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TAX NEWSLETTER

GARRIGUES

Latest developments and legal trends -

Legislation of interest - Judgments

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1. Coming to Spain for family illness reasons does not make an individual a resident

A Murcia high court judgment concluded that a taxable person does not become resident in Spain where their temporary stay in Spain is for family reasons.

The Personal Income Tax Law provides that an individual is resident in Spain, among other reasons, if they spend more than 183 days there in any calendar year. Sporadic absences do not count (in other words, if the taxable person leaves Spain for a few days, those days are not subtracted from the period of time they spend in Spain), unless they evidence tax residence in another country.

This rule has given rise to unreasonable situations, such as that of the taxpayer in the Murcia high court judgment rendered on September 24, 2018 (appeal 195/2017).

This individual had been residing in Thailand with his family uninterruptedly between 2007 and 2017, inclusive, although, by mistake, for a few years they continued filing personal income tax returns instead of nonresident income tax returns. After the individual realized the mistake and filed the relevant correction returns, the tax authorities accepted that the individual's residence outside Spain, except in 2010, when, as a result of the death of the individual's mother, he had to return to Spain to manage the estate, and spent more than 183 days in Spain that year.

The taxpayer produced to the tax authorities certificates of tax residence in Thailand for all the years, including 2010, because the Thai authorities interpreted the absence from Thailand by reason of the death of the individual's mother as a sporadic absence.

Murcia High Court found in the taxpayer's favor and made a number of interesting affirmations:

(a) Tax law is a public law and, therefore, mandatory, so the elements of tax obligations may not be left to the parties' choices. As a result, although tax returns are presumed to be true, if a taxable person made a mistake by filing personal income tax returns instead of nonresident income tax returns, he has the right to prove that his residence was not in Spain.

(b) For the purposes of determining the tax residence of a taxable person in Spain:

1. It is irrelevant whether the taxable person has properties in Spain, especially if the properties were acquired before moving to another country, because properties cannot be moved.

2. Making contributions under the system for self-employed workers or paying for medical insurance do not provide justification that a taxable person's center of vital interests is in Spain, because they are residual payments made only for health purposes.

3. The ownership of bank accounts in Spain is not relevant either, if most of the financial assets are outside Spain.

4. Electricity use at the principal residence during the time spent in Spain does not bring anything to the discussion, because that property was inhabited precisely in a sporadic absence with respect to residence in Thailand.

2. Judgments

2.1 Corporate income tax.- A legislation that taxes dividends differently according to where the company receiving them is a resident is contrary to the free movement of capital

Court of Justice of the European Union. Judgment of November 22, 2018, case C-575/17

In this judgment the CJEU held to be contrary to the free movement of capital a legislation, such as that in France, under which the dividends distributed by a resident company are taxable at source if they are received by a nonresident company, whereas, if it is a resident company receiving them, they are only taxed at the end of the tax period if the company receiving the dividends has recorded income in that period. Additionally, the CJEU warned that no taxation at source may take place if that company ceases trading without having become profitable after receiving those dividends.

The CJEU held in this respect that the difference in tax treatment of dividends dependent on the place of residence of the companies receiving those dividends is liable to deter nonresident companies from investing in companies in France and also to deter investors residing in France from purchasing holdings in nonresident companies. This separate treatment is not justified by different objective circumstances, by a balanced distribution of the powers of taxation between the member states, nor by the effective collection of tax.

2.2 VAT.- For VAT to be deductible, in the absence of the invoice, other proof of the acquisition of goods or services may be produced

Court of Justice of the European Union. Judgment of November 29, 2018, case C-664/16

The Romanian tax authorities refused the right of an individual, a VAT taxable person, to deduct input VAT as a result of not having the relevant invoices. To compensate for the absence of the invoices, the taxable person produced two experts' reports which determined the amount of input VAT, by estimate It so happened that when the goods and services on which input VAT was paid were acquired it was not mandatory to issue invoices to individuals.

The Court of Justice concluded as follows:

(a) According to the Court's own settled case law, the right to deduct VAT is a fundamental principle of the common system of VAT which, in principle may not be limited. In other words, the common system of VAT ensures that all economic activities, whatever their purpose or results, provided that they are themselves subject to VAT, are taxed in a wholly neutral way.

(b) To be able to benefit from this right, there is a procedural requirement to be in possession of an invoice issued in accordance with article 226 of the VAT Directive.

(c) However, the deduction of input VAT must be allowed if the substantive requirements are satisfied, even if the taxable persons have failed to comply with certain procedural requirements. Therefore, the tax authorities cannot refuse the right to deduction of VAT, if the taxable person has available all the information to ascertain whether the substantive conditions for that right are satisfied.

Nevertheless, it is for the taxable person seeking deduction of VAT to establish that they meet the conditions for eligibility. Accordingly, the taxable person is required to provide objective evidence that goods and services were actually provided as inputs by taxable persons for the purposes of their own transactions subject to VAT, in respect of which they have actually paid VAT.

That evidence may include, in particular, documents held by the suppliers or service providers from whom the taxable person has acquired the goods or services in respect of which they have paid VAT.

It must be noted, however, that an assessment based on an expert report commissioned by a national court may, if necessary, supplement that evidence or reinforce its credibility, but may not replace it.

2.3 VAT.- Penalties for failing to meet minimum terms for telecommunications services are subject to VAT

Court of Justice of the European Union. Judgment of November 22, 2018, case C-295/17 (MEO).

The Court examined the case of a company domiciled in Lisbon engaged in providing telecommunications services . Some of the contracts it signed with its clients established minimum terms. In these cases, the monthly charges are lower. In exchange, penalties are established if they discontinue the services before the end of the minimum term. These penalties are calculated by multiplying the monthly charge by the difference between the minimum term established in the contract and the number of months in which the service was provided.

The Court of Justice affirmed that:

(a) Payment of the penalty for breach of the minimum term in actual fact allows the company to receive the same revenues as if the customer had not terminated its contract early. In other words, the penalty remunerates the services provided by the company in the same way as the payment of a customer that does exercise its right to benefit from the services until the end of the minimum term.

(b) This penalty amounts, therefore, to remuneration for a supply of services subject to VAT.

(c) This conclusion is not altered by the fact that the aim of the penalty is to deter customers from breaching the minimum term and to compensate for the loss caused to the operator, or that, as a result of the penalty, the company could end up losing an even greater price than if a minimum term had not been stipulated.

2.4 VAT.- The chargeable event for VAT purposes related to acting in the placement of a player occurs with each of the club's payments to the agent not when the placement takes place

Court of Justice of the European Union. Judgment of November 21, 2018, case C-548/17

The examined case involved a German company providing agency business services in the professional football sector. In respect of placing a player with a football club, the company receives commission that is paid in installments every six months for as long as the player remains under a contract with that club and holds a German football league license.

According to the Court, in the case of a service such as that examined, which entails negotiating the placement of a player for a certain number of seasons with a club and remunerated by means of conditional payments in installments over several years following the placement, the chargeable event and chargeability of the tax does not occur when the player is placed, but on expiry of the periods to which the payments made by the club relate.

2.5 Inheritance and gift tax and transfer tax.- The contribution of assets to the matrimonial property system is not a gift but a transfer subject to but exempt from transfer tax

Murcia High Court. Judgment of October 25, 2018

Murcia High Court confirmed in this judgment that if a taxpayer, married under the matrimonial property system, contributes the taxpayer's own individual assets to the matrimonial property system, there is no gift to the other spouse (in respect of half the value of the assets) taxable in respect of inheritance and gift tax.

What does take place, however, is a transfer for consideration subject to transfer tax, under the "transfers for consideration" heading. For these purposes, the court recalled that a gift of individual assets to the matrimonial property system is a perfectly allowable legal transaction according to the Civil Code, equal to a transfer in which there is delivery (even if symbolic), and a reason, to cover marital costs.

It is, however, an exempt transaction under article 45 of the law on the tax which provides that spouses' contributions of assets and rights to the marital property system are exempt.

3. Decisions and Rulings

3.1 Requests for information.- The tax relevance of a request for information must be expressly explained when it does not arise clearly from the procedure

Central Economic-Administrative Tribunal. Decision of December 4, 2018

The information sought in requests for information must have tax relevance. This relevance is linked to the requirement to give reasons. TEAC concluded therefore that where the tax relevance of a request "does not ostensibly appear to be from the procedure", an express explanation must appear in the request.

In the specific case examined by TEAC, the tax authorities had requested information on "the specific medical service that has been provided to a given client or the identification of the specific persons who provided the identified service". TEAC concluded that with that brief request for information, the tax relevance "does not ostensibly appear to be from the procedure", in that the requested data do not show any usefulness or financial content for the tax authorities.

3.2 Management procedure.- An audit of reported values may be carried out in a limited review procedure

Central Economic-Administrative Tribunal. Decision of December 10, 2018

TEAC has set as an official interpretation that a limited review is a suitable procedure for carrying out an audit of reported values (both where this is its only purpose, and where the audit of reported values is a step within a broader audit of the taxable event), provided that the responsible authority considers that the procedure could give rise to an additional issue that does not simply involve auditing reported values.

TEAC's conclusion is based on the premise that all the guarantees offered by an audit of reported values, as an independent procedure, are present in a limited review and, in particular, the interested party's right to apply for an expert appraisal made at the taxpayer's instance.

3.3 Review procedure.- The absence of standing to bring challenges for a taxable person in a procedure is remedied if the assessments are notified with information on the routes for challenges

Central Economic-Administrative Tribunal. Decision of December 04, 2018

A partial audit was conducted on a company. The assessments determined in the audit were notified to both the company and its shareholders. In the notification of the assessments to the shareholders it was expressly mentioned that the assessments related to the company but that, since the company had not appeared in the procedure, the assessments had been notified to the shareholders also. The notifications included the relevant "challenge footnote".

Both company and shareholders all filed economic-administrative claims against the assessments.

In relation to their standing to bring claims:

TEAC did not question the standing to bring challenges of the company, which had not been dissolved and liquidated when the audit work was performed, and for that reason the work was considered to be carried out for formal purposes with the company and the assessments were issued in the company's own name.

(a) In relation to the shareholders, TEAC affirmed, first, that precisely for the foregoing reasons, they did not have standing to bring claims.

(b) However, the court considered that the fact that the assessments were notified to them including a "challenge footnote" entails an act by the tax authorities themselves which cannot be ignored or contradicted by the reviewing authority, because this notification has created a lawful expectation for the claimant. This transpires, among others, from Supreme Court Judgment of November 12, 2007.

3.4 Review procedure.- A document prepared at the instance of a party does not have material value for the purposes of a special appeal for judicial review of final decisions

Central Economic-Administrative Tribunal. Decision of December 10, 2018

An individual applied for the division of a property. Malaga Cadaster Office rejected the application due to finding inconsistencies in a produced deed. The decision rendered by the authorities became final. Later, the individual filed a special appeal for judicial review of final decisions attaching a deed for correction of the one that was originally produced.

TEAC disallowed the appeal by arguing that a special appeal for judicial review of final decisions cannot be founded on the appearance of documents with material value when these have been prepared at the instance of the appellant before lodging the appeal (which was the case of the corrected deed). Those documents appeared in a contrived or sought way, not spontaneously as required by the Supreme Court's case law. In this respect, TEAC recalled that this special route for judicial review of final decisions is not provided to compensate for the insufficient evidence that the appellant provided to the managing authority.

4. Ruling requests

4.1 Information returns.- Form 179 only has to be filed by those who actually act as intermediaries in the supply of leased vacation properties

Directorate General for Taxes. Ruling V3083-18, of November 28, 2018

Since 2018 any individuals and entities acting as intermediaries between the suppliers and recipients of properties for tourism use have been required to file form 179, "Quarterly information return on the supply of properties for tourism use". The intermediaries include collaborative platforms. The only exception to the quarterly filing obligation is that the first return must be filed in January 2019, in relation to the transactions performed in 2018.

This ruling request concerned the case of an owner who leased a property to a property manager in exchange for a monthly charge for it to be subleased later to tourists. This subleasing to tourists was done with the manager's resources at his own risk and at a price determined by the manager, without the owner's participation or knowledge.

In relation to this case, the DGT clarified, firstly, that:

(a) The definition of "intermediary", in the absence of statutory provisions, is that obtained from the case law of the Supreme Court (civil chamber). Specifically, an intermediary is someone who brings their customer into contact with another person for both to conclude a contract, in exchange for a price that is only received if the promoted contract is concluded.

(b) According to this definition, form 179 must be filed by an intermediary receiving remuneration for achieving a result consisting in an actual contract taking place between supplier and recipient of a property for tourism use.

In the specific case examined:

(a) The manager, as owner of a simple sublease right (by paying to the owner a fixed sum regardless of whether or not the manager places the property with tourists), becomes supplier of the properties for tourism use, and therefore may not be deemed an intermediary. As a result, the manager falls outside the scope of the information obligation.

This conclusion is not altered if the manager subleases the property through an online platform on which it searches for tourists to whom to sublease the property.

(b) If the online platform receives its remuneration for actually entering into the supply of properties for tourism use between the manager and the tourists, it will be considered to act as intermediary and must file form 179.

This will not apply if the platform simply carries out digital accommodation tasks to advertise properties for tourism use without acting as intermediary between supplier and recipient.

(c) The manager, as supplier of properties for tourism use, even if it is not required to file form 179, will be required to:

a. Keep a copy of the identification documents of the beneficiaries of the right to use the property.

b. Provide the person required to file the form with the particulars of the property and of the manager itself.

5. Legislation

5.1 New tax law on housing and rental

Royal Decree-Law 21/2018, of December 14, 2018 on urgent measures regarding housing and rental was published in the Official State Gazette on December 18 and came into force the day after.

In the tax field, the following new measures have been passed:

(a) Firstly, an exemption from transfer and stamp tax has been introduced for lease agreements related to housing for stable and permanent use.

(b) Additionally, in the field of real estate tax:

a. It has removed the obligation for authorities or public entities to charge real estate tax to tenants on the rental of properties for residential use.

b. Local councils with a surplus are now allowed to use that surplus to increase their supply of public housing. For these purposes, the law refers to the housing program known as "*152. Vivienda*" under additional provision sixteen (financially sustainable investment) of the Revised Local Finances Law, in effect from January 1, 2019.

c. Local councils are also allowed to establish a reduction of up to 95% to the real estate tax charge on homes rented at a restricted price.

d. It sets out the rules and safeguards related to the definition of "permanently unoccupied residential property", for local councils to apply certain surcharges.

5.2 Form 900D to report changes to the cadaster for properties

Order HAC/1293/2018, of November 19, 2018, approving the form for reporting changes to the cadaster for properties and determining the graphic and alphanumeric information needed to make certain notifications to the cadaster was published in the Official State Gazette on December 5, 2018. It came into force on December 6.

This new form 900D includes and replaces the various forms in place to date (forms 901N, 902N, 903N and 904N) and must be filed remotely in certain cases, such as those of legal entities.

The Order removes the obligation to file documents that are already held by the Directorate-General for the Cadaster or original documents, although they may subsequently be reviewed.

5.3 Objective assessment method for personal income tax purposes and simplified VAT rules for 2019

The Official State Gazette of November 30, 2018 published Order HAP/1264/2018, of November 27, 2014, implementing for 2019 the personal income tax objective assessment method and the simplified special VAT scheme.

The Order came into force on December 1, 2018, and is effective for 2019.

6. Miscellaneous

6.1 The penalty regime in relation to form 720 (to report assets and rights held outside of Spain) is disproportionate

Reasoned opinion of the European Commission in infringement procedure 2014/4330

As we reported in our Alert (*El régimen sancionador del modelo 720 (declaración de bienes y derechos en el extranjero) es desproporcionado*), the European Commission opened an infringement procedure against Spain (procedure number 2014/4330) in relation to the penalty regime for failing to file or filing late or incorrectly Form 720 to report assets and rights held outside of Spain.

In the reasoned opinion arising from this procedure, issued on February 2017, but disclosed recently, the Commission concluded that the Spanish legislation infringes the free movement of people and workers, the freedom of establishment, the freedom to provide services and the free movement of capital, to the extent that it establishes a discriminatory and disproportionate tax reporting system, and called on Spain to adopt the necessary measures to remedy this circumstance within two months from the date of receiving the opinion.

6.2 The directive harmonizing and simplifying certain rules in the value added tax system for the taxation of trade between member states has been published

As we reported in our VAT Alert 4-2018, Council Directive 2018/1910 of 4 December 2018 (published in the Official Journal on December 7, 2018) has introduced new value added tax legislation to simplify and harmonize certain rules, specifically, those concerning sales of call-off stock, "chain sales" and a few elements related to application and proof of the exemption for supplies of goods to another member state.

See our Alert for further details.

The transposition of these rules into national law must be done for them to take effect on January 1, 2020.

For further information:

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