expressly stipulated by the related law (which is not the case with community property).

Lastly, the court emphasized that the examined transaction, in which the beneficiary is the community property, should not be confused with a gift of separate property by one spouse to another.

## 2.9 VAT. - A penalty that applies irrespective of whether or not there are indications of fraud or loss of revenue for the tax authorities contravenes the Directive

**Court of Justice of the European Union. Judgment of April 15, 2021. Case C-935/19**

Grupa Warzywna purchased a building that had been occupied for more than two years. The seller charged VAT on the invoice, Grupa Warzywna paid the relevant VAT, subsequently treated the paid tax as deductible on its VAT return, and requested a refund. In an audit, the Polish tax authorities treated the transaction as VAT exempt and, consequently, considered that Grupa Warzywna was not entitled to deduct its input VAT.

Grupa Warzywna later corrected its tax return, in line with the adjustment made by the tax authorities. Nevertheless, the tax authorities levied a fine equal 20% of the amount by which the requested refund exceeded the correct sum.

The request for a preliminary ruling put to the CJEU entailed determining whether the levying of a fine of 20% of the VAT refund incorrectly claimed is in keeping with the principles of proportionality and of neutrality in relation to VAT and whether it is justified to ensure the correct collection of the tax and prevent tax evasion.

The CJEU's reasoning is as follows:

(a) Article 273 of the VAT Directive allows member states to adopt measures to ensure the correct collection of VAT and to prevent evasion, such as fines for breaching the requirements set out in EU legislation for exercising the right to deduct.

(b) However, in exercising this ability, member states must observe EU law and its guiding principles, including the principle of proportionality.

(c) In the case analyzed, article 273 of the VAT Directive and the principle of proportionality should be understood to preclude a national law that automatically levies a fine equal to 20% of the VAT refund incorrectly requested (for having erroneously classified an exempt transaction as subject to VAT), without taking into account the circumstances of the case.

The court criticized this fine being imposed indiscriminately to cases where the irregularity is the result of a simple error of judgment as to whether a transaction is taxable (without there being any indications of evasion or loss of revenue for the tax authorities) and one in which those "mitigating" circumstances are not present.

## 2.10 Transfer and stamp tax. - Valuation of a building based on the value declared in a previous transaction does not release the tax authorities from having to adequately substantiate their assessment

**Murcia High Court. Judgment of December 16, 2020**

An individual sold a building he had inherited. The buyer filed a transfer and stamp tax self-assessment return in connection with the sale. The purchase price, which was used as the taxable amount in the self-assessment, was lower than the value declared in the inheritance proceeding. The tax authorities considered that the value of the building for transfer and stamp tax purposes could not be below the value it had in the inheritance proceeding.

In its judgment, the court concluded that where the tax authorities value a building by reference to the value declared in a previous transaction, they must carry out a study on the building and explain whether the same physical, legal and economic conditions that determined the previous transaction value are still in place. Since this had not been done in the case analyzed, the assessment was voided.

## 2.11 Tax on construction, installation projects and works. - When a building permit is canceled, the tax must be refunded with late-payment interest, calculated from the original payment date

**Supreme Court.** **Judgment of February 15, 2021**

A company was awarded a building permit for a residential complex and paid the relevant amount of tax on construction, installation projects and works. The permit was later voided by a court ruling, and the company requested a refund of the tax paid. The city council allowed the request and refunded the tax along with late-payment interest, calculated from the date of the judgment that voided the permit.

The Supreme Court concluded that since the building work that gave rise to the right to charge tax could not be carried out because the building permit had been voided, the tax on construction, installation projects became incorrectly paid *ab initio*. Consequently, the late-payment interest should have been calculated from the date the tax was originally paid.

## 2.12 Tax on increase in urban land value. - Parties assuming payment of the tax under an agreement or contract do not have standing to seek correction of a self-assessment return

**Madrid High Court.** **Judgment of December 10, 2020**

As a result of the sale of several properties, the seller, as taxpayer, filed self-assessments for the tax on the increase in urban land value. However, pursuant to an agreement between the parties, the cost of this tax was effectively borne by the buyer. Subsequently, the buyer requested correction of the self-assessments based on the absence of an increase in value of the land. The city council rejected this request, citing that the buyer was not the taxable person for this tax.

The Madrid High Court rejected the application in this case of Supreme Court case law stemming from its judgments of October 30, 2019 (summarized in our November 19 Newsletter) and of September 17, 2020, and upheld the city council's position.

## 2.13 Extension of liability. – A gift recipient can be considered liable for the giver's tax debt, including a debt arising after the gift is made

**Supreme Court.** **Judgment of March 11, 2021**

A taxpayer gifted all of their real estate properties to their spouse. Subsequently, the tax authorities held the recipient liable for the giver's tax debts, even though they were incurred after the gift was made. The tax authorities based this extension of liability on article 42.2 a) of the General Taxation Law, concluding that the recipient had collaborated in the concealment or transfer of the tax debtor's assets to prevent the authorities from using them in their work.

The National Appellate Court partially upheld the taxpayer's appeal, by holding that the liability could not be extended to include debts that had not accrued at the time of the gift. However, in its judgment, the Supreme Court concluded that the extension of liability can indeed relate to tax debts and penalties arising after the taxable event (in this case, the gift), provided that the tax authorities evidence that a prior agreement was in place aimed precisely at avoiding or preventing the enforcement of future tax debts against the debtor's assets.

## 2.14 Administrative procedure. - AEAT can only disclose confidential information to other government bodies without the interested party's consent if done for tax purposes

**Supreme Court.** Judgment of March 11, 2021

The Las Palmas de Gran Canaria City Council requested information from AEAT (the Spanish Tax Agency) regarding the owner of certain taxi licenses, in order to verify whether there were any irregularities with these licenses. In response to the request, AEAT issued a report that led the city council to withdraw the licenses.

Article 95.1 of the General Taxation Law states that all tax-relevant information is confidential. Consequently, no information of this type may be disclosed unless the purpose of the disclosure is to cooperate with the public authorities in the performance of their functions and the tax debtors who are the data subjects provide their consent.

The Supreme Court therefore concluded that AEAT can only disclose tax-related data if done for tax purposes. In contrast, if the information is requested in order to carry out non-tax functions and there is no statutory provision allowing such disclosure, AEAT can only disclose the information with the data subject's prior consent.

Given that, in the analyzed case, the city council did not use the information for tax purposes but rather to apply the rules on taxi licenses, and since the data was disclosed without the data subject's consent, the court concluded that article 95.1 of the General Taxation Law had been breached. In the court's view, the city council should not have requested this information and the State Tax Agency should not have furnished it.

## 2.15 Limited review procedure - The tax authorities cannot extend the scope of a review once the preliminary assessment has been issued

**Supreme Court.** Judgment of March 4, 2021

In the analyzed case, the tax authorities had commenced a limited review procedure to verify the VAT charged on a taxpayer's invoices. As part of the procedure, the tax authorities issued a preliminary assessment and granted the taxpayer a period for filing submissions. However, the tax authorities later decided to extend the scope of the procedure to verify also whether certain requirements had been met for deducting input VAT, which led to the issue of a new preliminary assessment. When the second preliminary assessment was issued, the taxpayer was again granted a period for filing submissions.

The Supreme Court concluded that in a limited review procedure, the tax authorities cannot modify the scope of the review after notice has been given of the preliminary assessment, not even by issuing a second preliminary assessment within the same procedure and giving the taxpayer a period for responding. However, a separate procedure can always be commenced with a wider scope, provided it is done within the statutory limitation period.

### 2.16 Audit procedure. - Transactions carried out in statute-barred years prior to the entry into force of the 2003 General Taxation Law cannot be considered sham transactions

**Supreme Court. Judgments of March 11, 2021 (appeals 5972/2019 and 5053/2019)**

Under the 2015 amendment of the General Taxation Law, the tax authorities were expressly allowed to verify events that occurred in statute-barred years, where those events had an impact on non-statute-barred years. Given that this provision did not exist prior to the amendment, at issue was the extent of the tax authorities' audit and inspection powers prior to the amendment and, in particular, whether a legal act documented in private contracts before the General Taxation Law entered into force can be held a sham transaction.

Citing its earlier case law, the Supreme Court established that the date determining the legal regime applicable to the tax authorities' right to audit statute-barred years is not that of the audit or inspection work, but rather the date when the audited acts or transactions took place.

Since, in the case giving rise to this judgment, the legal acts (lease and usufruct agreements) were documented in private contracts signed prior to the entry into force of the 2003 General Taxation Law, the court concluded that the tax authorities could not verify them after they became statute-barred, not even to apply the effects of the verification to non-statute-barred years. The court clarified that this conclusion does not change when dealing with private contracts, given that the facts of the dispute suggest that the tax authorities knew or could have readily known of the existence of such contracts and that they could have inspected them before their right to do so expired.

## 3. Decisions

### 3.1 Corporate Income Tax. – Between 2007 and 2014, the test to determine whether there is a property leasing economic activity must go beyond the "premises and one employee" requirement

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

In its decision, TEAC adopted the view taken by the Supreme Court in a number of judgments declaring that, between 2007 and 2014, the tax authorities cannot consider a taxpayer to have a bona fide property leasing economic activity for corporate income tax purposes if and only if the "premises and one employee" requirement is met. This is because in those years, corporate income tax legislation did not contain an express provision allowing for the rules on economic activities as set out in the personal income tax legislation to be used for corporate income tax purposes.

TEAC noted that an economic or business activity is defined as the organization for someone's own account of the means of production and human resources or of either of them separately, with a view to participating in the production or distribution of goods and services. Consequently, for corporate income tax purposes in respect of those years, a case-by-case analysis is needed to review factors such as whether or not the taxpayer has premises and at least one employee, the volume of work that the lease generates, etc., in order to conclude, in light of these factors, whether or not there is an organization of operations that can be classified as an economic or business activity.

## 3.2 Personal income tax. - Prior to 2015, the application of reductions for irregular income was mandatory

**Central Economic-Administrative Tribunal. Decisions of March 23, 2021 (6790/2019 and 6791/2019)**

In 2012 and 2013, several workers received amounts of compensation on which they claimed the 40% reduction, the percentage allowed at that for salary income generated over a period longer than two years.

In 2016, the workers received an additional amount in respect of extraordinary compensation, which was significantly higher than the sums they received in 2012 and 2013. Since 2015, to be able to claim this reduction (currently 30%), taxpayers cannot have claimed the reduction on any other compensation in the preceding five tax periods (this requirement did not exist before that; rather, the compensation could not be periodic or recurring). Accordingly, the taxpayers filed supplementary returns to their 2012 and 2013 self-assessments, eliminating the 40% reduction claimed in those years, and claimed the reduction in 2016.

The tax auditors considered that the 30% reduction could not be claimed in 2016. According to the auditors, the supplementary returns for 2012 and 2013 could not give rise to the desired effect.

TEAC confirmed the tax auditors' interpretation, noting that, pursuant to the law:

(a) Since 2015, claiming the reduction has been an option.

(b) Up to and including 2014, taxpayers were required to apply the reduction.

Consequently, the supplementary returns for 2012 and 2013 are not valid. The reduction cannot therefore be claimed in 2016 since it had already been claimed in previous years.

## 3.3 Personal income tax. - Under the inbound expatriates regime, the year the taxpayer moved to Spain is not counted if they did not become a resident that year

**Central Economic-Administrative Tribunal. Decision of January 26, 2021**

A worker had lived outside Spain from June 16, 2005 to August 1, 2014. When the worker returned to Spain, in August 2014, they informed the tax authorities of their election of the special regime applicable to workers sent to work in Spain (inbound expatriates regime). The worker considered that they met the legal requirement not to have been resident in Spain in the 10 years before being sent to work in Spain, by including all the years between and including 2005 and 2014, since in 2005 the worker was not Spanish resident and did not become Spanish resident again until 2015.

The tax authorities denied the request because, in their view, 2014 should not be counted as part of the 10 years' residence outside Spain.

TEAC, however, upheld the taxpayer's arguments and concluded that when counting the 10-year period of tax residence outside Spain, the last year in which the taxpayer was a resident abroad should be included, even if they moved to Spain in that same year, since the first year in which the inbound expatriates regime can be applied, in this case, is the year following that of the relocation (that is, 2015, given that the taxpayer became tax resident in Spain during that year).

## 3.4 VAT. - A pharmaceutical company not registered for VAT purposes that did not charge VAT on its invoices cannot correct VAT in respect of discounts for the National Health System

**Central Economic-Administrative Tribunal.** Decision of March 17, 2021

Article 8 of Royal Decree-Law 8/2010, of May 20, 2010, allowed a 7.5% discount to be claimed on the retail price of industrially manufactured medicinal products for human use and prescribed under the National Health System. This discount is passed along the pharmaceutical chain, whereby, for example, the manufacturer applies the discount on the maximum manufacturer's selling price. It is now accepted practice that this discount reduces the VAT taxable amount. Accordingly, when the discount is applied, pharmaceutical manufacturers must correct any earlier invoices to reduce the taxable amount.

In its decision, TEAC concluded that, nevertheless, output VAT should not be corrected in this way in the case of pharmaceutical manufacturers that are not registered in the Spanish VAT area, because they issue their invoices without VAT, and the buyers of the products charge VAT to themselves under the reverse charge mechanism.

## 3.5 Transfer and stamp tax. - The tax authorities can take as the actual value of an asset the net carrying amount according to documents provided by the taxpayer for the purposes of article 108 of the Securities Market Law

**Central Economic-Administrative Tribunal.** Decision of January 28, 2021

A company took over another company through a capital reduction with repayment of contributions, which was treated as exempt from transfer and stamp tax. Since more than 50% of the acquired company's assets consisted of real estate located in Spain (calculated on the basis of the carrying amounts of the properties and total assets), the tax authorities considered that the exception allowed in article 108 of the Securities Market Law (currently article 314 of the Revised Securities Market Law) applied and therefore issued the relevant transfer and stamp tax assessment and fined the company. In the assessment, the tax authorities did not substantiate specifically why they used the carrying amounts as the calculation basis.

TEAC concluded that, under article 108 of the Securities Market Law and in order to determine the actual value of an asset, the tax authorities may either conduct an audit of reported values or use, as in the examined case, the values given in the accounting records of the company that has been taken over and assume that such values are, or are sufficiently close to, the actual value, therefore making any special substantiation unnecessary, given that this practice does not strip the taxpayer of its right of defense.

## 3.6 Transfer and stamp tax. - The novation of the financial clauses of a loan agreement is subject to transfer and stamp tax, and the taxable amount is the financial content of those clauses

**Central Economic-Administrative Tribunal.** Decision of January 28, 2021

A taxpayer signed a deed for novation of a mortgage loan and filed the relevant stamp tax self-assessment, classifying the transaction as exempt. The tax authorities considered that the transaction was indeed subject to stamp tax because it had been documented in a public deed that qualified for registration at the Property Registry and had quantifiable content, with the taxable amount being the amount of the secured principal or obligation (the aggregate mortgage liability).

TEAC concluded that the novation of the financial clauses of a mortgage loan agreement is subject to stamp tax. However, the court added that the taxable amount is not the aggregate mortgage liability but rather the financial content of the quantifiable financial clauses, since this is what defines the taxable economic capacity.

## 3.7 Extension of liability. - Acts performed to reduce the value at which assets and rights can be sold are considered "concealment" even if there is no change in ownership

**Central Economic-Administrative Tribunal.** Decision of March 16, 2021

A company did not pay the tax debt resulting from a tax audit in which an assessment was issued and a penalty was levied. Orders initiating enforced collection proceedings and for the attachment of receivables were issued but were not successful. The company was then notified of an attachment on a building it owned, through a provisional noting at the Property Registry. However, the property was already encumbered, among other liens, with a mortgage in favor of certain individuals. This mortgage had been created after the audit had commenced.

The tax authorities took the view that this mortgage represented an artificial encumbrance on the property made to reduce the value of the asset in a potential public auction, so as to render unfeasible the sale of the asset in a procedure of this type.

Accordingly, the individual in whose favor the mortgage had been created was held jointly and severally liable for the company's debts.

The Valencia TEAR found in favor of the allegedly jointly and severally liable party, on the grounds that the asset had not been physically or legally transferred as required under the article cited for declaring the joint and several liability, namely article 42.2.a) of the General Taxation Law.

Ruling on a point of law, TEAC concluded that acts carried out in order to reduce the value at which the tax authorities can sell assets or rights may be considered to fall within the statutory definition of "concealment of the principal debtor's assets or rights" even if there is no change in ownership. In the case analyzed, according to TEAC, the concealment of the properties began when the mortgage was created, deferring the transfer until the time the mortgage was enforced on account of default.

### 3.8 Collection procedure. - The tax authorities cannot issue enforced collection orders if the assessment has been appealed or a request was made to defer the tax debt and the tax authorities have yet to respond to such appeals or requests

**Central Economic-Administrative Tribunal. Decisions of March 16, 2021 (6715/2020 and 4757/2018)**

In these decisions, TEAC adopted the Supreme Court's recent view that enforced collection orders cannot be issued in two cases:

(a) Where an appeal for reconsideration was filed against an assessment that was not paid within the voluntary period and no decision was expressly handed down on the appeal within the statutory period for doing so.

As the Supreme Court concluded in its judgment of May 28, 2020, the tax authorities cannot be rewarded when they fail to respond to claims or appeals, given that the same effort employed in issuing enforced collection orders could have been used to decide on the appeal in a timely and proper manner.

(b) Where a request was made to defer or split payment of the tax debt but no decision has been issued on the request.

In its judgment of October 15, 2020, the Supreme Court concluded that the principle of good administration prevents the tax authorities from initiating enforced collection proceedings in relation to a tax debt without analyzing or replying, with reasons, to a request for deferred (or split) payments filed by the taxpayer in relation to the debt, even if the request was made after the debt had entered the enforcement period.

## 4. Resolutions

### 4.1 Corporate income tax. - When using the tax-payable assessment method, filing of a supplementary corporate income tax return also requires a return for the prepayment

**Directorate General for Taxes. Resolution V0409-21 of February 25, 2021**

In November 2020, a company that calculated its prepayments using the quota method filed a supplementary self-assessment return for 2019 corporate income tax, which resulted in a tax liability.

The question raised was whether, in these circumstances, a supplementary self-assessment should also be filed for the second prepayment for 2020, to take into account the new tax liability determined in this supplementary self-assessment.

The DGT concluded as follows:

(a) The obligation to make tax prepayments is separate from the obligation to file tax returns.

(b) Under the quota method, prepayments are calculated by reference to the tax liability shown on the most recent tax return. Specifically, for a company whose financial year coincides with the calendar year, the second prepayment for 2020 (to be filed in October 2020) will be based on the tax liability resulting from the 2019 return, filed in July 2020.

(c) Therefore, if the amount of tax payable for 2019 was modified in a supplementary return filed in November 2020, a supplementary return in respect of the October 2020 prepayment also needs to be filed.

## 4.2 Corporate income tax. - The leasing of urban land that is not fully developed is not subject to tax withholding if it does not involve assignment of a business

**Directorate General for Taxes. Resolution V0192-21 of February 5, 2021**

A company owns a property classed, in the general urban zoning plan, as urban land not fully developed. Completion of an area-specific or special plan is required for its development. The property is currently leased out to a legal entity. The lease covers only the land itself and an agricultural storage building on it, but no machinery or other elements.

The question was whether the income received from this lease is subject to withholding tax.

The DGT noted that corporate income tax legislation provides as follows:

(a) As a general rule, income from the leasing or subleasing of urban real estate is subject to withholding tax, even where the income derives from economic operations.

(b) In contrast, income from the leasing or subleasing of rural properties is not subject to withholding tax. However, where a single agreement covers the leasing, subleasing or assignment or rural property along with other movable property, tax must be withheld if a business or mine is being leased or assigned.

The answer therefore depends (according to article 61.3 of the Revised Local Finances Law and article 7 of the Revised Real Estate Cadaster Law) on whether the lease agreement can be classed as an urban or rural lease and, in the latter case, on whether it is a real estate lease or the lease of a business.

According to the DGT, based on the description of the facts of the case, the agreement appears to be a rural lease agreement, meaning that there is no withholding obligation. For VAT purposes, the exemption allowed in article 20.One.23 of the VAT Law is claimable for leases of land, including, as appropriate, agricultural buildings used in business transactions involving a rural properties, irrespective of how the land is classed.

## 4.3 Personal income tax. - Analysis of the cases in which the assignment of parking spaces to employees constitutes a payment in kind

**Directorate General for Taxes. Resolution V0405-21 of February 25, 2021**

The issue for resolution was submitted by a company that leases the buildings in which it has its offices. This lease includes both offices and parking spaces. Some of these spaces are subleased to the company's employees at market rates. Because there are free parking spaces available, the company is considering the option of allowing the workers to use them

free of charge, irrespective of their professional category. The rights to use these spaces would be granted only for business days and they would have to be requested beforehand, being valid for one day. They would be allocated in strict order according to when the requests are received from employees.

The DGT reiterated the following principles:

(a) If the use of the parking spaces is offered to all employees without distinction, i.e. without being allocated to any specific worker, no compensation in kind will have to be computed, since this is a benefit offered to the company's workforce on a collective basis.

(b) If the use of the spaces is offered to each worker individually, then it must be classed as compensation in kind, since it can no longer be viewed as a benefit offered collectively by the company to its workers, and in this case the relevant withholding taxes on payments in kind must be paid.

## 4.4 Personal income tax. - Place of taxation of income obtained by a remote worker

**Directorate General for Taxes. Resolution V0194-21 of February 8, 2021**

An individual will work for a British company from their home in Spain, and must spend more than 91 days of the year in the United Kingdom.

Based on the assumption that this person will work from Spain for the majority of the year (in particular, for more than 183 days), the DGT concluded that, under Spanish law, they should be treated as tax resident in Spain. In this case, in accordance with the tax treaty signed between the UK and Spain:

(a) Income received for work performed in the United Kingdom could be taxed either in Spain (as this is the country of residence) or in the UK (as employment is exercised in this country, at least partially), provided that the requirements set out in the tax treaty are met. If the income is taxed in both countries, Spain, as the country of residence of the worker, would have to eliminate the double taxation.

(b) With regard to the salary income earned for working from home, the employment would be understood to have been exercised in Spain (the fact that the work benefits a British company is irrelevant) and therefore this income would only be taxed in Spain.

If, in contrast, the worker were not a Spanish resident:

(a) The income for work performed in the UK would not be considered to have been obtained in Spain (since the work is not carried out there) and the income would not be taxed in Spain.

(b) As for the income received for working remotely in Spain, since it was earned in a professional activity carried out in Spanish territory, the income could be taxed both in the United Kingdom (as the country of residence) and in Spain (as the country in which the remote work was performed). If the income is taxed in both countries, the United Kingdom, as the country of residence of the worker, would have to eliminate the double taxation.

## 4.5 Nonresident income tax. - A set of business premises in Spain from which only ancillary activities are carried out does not constitute a permanent establishment

**Directorate General for Taxes. Resolution V0156-21 of February 2, 2021**

A company engaging in intermediation and sale and purchase activities in relation to apparel and accessories is considering moving its registered office to Andorra. It would keep a set of business premises in Barcelona, which it would only use to store and display articles.

Pursuant to the tax treaty between Spain and Andorra, the company would be required to pay taxes in Spain if the premises in Barcelona were considered a permanent establishment. Otherwise, the company would be taxed only in Andorra.

Given that the Spain-Andorra tax treaty is not based on the latest version of the OECD model tax treaty (2017), the commentaries on the 2014 version would apply, based on the dynamic interpretation of the commentaries on the model tax treaty, always bearing in mind that, given their intended prospective nature, the new commentaries do not affect the interpretation that Spain had been making of version prior to 2017.

Accordingly:

(a) If the Barcelona business premises, being a fixed place of business within the meaning of article 5.1 of the tax treaty, were only used for storage and display purposes, and no other circumstances exist that may alter those activities, the premises would not be treated as a permanent establishment for the purposes of the tax treaty.

(b) In contrast, if company employees interact with customers at the warehouse where the articles are displayed and delivered, and the sales transactions are substantially conducted in those premises space (even if contracts are concluded and money changes hands later in Andorra), it would be understood that the activity carried out in Spain cannot be classified as merely ancillary, given that the entire sale and purchase exchange (other than its formalization) would be taking place in Spain.

In conclusion, there would be no permanent establishment in Spain only if the fixed place of business available in Spain were used for the ancillary activity of storage and display of product samples while management, sales and invoicing are carried out from the corporate office in Andorra, and the orders are not filled in Spain.

## 4.6 Wealth tax. - Nonresidents can claim the family business exemption if they meet the exemption requirements

**Directorate General for Taxes. Resolution V0241-21 of February 11, 2021**

The issue for resolution was submitted by two individuals, one resident in Mexico and the other, in Panama, who have investments in companies with tax residence in Spain and with tax domicile in the Madrid autonomous community, where the bulk of the assets are located. These individuals are the sole directors of the companies, at which they also carry out management functions, receiving compensation representing over 50% of all their business, professional and personal salary income.

The DGT reiterated the following principles established in earlier rulings:

(a) Individuals that are not Spanish residents are subject to wealth tax as nonresident taxpayers, on the assets or rights that they own and that are located, may be exercised or have to be performed in Spain.

(b) As regards the investments in the Spanish companies, the fact that the individuals are subject to wealth tax as nonresident taxpayers does not prevent them from being eligible for the family business exemption.

(c) In connection with the requirement that management functions must be performed and that the compensation for such functions must represent over 50% of the business, professional and personal salary income, the nonresident must provide verifiable evidence to the tax authorities that this percentage is met, irrespective of whether the income is received in Spain or abroad.

(d) Since the individuals are residents of third countries not forming part of the European Union or the European Economic Area, only the central government legislation, and not that of the Madrid autonomous Community, will apply.

## 4.7 Cadastral values. - The method for calculating the reduction in real estate tax can cause the tax charge to increase even where the cadastral value of the property has decreased

**Directorate General for Taxes. Resolution V0301-21 of February 19, 2021**

Under the legislation governing real estate tax, a reduction can be claimed in certain cases where the cadastral value of the property has increased. This reduction is calculated by subtracting a base value from the new cadastral value. In certain cases, this base value is calculated by multiplying the new cadastral value by an average multiplier for the municipality as a whole.

In the case described in this issue submitted for resolution, a decrease had been recognized in the cadastral value of a company's building, which, in principle, should have reduced the real estate tax charge. However, due to the workings of the calculation method established in the regulations for determining the base value of the reduction upon application of the average multiplier, the real estate tax payable (after reducing the cadastral value) ended up being higher than the amount the company had been paying in the periods preceding the decrease.

In its ruling, the DGT concluded that the regulations do not contain any exception in a situation such as the one described above, and therefore the company must pay higher real estate tax even though the cadastral value had decreased.

# 5. Legislation

## 5.1 The VAT Directive on distance sales to final consumers is transposed into Spanish legislation

Royal Decree-law 7/2021, of April 27, 2021, published in the Official State Gazette on April 28, 2021, transposes into Spanish law the amendments to the VAT Directive in respect of distance sales to final consumers. This transposition is an important development, given the growth seen in online sales. The new rules will start to apply on July 1, 2021.

See our May 10, 2021 alert for further details.

## 5.2 Reduction of the net income indexes applicable under the personal income tax objective assessment method for agricultural and livestock farming activities.

Order HAC/411/2021, of April 26, 2021, published in the Official State Gazette on April 28, 2021, reduces for the 2020 tax period the net income indexes applicable under the objective assessment method for personal income tax purposes in respect of agricultural and livestock activities affected by various circumstances of an exceptional nature.

## 5.3 The tax authorities may request information on the identity of the beneficial owners of shares from persons or entities who have, or are in a position to have, such information

Law 5/2021, of April 12, 2021, amending the Revised Capital Companies Law was published in the Official State Gazette on April 13, 2021.

As we highlighted in our April 13, 2021 alert, the purpose of this new law is to transpose, into Spanish law, Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement in listed companies.

In relation to taxation, it also amends article 93 of the General Taxation Law.

This article provides that individuals, legal entities and pass-through entities are required to provide the tax authorities with data, reports, background information and evidence that is relevant for tax purposes in connection with fulfillment of their tax obligations or which are to be deduced from their economic, professional or financial relationships with other persons. Article 93.1 provides a list of persons and entities who are understood, in particular, to meet such requirements (for example, withholding agents and deposit taking institutions).

The amendment adds a new case to this list of persons and entities. It is now stipulated that the obligation to provide the information required in the regulations lies with persons who know, or are in a position to know, the identities of the beneficial owners of shares.

## 5.4 DAC 6: Approval of the regulations completing the transposition of the directive and of the forms to be used for reporting purposes and communication between private parties

Law 10/2020, of December 29, 2020, was published in the Official State Gazette on December 30, 2020, which began the transposition into Spanish law of Council Directive (EU) 2018/822 of May 25, 2018 as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (DAC 6).

Royal Decree 243/2021, of April 6, 2021, amending the general regulations on tax management and audit work and procedures and implementing the common rules on procedures to manage, collect and audit taxes (Royal Decree 1065/2007 of July 27, 2007) was later published, in the Official State Gazette on April 7, 2021. This royal decree has completed the directive's transposition.

In our commentary prepared on April 9, 2021, we summarized the key points in relation to the transposition of DAC 6 in Spain.

And lastly, the April 13, 2021 edition of the Official State Gazette published:

(a) Order HAC/342/2021 of April 12, 2021 approving the standard forms (nos. 234, 235 and 236) to be used by intermediaries and/or taxpayers in compliance with their reporting obligations.

(b) The April 8, 2021 decision by AEAT's Tax Management Department, approving the forms for communications between individuals and entities involved and participants in cross-border arrangements in cases in which the intermediaries or taxpayers are not required to submit report forms.

See our alert of April 13, 2021 for a summary of these two rules.

## 5.5 Recipients of temporary lay-off (ERTE) unemployment benefits may pay their personal income tax for 2020 in installments.

Order HAC/320/2021, of April 6, 2021, was published in the Official State Gazette of April 7, 2021. It allows anyone who has received temporary lay-off unemployment benefits to defer payment of their personal income tax and also to pay it in installments.

See our April 7, 2021 alert for a summary of the main implications of this order.

**More information:**

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