Tax Newsletter

Spain

GARRIGUES

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1. Judgments

1.1 Free movement of capital. - It is contrary to EU law to limit the reduction applicable to gains obtained on the sale of shares based on the place of residence of the companies whose shares are transferred

Court of Justice of the European Union. Judgment of November 16, 2023. Case C-472/22

The Portuguese personal income tax legislation allows a 50% reduction for gains obtained on the transfer of shares in entities resident in Portugal, whereas gains from the transfer of shares in companies established in other member states are excluded from the reduction.

The Court of Justice of the European Union ("CJEU") held that a national legislation such as that described is precluded by EU law, and in particular, the free movement of capital, because it makes eligibility for a reduction depend on the place of residence of the entity whose shares are transferred, thereby giving rise to discriminatory treatment among taxpayers according to the country where they make their investments.

1.2 Corporate income tax. - The neutrality regime cannot be applied where, when the merger takes place, the absorbed company only has tax assets

National Appellate Court. Judgment of December 7, 2023

The tax authorities rejected application of the special regime for mergers, spinoffs, asset contributions and share exchanges (neutrality regime) under the corporate income tax law to a simplified merger by absorption of two companies, due to finding that no valid economic reasons existed, but rather simply the aim for the absorbing entity to offset the tax losses obtained by the absorbed companies.

The appellant alleged that the reason for the merger was a restructuring and rationalization of the group's activities, to strengthen its financial capacity, reduce management and administration costs, eliminate sale and purchase transactions between the companies and offset reciprocal debts.

The National Appellate Court confirmed the tax authorities' reasoning, after observing that for several years the absorbed companies had not conducted any activities, had not had any infrastructure or employees, had not engaged in any commercial relationships with third parties and had transferred their assets and businesses to the appellant at no tax cost, in previous years. All in all, according to the court, the merger did not entail a grouping or concentration of operations, or a cost saving, or an improvement in management, but rather its ultimate aim was to offset the absorbed entities' tax losses.

1.3 Corporate income tax. - Entities engaged in residential property leasing must fulfill the requirements for the leasing to be characterized as an economic activity

Madrid High Court. Judgment of October 18, 2023

The tax authorities rejected that an entity met the requirements to apply the special regime for entities engaged in residential property leasing because it did not carry on a genuine economic activity involving residential property leasing, even though the entity evidenced that it had rented out 15 residential properties and had signed a management agreement for conducting the activity.

Madrid High Court noted that the Corporate Income Tax Law expressly defines "economic activity" and determines that for the rental of properties to be able to be characterized as such there must be at least one individual employed under an employment contract with full-time working hours who manages the business.

Therefore, this requirement must be fulfilled strictly, and the definition of economic activity cannot be broadened beyond the cases determined in the law.

1.4 Personal income tax. – In certain circumstances the tax credit for the taxpayer's principal residence may be applied even if the taxpayer had not done so before 2013

Supreme Court. Judgment of December 4, 2023

Under the current personal income tax legislation, the tax credit for the purchase of the taxpayer's principal residence can be applied if the residence was purchased before January 1, 2013 and the taxpayer had already made the deduction in respect of the same residence in taxable periods before that date.

In the examined case, the taxpayer could not apply the tax credit for their residence before 2013 because, in line with article 68.1. 2) of the Personal Income Tax Law (in the wording in force as of December 31, 2012), the tax credit for the purchase of a new residence could not be applied until the amounts invested in this residence went above those invested in other previous residences on which they had applied the tax credit.

The Supreme Court concluded that, in these cases, it is reasonable to consider that the tax credit may indeed be applied in or after 2013, from when the invested amounts go above those invested in one or more previous residences.

1.5 VAT. - It is examined whether board members are taxable persons

Court of Justice of the European Union. Judgment of December 21, 2023. **Case C-288 /22**

An individual was member of a board of directors of several Luxembourg public limited companies and carried out many activities as such, in exchange for remuneration consisting of a percentage of the income obtained by those entities. The Luxembourg tax authorities issued a VAT assessment to him due to considering that he was a taxable person for VAT purposes.

The CJEU concluded that an individual who is member of a board of directors of a Luxembourg public limited company carries on an economic activity for VAT purposes if (i) they supply a service to the company for consideration, (ii) the activity is carried out on a continuing basis, and (iii) the procedures for determining the remuneration are foreseeable.

However, that activity is not considered to be carried out independently if the individual does not act on their own behalf or under their own responsibility and does not bear the economic risk linked to their activity, despite the fact that they are free to arrange how they perform their work, receive the emoluments making up their income, act in their own name, and are not subject to an employer-employee relationship.

1.6 Real estate tax. - Ownership of surface rights for real estate purposes only relates to the built structure

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

In a case handled by Garrigues, the Supreme Court recognized in its judgment the possible exemption from real estate tax for the construction of real estate assets on which the central government, the autonomous community governments or local authority entities owned a surface right.

It moreover confirmed its interpretation according to which, in relation to a surface right as an interest in real property a distinction can be made between (permanent) ownership of the land on which the building is built and (temporary) ownership of the built structure, and the surface right relates to this second element.

A similar ruling was made by the Madrid Regional Economic-Administrative Tribunal (TEAR) in a decision dated June 29, 2023. In this decision, the tribunal held that, in the specific context of a surface right as an interest in real property, two separate cadaster-registered owners may be distinguished, whose rights relate to parts of the real estate asset that are perfectly distinguishable from each other, (i) the cadaster-registered owner of the plot, as the owner of the land who grants the surface right, and (ii) the surface right holder, whose cadaster-registered ownership only relates to construction of the real estate asset. For that reason, in the context of a surface right in a real estate asset, the surface right holder is only taxable in relation to the cadaster value of the built structure.

For further details on the content of the judgment, see our publication dated December 22, 2023.

1.7 Tax management and audit procedures. – The tax authorities cannot initiate a new examination process when it has already reviewed the same item and period in an earlier tax management procedure

National Appellate Court. **Judgment of November 7, 2023**

Following the transfer of a real estate asset, the tax authorities initiated a limited review procedure on the purchaser to verify the application for a refund of the input VAT paid on the real estate transaction. The examination did not result in a reassessment and AEAT refunded the requested amount to the taxpayer.

Later, AEAT initiated an audit on the same taxpayer, the scope of which included, among other items, the input VAT paid in the period when the real estate transaction was performed. This process ended with a provisional assessment in which the authorities rejected the ability to deduct the input VAT paid on the real estate transaction.

The issue raised in this appeal was whether a limited review prevents an audit later being commenced with the same subject-matter. The National Appellate Court concluded that the tax authorities could not review an earlier provisional assessment again unless there were new facts or unknown circumstances.

1.8 Audit procedure. – Where submissions against a protested notice of assessment are partially upheld the proposed penalty must be corrected and a new submissions period granted

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

A protested notice of assessment was issued in an audit on a company in respect of corporate income tax, against which the entity filed submissions. Before the assessment decision was delivered, the auditors notified the taxpayer of the commencement of penalty proceedings. The taxpayer filed submissions against the proposed penalty. The auditors later notified their assessment decision, in which they partially upheld the entity's submissions against the protested notice of assessment and decided to reduce the reassessed tax liability. As a result of that partial confirmation, the auditors issued a penalty decision in which they reduced the penalty they had originally proposed. When this decision was delivered, however, the auditors had not issued a new proposed corrected penalty or offered the company a new period for filing submissions before the penalty decision was delivered.

The Supreme Court concluded that where submissions filed against a protested notice of assessment are partially upheld, which makes it necessary to adjust the penalty, the auditors must issue a new corrected proposed penalty and provide a new period for the interested party to file submissions. This step in penalty proceedings has constitutional significance and its omission renders all steps taken null and void, due to manifestly impairing a fundamental right.

1.9 Enforcement of secondary liability. – Each director's liability must be examined separately

National Appellate Court. **Judgment of October 24, 2023**

The tax authorities declared a director secondarily liable for certain of a company's debts because, in their opinion, the board of directors (and, therefore, the director declared liable himself) did not correctly oversee the actions of the company's chief executive officer, nor had its members (including the director declared liable) taken the required steps to prevent tax infringements from occurring.

The National Appellate Court held that it was inadmissible for the tax authorities to declare the director secondarily liable simply due to the fact of belonging to the board of directors. In its view, the tax authorities must necessarily provide an explanation, giving justification and reasons, of the director's specific conduct that prevented collection of the tax debts for which he had been found secondarily liable.

1.10 Penalty procedure. – An assessment cannot be challenged in an appeal against the penalty

Supreme Court. Judgment of November 20, 2023

After an audit, an assessment decision was delivered which was not appealed and therefore became final. In the later penalty proceedings, a penalty was imposed for an infringement consisting of issuing invoices with false or forged data, which was appealed by the taxpayer.

The Supreme Court ruled that a final administrative decision (such as the assessment decision in this case) cannot be challenged (except through special remedies) either directly or in appeals lodged against other administrative acts (the penalty decision, in this case). Effective judicial protection, interpreted as the right of access to a court, is not breached by the fact of not being able to contest again something that became consented and final.

1.11 Penalty procedure. – The penalty for incorrectly applying for refunds must be calculated on the incorrectly requested amount, regardless of the sum actually refunded

Supreme Court. Judgment of November 20, 2023

Article 194.1 and article 195.1 of the General Taxation Law (LGT) set out two infringements defined as conduct involving, respectively, incorrectly applying for tax refunds, benefits or incentives, and incorrectly determining or evidencing positive or negative amounts or apparent tax assets.

According to the Supreme Court these infringements fall within what legal theorists have defined as "danger" types of conduct (types of conduct that do not cause direct or immediate economic harm but could have done so if the authorities had not acted to remedy the situation) and directly protect the financial interests of the public purse.

In view of this, the Supreme Court concluded that "the basis for calculating the penalties defined in article 194.1 and article 195.1 of the General Taxation Law in cases where, despite having engaged in the infringing conduct, the infringing party has a right to obtain a refund of incorrectly paid tax, must be quantified, respectively, by reference to the amount incorrectly requested or unlawfully determined or evidenced, regardless of that refund".

1.12 Review procedure. – Written submissions in an administrative appeal to a superior administrative body may be filed with any register held by the authorities

Supreme Court. Judgment of November 27, 2023

The head of the Audit Department lodged an appeal against a decision by a regional economic-administrative tribunal (TEAR) and filed written submissions with the Central Economic-Administrative Tribunal (TEAC) instead of with the TEAR that had delivered the decision. TEAC sent the written submissions to the TEAR on the same date, but the TEAR received it a few days later, after the one-month time limit for filing written submissions had ended.

The Supreme Court concluded that written submissions in an appeal to a superior administrative body may be filed with any register held by the central government authorities or by any other public authorities under article 2.1 of the Public Authorities Common Administrative Procedure Law, which must send them to the body responsible for carrying out the appeal process. The filing date must be considered to be the date when the appellant files its written brief in this manner, regardless of the date when the body responsible for delivering a decision receives it.

2. Decisions

2.1 Corporate income tax. – The patent box rules cannot be applied to income obtained from licensing arrangements carried out in a tax group by the party subscribed as licensee by the creator of the intangible asset

Central Economic-Administrative Tribunal. Decision of October 30, 2023 (Principle 1 and Principle 2)

The creator entity of an intangible asset (parent company of a consolidated tax group) contributed that intangible asset to one of its subsidiaries. Following that contribution, the new owner signed with the group entities a licensing agreement for the intangible asset, which benefited the creator/contributor.

TEAC recalled that the licensing of intangible assets in a consolidated group does not create an impediment to applying the reduction under the patent box rules, as it stated in a decision dated March 23, 2022. It concluded, however, that the reduction cannot be applied in a purely circular arrangement such as that described, in which the creator entity of the tangible asset ends up paying for the licensing as a result of a number of internal transactions. In the tribunal's opinion, this practice would be contrary to the aim of the tax benefit, which it had already noted in its decision dated November 24, 2022 (1584/2019).

2.2 Personal income tax. - The pricing rules for the transfer of shares in unlisted entities prevail over the pricing rules for controlled transactions

Central Economic-Administrative Tribunal. Decision of November 28, 2023

Article 37.1.b) of the Personal Income Tax Law contains a special pricing rule for transactions involving a transfer of shares in unlisted entities, whereby, unless there is proof that the paid amount matches the amount that would have been agreed between independent parties on an arm's length basis, the transfer value cannot be lower than the higher of the equity figure per the balance sheet as of the latest fiscal year to end before the due date for the tax and the result of capitalizing at 20 percent the average earnings figure for the three fiscal years ended before the due date for the tax.

This decision examined a transfer of shares performed in 2015 at their acquisition cost, meaning that actual income amounted to "0". The tax authorities recalculated the income by reference to the value of equity per the balance sheet for 2014 (higher than the capitalization value mentioned in the rule described above). One of the parties was related (director) to the transferee and, for that reason, the appellant considered that the special pricing rule for controlled transactions under article 41 of the Personal Income Tax Law applied, whereby transactions between related individuals or entities must priced on an arm's length basis.

TEAC concluded that the special rule on transfers of shares in unlisted entities prevails over the rule on controlled transactions, because it is a specific rule for this type of transfers, reiterating its conclusion in its decision dated July 3, 2014 (6804/2013).

In any event, the tribunal warned that a decision by the Supreme Court is awaited on this issue (prevalence of one or another rule) (Admission decision dated April 26, 2023 -rec. 7097/2022-).

2.3 Personal income tax. – The double taxation tax credit for income obtained in a country with a split tax year must be calculated by reference to the portion of tax relative to the income for the period in which the credit is applied

Catalan Regional Economic-Administrative Tribunal. Decision of September 14, 2023

In the examined case, the taxpayer performed work in the United Kingdom in fiscal year 2017 for which he obtained income that was taxable in that country. In the United Kingdom the tax year ends in April, so the income obtained in 2017 was taxed partly in the 2016/2017 tax year and partly in the 2017/2018 tax year.

The Catalan TEAR concluded that in the recipient's 2017 Spanish personal income tax return he could deduct the taxes paid in the United Kingdom attributable to the income in the 2017 tax year, and therefore he would have to calculate the portion of those taxes relating to income received in that calendar year.

2.4 Personal income tax. – The specific income for work performed abroad is fully exempt, up to a maximum limit of €60,100

Catalan Regional Economic-Administrative Tribunal. Decision of September 14, 2023

The Personal Income Tax Law allows an exemption for work performed abroad. The exempt amount is calculated, as a general rule, by applying to the employee's income the proportion that the days spent abroad bear to the total number of days in the year. The law also states, however, that the specific income in respect of that work performed abroad is fully exempt.

The Catalan TEAR confirmed that indeed the portion of any income that the taxpayer obtains only for work performed abroad is fully exempt, subject to a general annual limit of €60,100. And in doing so the tribunal clarified the following points:

(i) The specific income for work performed abroad is that paid to the worker as a direct and unequivocal consequence of the worker being sent abroad.

(ii) The specific income for work performed abroad does not include any wages or salary that are going to be paid regardless of whether the worker is going to provide services abroad.

2.5 Nonresident income tax. - Income obtained by artists for performing their activities cannot automatically be characterized as artistic income

Central Economic-Administrative Tribunal. Decision of October 30, 2023

A Spanish tax-resident company hired nonresident artists through a nonresident entity for performances in various Spanish towns and cities. The tax authorities considered that the income paid to the nonresident company was subject to nonresident income tax withholdings, because it was received for artistic activities. The withholding agent, however, supported that a portion of the paid amounts of income was not obtained for the performance of artistic activities (subject to withholdings), but rather for the provision of ancillary services to the artists' performances, such as directing, production, transport, security or catering services (business profits not subject to withholdings at source).

TEAC held that not all amounts of income that are obtained directly or indirectly from an artistic performance have to be characterized automatically as "artistic income". The characterization of income requires an analysis of the existing circumstances in each specific case, and the burden of proof lies with the interested party.

2.6 VAT. - Enforced collection surcharges are not required to be imposed in cases of deferred VAT on imports where the debt was paid before receipt of the order initiating enforced collection proceedings

Central Economic-Administrative Tribunal. Decisions of October 23 and November 20 2023 (00/06872/2020/00/00, 00/07720/2020/00/00 and 00/05766/2020/00/00)

TEAC adopted the interpretation determined by the Supreme Court in a judgment dated December 13, 2022 (January 2023 newsletter) and concluded that where the deferred import VAT scheme has been elected, an order initiating enforced collection proceedings is not required to be issued where, even if the import VAT assessed by the customs authorities has not been included on the relevant self-assessment, those amounts of VAT were paid over before notification of the order initiating enforced collection proceedings.

2.7 Tax on economic activities. – Tax on economic activities liability for an oil refining economic activity

Central Economic-Administrative Tribunal. Decision of June 21, 2023

TEAC clarified in this decision that, when calculating the tax on economic activities liability for an oil refining business (group 130 in the classification), the taxable amount must be the volume refined in the immediately preceding year. If variations greater than 20% occur later, the taxable person will have to file a variation return, which will have effects starting in the following taxable period.

Additionally, the area used for oil refining activities must be calculated by including all the areas or spaces that are directly used to carry out the activities, including for these purposes certain areas of roads and pathways.

2.8 Administrative procedure. - The handling of administrative proceedings by individuals who are not public servants is a ground for rendering the steps carried out and the decision bringing them to an end null and void

Central Economic-Administrative Tribunal. Decision of October 24, 2023

It was examined whether administrative proceedings carried out by a local council in which ancillary staff who did not have the category of statute-based staff or public servants took part generally and on a permanent basis are valid.

TEAC applied the principle determined by the Supreme Court in its judgment dated September 14, 2020 (appeal 5442/2019) and concluded that, although the authorities are authorized to conclude technical assistance agreements with companies in the private sector, non-public servant staff cannot carry out activities that imply exercising public authority, such as those inherent to an audit process, which must be carried out by individuals having public servant status. Additionally, the fact of the administrative actions arising from the process having been signed by public servants does not automatically make them valid, because the signature does not guarantee that it was handled by individuals attached to the competent body under a public servant relationship.

The consequence of those functions being carried out by unauthorized staff will be the rendering void of all steps performed and therefore of the decision ending the proceedings concerned.

2.9 Tax collection procedure. - Enforcement action for a mutual agreement recognizing an unjustified assessment gives entitlement to a refund of the cost of providing security

Central Economic-Administrative Tribunal. Decisions of March 21 and November 20, 2023

The General Taxation Law sets out an obligation to refund to the taxpayer the cost of security provided to stay payment of an assessment, where the assessment has been held unjustified by a final judgment or administrative decision.

TEAC held that this rule is also applicable in relation to a stay of enforcement of debts arising from assessments that are subsequently set aside or partially set aside under a mutual agreement. According to the tribunal, although the agreement reached in a mutual agreement procedure does not have the status of a final administrative decision, the enforcement action in which it is decided to correct the originally issued assessment, to issue new assessments reflecting the effects of the amicable agreement does have that status.

3. Resolutions

3.1 Corporate income tax. - The transfer of the assets of a French company to its sole shareholder resident in Spain by reason of its winding up without liquidation does not allow use of the losses caused by terminating the investment

Directorate General of Taxes. Resolution V3057-23 of November 23, 2023

A Spanish company is sole shareholder of a French company. Due to the accumulated losses of this latter company, its liquidation was being considered. Under French law, the winding up of a company with a sole shareholder implies the automatic transfer of its assets, without liquidation, to the shareholder.

Article 21.8 of the Corporate Income Tax Law states that losses arising in the event of dissolution of an investee are deductible, unless it is dissolved as a result of a restructuring transaction. In view of this article, the DGT concluded that the Spanish company would not be able to include in its tax base for the period in which the dissolution of the subsidiary would be carried out the losses arising from that dissolution, insofar as the winding up without liquidation gives rise to similar results to those arising from a restructuring (automatic transfer by operation of the law of all the assets and liabilities of the investee to its sole shareholder, without liquidation).

3.2 Excise tax on non-reusable plastic packaging - The mass balance method is accepted for evidencing chemically recycled plastic

Directorate General of Taxes. Resolution V3042-23 of November 22, 2023

The taxable amount for the tax on non-reusable plastic packaging consists of the amount of non-recycled plastic, expressed in kilograms, contained in the products that are part of the taxable item for this tax.

Where mechanical recycling is used, the law states that the amount of recycled plastic must be certified by an entity accredited to issue a certificate under standard UNE-EN 15343:2008 “Plastics. Recycled plastics. Plastics recycling traceability and assessment of conformity and recycled content” or whatever standards may replace it.

In the case of chemically recycled plastic, that amount must be evidenced with the certificate issued by the entity accredited or authorized to do so. In this respect, the DGT accepted the validity of a certificate issued by an accredited entity using the mass balance method (consisting of accounting for mass inputs and outputs in a process or part of a process) to evidence recycled plastic status, provided that the amount, expressed in kilograms, of recycled plastic is specified.

3.3 Corporate income tax. – Recognition and deduction of layoff costs in relation to staff transferred to another company

Directorate General of Taxes. Resolution V3001-23 of November 16, 2023

A company transferred in year X various lines of business to other companies, which implied the transfer of employees associated with them. In its agreements with the transferee entities, the transferring company accepted responsibility for the cost of future layoffs of the transferred employees. The transferring entity and the transferee entities belonged to the same group.

In the context of the transferee entities leaving the group, an agreement was signed with representatives of workers across the whole group and representatives of those companies to lay off certain sectors of the workforce, including a few of the transferred workers. This agreement was adopted in the year following that of the transfer of the lines of business (X+1). The layoff plan was funded under deferred income insurance policies, for which the premiums were paid to the insurance company in year X+2. The portion relating to the premiums of the employees received in the transfer was rebilled to the transferring entity.

The DGT noted the following:

(i) From when the layoff agreement was reached (year X+1) a valid expectation was created for the workers, and as a result, implicit obligations for the transferring company to take on certain costs related to the layoffs. Therefore, this company should have recorded the relevant provision in that year, which would not be deductible until the agreed payments fell due to the workers.

(ii) For their part, in relation to those severance payments, the transferee entities would not have to recognize for accounting purposes any employee cost or revenue in respect of the rebilling, because it must be considered that, in relation to those severance payments, they simply acted as intermediaries.

3.4 Corporate income tax. - The additional limit for the deduction of financial expenses incurred to acquire companies that will become part of the tax group comes before the general limit

Directorate General of Taxes. Resolution V2969-23 of November 13, 2023

An entity arranged a loan to acquire another entity. Later, the two entities started to be taxed under the consolidated tax regime. The tax group recorded an operating loss, without taking into account the operating income figure of the acquired entity. In the group there were no financial expenses other than those incurred for that acquisition.

The DGT analyzed deduction of the financial expenses and recalled that, in this type of transactions, two limits need to be considered:

(i) The first is the general 30% limit on the operating income of the tax group (article 16.1 of the law).

(ii) Secondly, the additional limit on financial expenses incurred to acquire shares in the capital or equity of any type of entities belonging to a tax group, which amounts to 30% of the operating income of the entity or acquiring tax group, after the necessary

eliminations and inclusions. That figure does not include the operating income of the acquired entity or any other included in the group in any taxable period commencing in the four years after that acquisition (article 67.b of the law).

According to the DGT, this second limit is in addition to and comes before the general limit, and therefore must be applied first. In other words, only after determining the net financial expenses that are deductible under the special rule, can those costs be added to all the other net financial expenses that the entity might have for the purpose of applying the general limit.

However, if in a taxable period, the operating income of the acquiring entity, after the necessary eliminations and inclusions, without including that relating to the acquired entity, is not a positive figure, the tax group cannot deduct any net financial expenses (not even the minimum million euros under article 16 of the law), taking into account that in the examined case there are additional financial expenses on top of those relating to the loan mentioned above.

3.5 Corporate income tax. – Dividends distributed after a share exchange subject to the tax neutrality regime give rise to income for tax purposes at the beneficiary of the exchange

Directorate General of Taxes. Among others, resolutions V2683-23, V2662-23 and V2663-23, of October 2, 2023, V2729-23, of October 6, 2023, and V2751-23, of October 10, 2023

The DGT examined various share exchange transactions subject to the tax neutrality regime, after which dividends were distributed by the company contributed to the beneficiary of the exchange. In relation to the treatment of these dividends, the DGT concluded as follows:

(i) For accounting purposes, the company receiving the dividends will have to recognize an amount of income in respect of the portion of earnings arising on or after the acquisition date of the shares (which will be the exchange date); whereas the portion relating to earnings arising before the exchange will reduce the value for accounting purposes of the investment.

(ii) In relation to corporate income tax, however, if the exchange was subject to the tax neutrality regime, all dividends will be treated as income for tax purposes under the subrogation principle, insofar as the value of the contributed investment and its holding period will be retained at the beneficiary of the exchange. This income can benefit from the dividend exemption regime if the requirements do so are met.

3.6 Corporate income tax. - A change to the terms and conditions of a surface right makes value adjustments necessary in respect of changes to estimates for accounting purposes

Directorate General of Taxes. Resolution V2401-23 of September 06, 2023

An entity created a surface right on a plot of land it owned, in exchange for a regular fee and reversion of the building after the end of the contract. In its accounting records, it recorded an asset in respect of the ownership right in the real estate asset against a revenue, which it estimated as the net present value of the building at the end of the contract. Before this point, it had been agreed with the surface right holder to apply for a complete reform project on the building, which involved complete demolition of the existing building and the construction of

a new commercial building, in addition to an extension of the term of the surface right. After submitting a request to the Spanish Accounting and Audit Institute (ICAC), the DGT concluded as follows:

(i) Accounting treatment (according to the ICAC): value adjustments must be made to the asset which take into account the new term of the surface right and the potential change to the estimate of the net present value of the building. These adjustments must be characterized as changes to estimates for accounting purposes and applied prospectively. Their effect must be recognized, depending on the nature of the transaction concerned, as income or an expense on the income statement (or, where applicable, directly in equity).

(ii) Treatment for corporate income tax purposes

(a) If a lower value had to be recorded for accounting purposes for the asset, it would be a retirement equal to the difference in value under recognition and measurement rule 22 in the Spanish National Chart of Accounts (PGC), rather than an impairment loss on the asset. For that reason, the expense must be included in the tax base for the year it is incurred, insofar as it is not an impairment loss and therefore article 13 of the corporate income tax law is not applicable.

(b) Otherwise, an amount of income must be recorded, which must be included in the tax base for the taxable period in which it accrues.

3.7 Personal income tax. - The 2% minimum withholding rate is not applicable for indefinite contracts attached to a project or for indefinite contracts for intermittent work

Directorate General of Taxes. Resolution V3107-23 of November 28, 2023

The Personal Income Tax Regulations state that the withholding rate cannot go below 2% for contracts or relationships with terms below a year. It was asked whether this minimum rate applied to indefinite contracts attached to a project in the construction industry and to indefinite contracts for intermittent work.

The DGT concluded that, under labor and employment law, these contracts are indefinite contracts, in other words, contracts with no specified time limits, which means there is a permanent relationship for an indefinite term with the company. As a result, the amount to be withheld must be determined under the general procedure, and the 2% minimum rate is not applicable.

3.8 Personal income tax. –Treatment of income from exercising stock options where an individual is no longer an employee of the company that granted them

Directorate General of Taxes. Resolution V2721-23 of October 6, 2023

A taxpayer holding stock options granted by a foreign company was considering exercising the options when they no longer worked for that entity. In relation to the consequences of exercising those options, the DGT explained the following:

(i) The income obtained from being granted or exercising stock options awarded by a company to its employees or to the workers of other entities in its group due to their status as such is characterized as earned income in kind, regardless of whether when the income accrues the taxpayer no longer provides services for the group.

(ii) If the options cannot be transferred *inter vivos* the income will accrue when the options are exercised. The income must be recognized as the positive difference between the market value of the share on the day the option is exercised and the amount, if any, paid in respect of the option.

(iii) If at the point when the options are exercised the taxpayer is no longer an employee of the granting group, the exemption for shares awarded to employees will not be applicable, because it requires the shares to be awarded to serving employees at the granting entity or group.

(iv) The 30% reduction may be applied if the period between when the option rights are granted and exercised is longer than two years, provided that in the preceding five taxable periods the requester had not obtained any other income with a generation period longer than two years to which they had applied the reduction.

3.9 VAT and personal income tax. – The deduction of input tax and expenses paid in respect of the supply of an internet service and cellphone expenses for mixed use

Directorate General of Taxes. Resolution V2554-23 of September 25, 2023

The DGT examined the deduction of certain overheads (supply of an internet service to the building partially used for the activity and cellphone expenses for mixed use) and concluded as follows:

(i) Supplies in buildings partially used for the activity:

(a) VAT. The DGT changed its interpretation following the recent decision on a point of law by the Central Economic-Administrative Tribunal (TEAC) dated July 19, 2023. Namely, it accepted proportional deduction of input VAT on utility expenses (such as internet access) relating to the home partially used for the professional activity.

(b) Personal income tax. The DGT referred to the current wording of rule 5 in article 30.2 of the Personal Income Tax Law, introduced by Law 6/2017 on urgent reforms relating to the work of independent contractors. According to this wording, to determine the income from the activity, utilities expenses for the home may be deducted (including internet access), where the taxpayer uses part of their home to carry on an economic activity. In particular, the law allows deduction of 30% of the proportion that the square meters of the home used for the activity bear to the total area of the home (unless evidence is provided of a higher or lower percentage).

(ii) Tax on cellphones for mixed-use phones: Both for VAT and personal income tax purposes, the DGT concluded that (i) the input VAT is not deductible and (ii) the expenses cannot be considered deductible for determining the net income of the activity, where the phone is used for private purposes and for the economic activity and not exclusively for the economic activity.

3.10 Wealth tax. - The management activities requirement cannot be met by another person in the family group if the exemption is for each individual interest

Directorate General of Taxes. Resolution V2390-23 of September 05, 2023

The requesting individual owned individually 11.50% of the shares in a corporation and her spouse owned 3.5%. Her spouse carried out the tasks of head of the entity's sales department and his remuneration amounted to more than 50% of his business income, professional income and income from personal work in the year. If was asked whether the requirements to apply the family business exemption are met.

The DGT warned that in this case the requirement relating to carrying out management activities was not met, because the requesting individual did not actually perform management activities at the entity. It makes no difference for these purposes whether these activities are performed by her spouse, because individually he does not own the minimum 5% interest and the family group combined does not own the minimum 20% interest.

3.11 Tax on economic activities. - Taxable persons engaged in residential property leasing only must be taxed in respect of the buildings actually leased

Directorate General of Taxes. Resolution V3227-23 of December 13, 2023

The DGT clarified that the tax on economic activities liability under caption 861.1 *"Renting homes"* will only arise in respect of homes which are actually rented.

Therefore, when starting the activity, the taxable person will only have to file a return notifying a new taxable person for the tax where the total cadaster-registered value of the homes actually rented out throughout Spain is higher than the minimum threshold provided for this tax on economic activities caption (€601,012).

4. Legislation

4.1 Canary Islands. - Amendments to the Canary Islands general indirect tax and the tax on tobacco products and approval of measures in relation to the Canary Islands economic and tax regime (REF)

Law 7/2023 of December 27, 2023, the 2024 General Budget Law for the Canary Islands autonomous community, was published on December 30, 2023. Among other provisions, it makes numerous amendments to the Canary Islands general indirect tax (IGIC) and to the tax on tobacco products.

For a summary of the new legislation, see our publication dated December 30, 2023.

Additionally, Royal Decree-Law 8/2023 of December 27, 2023, referred to below, was published on December 28, 2023. It has introduced new legislation on the Canary Islands economic and tax regime (REF) which we summarized in our publication dated December 28, 2023.

4.2 The average sale prices for 2024 of certain modes of transport for the purpose of auditing values have been published

The Official State Gazette of December 29, 2023 published Order HFP/1396/2023, of December 26, 2023, approving the applicable average sale prices in the management of transfer and stamp tax, inheritance and gift tax and the special tax on certain modes of transport.

4.3 Amendments have been made to various tax forms and the direct debit option from accounts held by institutions not authorized for tax collection and management located in SEPA countries has been broadened

On December 29, 2023, the Official State Gazette published Order HFP/1397/2023 of December 26, 2023, amending several ministerial orders in relation to various return forms. The specific forms that have been amended are:

(i) **Forms 030, 036 and 037 (business taxation status notification forms)**. It has been specified that supplying a phone number and/or email address imply giving authorization for them to be used by AEAT and other economic-administrative bodies to send notices purely for information purposes.

(ii) **Form 390 (annual VAT recapitulative statement)**. The form has been prepared to be able to include various types of compensatory charges in force in fiscal year 2023 other than those provided in article 165 of the VAT Law.

(iii) **Form 289 (annual information return on financial accounts in the field of mutual assistance)** Tunisia has been included in schedule I (jurisdictions of residents on which financial institutions must file the form) and schedule II (participating jurisdictions for the purposes of identifying the residence of individuals that own or control financial accounts and for reporting on those accounts in the field of mutual assistance) attached to the order governing the form.

(iv) **Form 345 (information return on plans, pension funds, alternative and similar systems)**. A specific subcode has been included for managing entities to report on the contributions by self-employed workers or independent contractors.

Additionally, in relation to the electronic filing of **self-assessments with an underpayment where the payment is made by direct debit**, it is set out that direct debits may be specified for payments out of accounts held at an institution not authorized for tax collection or management located in the single euro payments area (SEPA).

4.4 Numerous tax amendments introduced in the last anti-crisis decree in 2023

Royal Decree-Law 8/2023 of December 27, 2023, adopting measure to confront the economic and social consequences of the conflicts in Ukraine and the Middle East, as well as to mitigate the effects of the drought, was published in the Official State Gazette on December 28, 2023.

For a summary of the main new provisions, see our publication issued on the same date.

4.5 Amendment of the VAT, excise taxes and mutual agreement procedure regulations

Royal Decree 1171/2023 of December 27, 2023, amending the VAT Regulations, the Excise Taxes Regulations and the Regulations on mutual agreement procedures relating to direct taxes was published in the Official State Gazette on December 28, 2023. Below is a summary of the new legislation in each of these regulations:

(i) VAT Regulations

(a) **Payment services.** Law 11/2023 of May 8, 2023, transposing European Union directives, amended Law 27/1992 of December 28, 1992, to introduce new obligations with payment services providers. Now the transposition of the directives has been completed, and the VAT regulations specify the contents of the payment services providers registers.

Additionally, on December 30, 2023, form 379: Information return on cross-border payments was approved in Order HFP/1415/2023 of December 28, 2023, to enable those payment services providers to fulfill that obligation.

(b) **EU customs legislation.** Amendments have been introduced in relation to the exemptions applicable to exports of goods made by anyone with exporter status (under the customs legislation) other than the transferor or transferee of the good, along with new legal provisions on warehousing and the customs and tax rules.

(c) **Recovery of VAT charged on uncollectible debts.** Amendments have been introduced in relation to modification of the taxable amount in relation to debts that are uncollectible as result of insolvency proceedings declared by a court of another member state.

(d) **Procedure for refunds of input VAT paid in Spain by traders and professionals not established in the EU.** It has been specified that it will not be necessary to provide a power of attorney before filing the application.

(ii) Excise Taxes Regulations**:** The obligation to use seals in the trading of all tobacco products has been made binding outside the suspensive procedure and the necessary technical adjustments have been made in the other articles of the law.

(iii) Regulations on mutual agreement procedures relating to direct taxes: It sets out an obligation for the competent authorities to notify the grounds for termination of the mutual agreement procedure to the other competent authorities in the member states concerned.

4.6 Publication of the annual equivalent rate for the first quarter of 2024, for characterizing certain financial assets for tax purposes

On December 27, 2023, the Official State Gazette published the decision of December 20, 2023, setting out the effective annual interest rate for the first calendar quarter of 2024, for characterizing certain financial assets for tax purposes. The rates are as follows:

- Financial assets with a term equal to or shorter than four years: 2.596 percent.

- Assets with terms higher than four, but equal to or shorter than seven years: 2.667 percent.
- Assets with ten-year terms: 2.888 percent.
- Assets with fifteen-year terms: 2.871 percent.
- Assets with thirty-year terms: 3.572 percent.

4.7 Implementation of the objective assessment method for personal income tax purposes and the simplified special VAT scheme for 2023

Order HFP/1359/2023 of December 19, 2023, implementing for 2024 the objective assessment method for personal income tax purposes and the simplified special VAT scheme was published in the Official State Gazette on December 21, 2023.

The order has retained the same amounts for the signs, indexes, modules, reductions and instructions as in 2023.

In relation to personal income tax, its main provisions are as follows:

(i) The general reduction for 2023 will be 5% of net income in modules applicable to all taxpayers determining the net income of their economic activity under the objective assessment method.

(ii) It has kept for 2024 (i) the 35% reduction to the acquisition price of agricultural diesel fuel and the 15% reduction to the acquisition price of fertilizers, for the performance livestock and agricultural activities, (ii) the special reduction for economic activities carried out on the island of Palma; and (iii) the reduction for economic activities carried out in Lorca.

4.8 The patronage legislation has been amended

Royal Decree Law 6/2023 of December 19, 2023, approving urgent measures for implementation of the Recovery, Transformation and Resilience Plan with regard to the public justice service, government service, and the local authority and patronage regime which amends, among others, Law 49/2002 of December 23, 2002, on the tax regime for not-for-profit entities and on tax incentives for patronage (Law 49/2002) was published in the Official State Gazette on December 20, 2023. Its amendments will come into force on January 1, 2024. For a summary of the main new legislation in the tax field, see our publication dated December 20, 2023.

4.9 The requirements to be met by computer or electronic billing systems and programs have been published

Royal Decree 1007/2023 of December 5, 2023, approving the Regulations setting out the requirements to be met by computer or electronic systems and programs used for the billing processes of traders and professionals, and the standardization of billing record formats was published in the Official State Gazette on December 6, 2023.

For a summary of the main new legislation in this royal decree, see our publication issued in December 2023.

4.10 Implementing regulations approved for the new inbound workers regime

Royal Decree 1008/2023 of December 5, 2023, providing the implementing regulations for the new layout of the regime for workers assigned to work in Spain (inbound expatriates regime) which was introduced by Law 28/2022 of December 21, 2022, promoting the ecosystem for startups, was published in the Official State Gazette on December 6, 2023. For a summary of the main new legislation in this royal decree, see our publication dated December 11, 2023.

Published later in the Official Gazette on December 15, 2023 Order HFP/1338/2023 of December 13, 2023 approved the notification and reporting forms adapted to the contents of the regime in the version in force starting on January 1, 2023. The approved forms are as follows:

(i) **Form 151** for reporting.

(ii) **Form 149** for notification for the period in which this special regime was elected.

It states that taxpayers who obtained residence in Spain in 2023 as a result of being sent to Spain in 2022 or in 2023 before the entry into force of this order may elect this option within a six-month period starting on December 16, 2023, unless the regulations grant a longer time period.

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