Tax Newsletter

GARRIGUES

February 2021

CONTENTS

2.8 Inheritance and gift tax. - To valuate a building, the tax authorities' expert must visit it directly in person

2.9 Inheritance and gift tax.- Surviving spouse with a usufruct right in a third of the estate is not liable for decedent's tax debts

2.10 Inheritance and gift tax.- In an intestate succession, the reduction for acquiring a farming business relates to the heir who received the business

2.11 Inheritance and gift tax.- The gift of a family business benefits from the reduction to the tax, even if either spouse owning the shares is under 65

2.12 Local taxes.- The directive on authorization of electronic communications networks and services applies to providers of landline phone and internet access services

2.13 Tax on economic activities.- Insufficient substantiation of the situation multipliers in the local authority rules may be pleaded when challenging assessment of the tax

2.14 Tax on increase in urban land value.- Land value may be calculated by multiplying the price by the proportion between the cadastral value of the land and the cadastral value of the building, although other land valuation methods may be allowed

2.15 Tax procedure.- The taxpayer has "two shots" in tax procedures if there are unforeseen grounds, circumstances or facts

2.16 Refund procedure for incorrectly paid tax.- Where a tax credit has not been claimed on the corporate income tax self-assessment and the refund due to the taxpayer is higher than the amount originally requested, prepayments become incorrectly paid tax which must be returned with late-payment interest

2.17 Penalty procedure.- Individuals are entitled to remain silent in administrative penalty procedures also

3. Decisions

3.1 Corporate income tax.- According to TEAC, the judgment holding Royal Decree-Law 2/2016 unconstitutional does not affect prepayments for 2018 and later years

3.2 Personal income tax.- Failure by one spouse to assign the right to the tax credit for a large family does not prevent the other spouse from claiming it

3.3 VAT.- Transactions that have tax as their only purpose in which the performed and reported steps are exactly the same are not simulated/sham translations

3.4 Transfer and stamp tax.- The contribution of buildings with debt gives rise to two separate taxable events for transfer and stamp tax purposes: the corporate transaction relating to the contribution and a transfer of assets relating to the transfer of ownership in exchange for assuming debt

3.5 Transfer and stamp tax.- Audit work in relation to transfers for consideration tolls the statute of limitations for determining the tax debt in respect of stamp tax (connected obligations)

3.6 Audit procedure.- The obligation to respect the bilateral nature of adjustments relating to controlled transactions also applies in relation to challenges of the assessments of both parties

3.7 Audit procedure.- The facts in a notice of assessment signed in agreement cannot be challenged, whereas the legal comments can

3.8 Penalty procedure.- The stay of time periods due to the state of emergency includes the time period for fulfilling requests

4. Resolutions

4.1 Corporate income tax.- Clarification of when the obligation to withhold tax on interest accrued on convertible debentures arises

4.2 Corporate income tax.- The DGT clarifies principles for claiming tax credit for dividends on shares acquired before 2015

4.3 Corporate income tax.- The expense in respect of a stock options plan for a subsidiary's employees is deductible for the subsidiary when the shares are awarded

4.4 Nonresident income tax.- The new definition of dependent agent under BEPS Action 7 does not apply to treaties not based on the 2017 edition of the OECD model tax treaty

4.5 Personal income tax.- A capital reduction to offset losses does not generate income for the shareholder

4.6 Personal income tax.- The DGT gives its view on the personal income tax on a “concertina” (simultaneous capital reduction and increase) transaction

4.7 Personal income tax.- Salary differences payable as a result of an unlawful loan of workers must be attributed when the judgments recognizing them become final

4.8 Personal income tax.- Capital loss from an uncollectible debt caused by winding up of the debtor company must be included in general component of taxable income

4.9 Personal income tax.- Clarification of timing of allocation of various items received as a result of recognition of an unjustified dismissal

4.10 Tax on economic activities.- Client's offices where the workers provide the services making up the taxable person's activity do not qualify as premises used in its activity

5. Legislation

1. Meaning of "expenses incurred to carry out activities that are against the law" cannot be construed broadly

The Corporate Income Tax Law states (article 15.f) that expenses incurred to carry out activities that are against the law are not deductible. The Supreme Court concluded in a judgment delivered on February 8, 2021 that this concept should be construed narrowly.

In its judgment, the Supreme Court examined the deduction for corporate income tax purposes of late-payment interest arising from tax auditors' assessment reports and from a stay of enforcement of administrative decisions, while the Revised Corporate Income Tax Law (TRLIS) was in force, in other words before the current Corporate Income Tax Law (Law 27/2014, of November 27, 2014) came into force for years that commenced on or after January 1, 2015.

The court ended the debate over deduction of this item by concluding that this late-payment interest is deductible. Among other remarks it noted that:

(a) In judgment 76/1990 delivered on April 26, 1990, the Constitutional Court had already found that late-payment interest is not a penalty, instead it serves only to compensate for or restore the loss caused in payment of the tax debt.

(b) Late-payment interest does not appear on the list of nondeductible expenses in article 14 TRLIS. Namely:

  (i) It cannot be considered to be included in letter (c) of that article (fines, penalties and surcharges) because it is a form of compensation rather than a penalty.

  (ii) Nor can it be considered to be included in letter (e) of the same article (gifts and gratuities) because its payment is required by the law and therefore there is no *animus donandi* or voluntary element in its payment.

Therefore, if recognized correctly in the accounts, it is a deductible expense (subject nevertheless to the limits laid down for finance costs).

Although, as mentioned, the court examined the ability to deduct the expense in periods while the TRLIS was in force, it also expressed its view on this issue for periods while the current Corporate Income Tax Law (LIS) is in force. Besides underlining that neither law bars deduction of these expenses, it reflected on whether now late-payment interest could be treated as nondeductible, because it falls within the new definition of expenses incurred to carry out activities that are against the law, defined in article 15.f) LIS.

The court was conclusive in its reply that late-payment cannot be considered to be included in that letter. And noted that this expression has to be construed narrowly, mentioning examples such as bribes and other similar types of conduct.

This conclusion may be reproduced in other areas such as, for example, the deduction of expenses in respect of compensation to directors, in which the tax authorities continue to stress that strict compliance with the law is necessary to ensure that they are able to be deducted.

2. Judgments

2.1 European law.- A violation of free movement of capital does not disappear even if in their country of residence the foreign investor is able to neutralize the discriminatory treatment received in Spain

Supreme Court. Judgments of January 21, 2021, in appeals 5086/2018 and 6760/2018

In these judgments, the Supreme Court reiterated the existence of a violation of free movement of capital due to the different tax treatment given by the Spanish legislation to certain investors resident in third countries outside the European Union or the European Economic Area when compared with their resident counterparts; and it was asked, for the first time, whether its earlier case law should be made subject to whether the nonresident investor evidences that it has not neutralized the excess tax incurred in Spain investor through a deduction of that tax in their country of residence.

As we discussed in our alert on February 18, 2021, the court rejected that its case law had to be qualified in relation to that potential neutralization.

2.2 Corporate income tax.- Where the difference between the market value and agreed price in a controlled transaction benefits the company, the portion of income that does not relate to the shareholder's ownership interest is income for the company and a gratuity for the shareholder

Supreme Court. Judgment of December 17, 2020

To price at arm's length a transaction performed between a company and its sole director and majority shareholder, the tax auditors made the following adjustments:

(a) A first adjustment (known as a "primary adjustment") which decreased the company's corporate income tax base and a matching increase in the shareholder/director's taxable income for personal income tax purposes.

(b) A second adjustment (known as a "secondary adjustment") which, under article 16.8 TRLIS, increased the company's corporate income tax base. That income resulted from multiplying the difference between the market value and the value agreed in the controlled transaction by the ownership interest percentage of the other shareholders with which the controlled transaction was not considered.

The Supreme Court concluded that where related-party status is determined by a shareholder-company relationship, the difference must, as a general rule, receive the following treatment:

(a) Where the difference benefits the shareholder:

(i) The portion relating to the ownership interest in the entity must be treated as return on equity for the entity and a share in income for the shareholder.

(ii) The other portion also has to be treated as return on equity for the entity, although for the shareholder it must be treated as income received in respect of their shareholder status.

(b) Where the different benefits the entity:

   (i) The portion of the difference that relates to the ownership interest must be treated as a contribution by the shareholder to the entity's equity and increases the acquisition cost of the shareholder's shares.

   (ii) The other portion must be treated as income for the entity and a gratuity for the shareholder.

2.3 Corporate income tax.- Sponsorship expenses on events of exceptional public interest are not deductible as an expense but as a deduction from tax liability

National Appellate Court. [Judgment of December 9, 2020]

An entity deducted from its tax base sums paid to the funding consortium for an event of exceptional public interest and also made a deduction from tax liability in respect of the same amounts.

The National Appellate Court confirmed in this judgment that gifts made to the consortium cannot be deducted from the tax base as an expense, instead they have to be deducted from the tax liability. Otherwise, the court said, the taxpayer would be allowed to take a double tax benefit which is not contemplated in the legislation.

2.4 Personal income tax.- Income obtained from fluctuations in the exchange rate on a mortgage forms part of the general component of taxable income

Supreme Court. [Judgment of January 26, 2021]

An individual took out a mortgage in foreign currency (Japanese yen). A fluctuation in the exchange rate increased the outstanding debt, or in other words gave rise to a capital loss.

The court concluded that this loss should be included in the general component of taxable income rather than in the savings component, because it was not obtained from the transfer of an asset.

It needs to be recalled that losses included in the general component of taxable income are offset first against the gains included in that taxable income. If that offset results in a negative figure, that figure may be offset against up to 25% of the positive balance of income and imputations of income that make up the general component of taxable income. Lastly, if the whole of the loss cannot be offset, the remaining amount may be offset over the following four years.

2.5 Personal income tax.- Interest on just compensation must be attributed to the year the court judgment containing all the information needed for its quantification becomes final

Supreme Court. Judgment of January 21, 2021

The following facts were examined in this appeal:

(a) Following an eminent domain proceeding, in December 2007 Madrid High Court delivered a judgment determining the just compensation and ordering the government to pay interest (not quantified in the judgment). The judgment became final in 2008.

(b) During enforcement of the judgment, in July 2008 the same court requested payment of late-payment interest by the government on the amounts owed.

(c) In December 2009 a decision was delivered in an ancillary proceeding related to enforcement of the judgment. The decision determined the accrual period and the base for that interest, although it did not state its exact amount. This decision became final in 2010.

(d) Following the government's failure to pay the interest, in June 2011 a further decision was rendered determining the exact amount of interest. The decision became final in 2012.

It was asked when the capital gain arising from the receipt of interest in respect of a delay in determination and payment of the just consideration should be attributed.

The Personal Income Tax Law (article 14.2 a) states that, where all or part of an item of income has not been paid because the right to receive it or its amount has yet to be determined in a court decision, the income must be attributed ultimately to the taxable period when the judgment becomes final.

At issue in this case was whether the income obtained as a result of the payment of late-payment interest must be attributed to the year when the decision specifying the parameters to be used to determine it is rendered (days on which the period begins and ends and its calculation base) or the period in which the decision calculating it and determining the exact amount payable is delivered.

The Supreme Court ruled that it must be attributed to 2010, when the decision specifying all the factors needed to determine the exact amount of interest became final, because in 2010 the tax debt already existed and, although it was not a liquidated sum, it could be calculated in a simple arithmetic operation.

2.6 Personal income tax.- An individual's services as director of an entity cannot be treated in the same way as that individual's services as representative of that entity on the managing body of another company

Valencia High Court. Judgment of November 25, 2020

An individual was director at entity A besides acting as entity A's representative for its position as director of a subsidiary B. In respect of their services as director at A, the individual received compensation below the amount that the entity at which they served as director (A) received in respect of services as director of its subsidiary B.

The tax authorities considered that the whole amount of compensation paid by subsidiary B to its parent company A was in respect of the parent company's services as director. Because those services were actually performed by its representative individual, it had to be concluded that the compensation paid to the individual as director was not the market rate. The tax auditors therefore made an adjustment to the individual's position, by increasing their salary income in respect of the difference between the market value for the compensation and the compensation actually received.

In support of their conclusions, the tax auditors argued that entity A did not any have material or human resources.

The court contradicted the tax authorities.

It affirmed first that a market price (for the individual's compensation in respect of their services as director) did not have to be calculated by reference to the price of transactions performed between related parties (the price of transactions performed between A and B). The essence of the arm´s length pricing method lines in the gathering of data generated in arm's length contexts.

Because the tax auditors' pricing method was invalid, the third party's report produced in the proceeding by the individual had to be taken. That report certified that the compensation received by the individual was within an arm-s length range, from the standpoint of both the management and administrative activities at company A and the representative activities at company B.

On another subject, the court remarked that in the view taken by tax auditors there is an underlying belief that the services carried out by the individual as representative of A on the managing body of B are inherent to that individual and identical to those carried out as sole director of A and that, in short, the group's corporate structure reveals that A is a holding company created to lower the individual's personal income tax. The court concluded in relation to this that:

(a) If the tax auditors believed this they should have looked into concepts such as fraud upon the law or simulated/sham transactions.

(b) However, turning to the merits of the case, the tasks of a board member cannot be identified with those relating to management of another entity, unless there is crystal clear evidence that the only content of management of a company (A) consists of its participation as member of the board of the other entity (B).

    This requirement cannot be deemed to take place solely by referring to the absence of resources at A, because they are not necessarily required for the performance of an economic activity.

2.7 Wealth tax.- Taxable person status is not acquired as a result of indirect ownership, through a foreign entity, of a property in Spain

Balearic Islands High Court. **Judgment of December 3, 2020**

A German tax resident individual is shareholder in a German company owning shares in a Spanish company. More than 50% of this company's assets consist of real estate investments located in Spain.

The tax authorities found that this indirect ownership of the property made the German resident a taxable person for wealth tax purposes.

The Balearic Islands High Court reached the opposite conclusion, by arguing that the shares owned by the appellant were in a German company and therefore the assets could not be realized in Spain.

2.8 Inheritance and gift tax. - To valuate a building, the tax authorities' expert must visit it directly in person

Supreme Court. Judgment of January 21, 2021

The Supreme Court confirmed in this judgment its case law on the need for an expert acting for the tax authorities to visit buildings under an administrative valuation process directly and in person. The court stressed the following points:

(a) The simple fact of using purchase values of similar buildings, by comparison or analysis, requires exact identification of the samples obtained and the production of certified public documents recording those values.

(b) As a general rule, a visit made directly in person to the building is a necessary requirement, which means permission to leave out this formality may only be granted exceptionally and with substantiated reasons in every case.

(c) Expert evidence "is neither useful or necessary where the expert does not produce a decision founded on their experience or skill which is not held by the deciding body, and has instead simply used tables, comparisons or general data which could have been found for each case by any other official, even if they did not have the technical capability required of the expert".

(d) Where the taxpayer has used the reference values approved by the authorities themselves, the principles of good faith and legitimate expectation require special substantiation of the need for expert evidence determining another value and on the error in the tables and estimates published by the authorities.

2.9 Inheritance and gift tax.- Surviving spouse with a usufruct right in a third of the estate is not liable for decedent's tax debts

Andalusia High Court. Judgment of November 18, 2020

Following the death of an individual his spouse received a usufruct right in a third of the estate. The spouse later received an official request seeking payment of the decedent's outstanding tax debts. The spouse argued against that she did not have universal heir status, and simply held a usufruct right, so she could not be required to accept the decedent's debts.

The court accepted the appellant's arguments and affirmed that the purpose of calling the widow to the inheritance process is for her to benefit from a portion of the estate temporarily, without succeeding to the decedent in relation to any of his liabilities.

As a result, because the spouse is not an heir strictly speaking, she is not jointly and severally liable for the payment of the decedent's debts together with the other heirs.

2.10 Inheritance and gift tax.- In an intestate succession, the reduction for acquiring a farming business relates to the heir who received the business

Andalusia High Court. [Judgment of October 19, 2020]

In an intestate succession, the farming business was left to one of the decedent's brothers. The other brother received other assets.

The first brother claimed the 90% reduction to the taxable amount for inheritance and gift tax purposes allowed in the Law on Modernizing Farming Businesses. The tax authorities found, however, that this reduction had to be distributed, in equal parts, between the two brother heirs, because the distribution agreement took place after the division of the estate and therefore should not have taken effect with respect to the finance authority.

Andalusia High Court rejected the tax authorities' interpretation by arguing that an agreement between the heirs is not disallowed in an intestate succession, and relates instead precisely to the process for distributing the assets in the estate. As a result, the only person entitled to the disputed reduction was the heir that received the farming business which gave rise to the reduction.

The court based its conclusion on the Supreme Court judgment delivered on June 10, 2020.

2.11 Inheritance and gift tax.- The gift of a family business benefits from the reduction to the tax, even if either spouse owning the shares is under 65

Murcia High Court. [Judgment of October 5, 2020]

A married couple gifted to their three offspring shares in a company that met the requirements to qualify as a family business, so that their offspring could take over the running of the company after their father retired. When the gift was made the circumstances were:

(a) The shares were marital property.

(b) The father was over 65, but the mother was not.

(c) The father was the one who acted as director at the company and carried out the management activities, for which he received the relevant compensation.

The inheritance and gift tax legislation states that a gift of shares in a family business that is exempt from wealth tax gives entitlement to a reduction if the giver is aged 65 or over (or is incapacitated, with absolute permanent incapacity or severe invalidity) and stops carrying out management activities and receiving compensation for them, if the recipient retains the gift for 10 years with the right to a wealth tax exemption.

Because the gifted shares were marital property, the tax authorities considered that two gifts had been made rather than one, namely a gift by each spouse, and denied that tax benefit for the gift by the other spouse, because she was under 65.

The court concluded however that the right to the benefit arises on the whole gift. According to the court:

(a) The wealth tax benefit depends on whether the shares were exempt from wealth tax before the gift.

(b) The requirements for claiming this exemption are measured by reference to the family group not to each of its members.

(c) Therefore, the reduction to inheritance tax does not become unavailable if one of the spouses is under 65.

The court also recalled that the rules must be applied consistently with their purpose and in the case of the reduction under examination this purpose is for the family business to continue operating.

2.12 Local taxes.- The directive on authorization of electronic communications networks and services applies to providers of landline phone and internet access services

Court of Justice of the European Union. Judgment of January 27, 2021. Case C-764/18

In this judgment the Court of Justice of the European Union (CJEU) replied to two references for a preliminary ruling submitted by the Spanish Supreme Court over the application of the Directive of the European Parliament and of the Council of 7 March 2002, on the authorization of electronic communications networks and services, to the charge made by a local council on a telecommunications operator.

The questions and replies are described below:

(a) The first question was whether the limitations on the taxation powers of the member states set out in articles 12 and 13 of the directive are applicable to companies providing landline phone and internet access services; and the CJEU replied that they are.

(b) It was also asked whether those same articles allow member states to impose a charge or fee calculated exclusively by reference to the gross annual income obtained by the company owning the installed facilities from the provision of the landline phone and internet access services mentioned. The CJEU concluded that those articles do not preclude national legislation which imposes on those companies a charge determined exclusively on the basis of their annual gross income.

2.13 Tax on economic activities.- Insufficient substantiation of the situation multipliers in the local authority rules may be pleaded when challenging assessment of the tax

Supreme Court. Judgments of January 21, 2021, in appeals 2314/2019 and 4783/2018

The legislation on the tax on economic activities states that local councils have the power to establish, for the purpose of calculating the tax liability, a scale of multipliers providing a weighting for the physical situation of the premises used for the activity within the municipality, by reference to the category of the thoroughfare on which the premises are located (known as situation multipliers). These multipliers must be substantiated when they are established.

In these two judgments, the Supreme Court rules on whether, in an indirect challenge of the tax rules (through a direct appeal against assessment of the tax), lack of substantiation of the reasons for modification of the situation multipliers carried out by the local council may be pleaded.

The court concluded that it could, although the taxpayer must evidence specifically how far those multipliers are unjustified. As the court underlined, the situation multipliers are an essential element for quantifying tax liability, so a lack of substantiation of the reasons that prompted the local council to modify them is a substantive rather than a procedural defect.

2.14 Tax on increase in urban land value.- Land value may be calculated by multiplying the price by the proportion between the cadastral value of the land and the cadastral value of the building, although other land valuation methods may be allowed

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

A plot of land was acquired in 2008, on which housing units were built and later sold.

To conclude whether there had been a capital gain on the sale (and therefore to assess the tax on increase in urban land value), the local council found that the acquisition cost of the plot had to be compared with the purchase price of that plot, calculated by multiplying the total purchase price by the proportion between the cadastral value of the land and the aggregate cadastral value of the building. In opposition to this, the taxpayer produced an alternative valuation method to calculate the land value separately.

The Supreme Court concluded that the method used by the local council is adequate where the deed of sale does not specify which part of the price must be allocated to the land. It noted however that this is not the only method nor, of course, does it have to be imposed over any other means of proof permitted by law and, in particular, in this case it favored the valuation produced by the taxpayer.

2.15 Tax procedure.- The taxpayer has "two shots" in tax procedures if there are unforeseen grounds, circumstances or facts

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

The Supreme Court has accepted that taxpayers are allowed to initiate and apply a second time for a correction of a tax self-assessment (together with a refund of incorrectly paid taxes resulting from a correction of that type), if this second application is based on unforeseen grounds, circumstances or facts other than those used to substantiate the first application, as long as the taxpayer's right has not become statute-barred.

We discussed this judgment in our alert on February 17, 2021.

2.16 Refund procedure for incorrectly paid tax.- Where a tax credit has not been claimed on the corporate income tax self-assessment and the refund due to the taxpayer is higher than the amount originally requested, prepayments become incorrectly paid tax which must be returned with late-payment interest

Supreme Court. Judgment of January 28, 2021

In the case that gave rise to this judgment, a taxpayer had not claimed a tax credit on its corporate income tax self-assessment for year "n" because when the self-assessment was filed the legislation did not expressly specify the right to that tax credit. The self-assessment determined a refund due to the taxpayer.

Following a tax audit in relation to later years, the tax authorities acknowledged the taxpayer's right to this tax credit. Because the tax audit did not include year "n" to which that self-assessment related, the taxpayer applied for its correction. After including and claiming the tax credit in that year "n", the final result of the self-assessment was a refund due to the taxpayer higher than the amount originally requested. The taxpayer applied for that refund with late-payment interest.

The tax authorities allowed the refund, but did not accompany it with late-payment interest. According to the tax authorities, it was not a refund of incorrectly paid tax, instead a refund arising from the legislation on the tax and therefore did not give rise to late-payment interest if the refund was made within up to six months after the refund application.

The National Appellate Court, in a judgment delivered on January 15, 2018 (appeal 565/2016), in a case advised by Garrigues, accepted the company's arguments. This court concluded as follows:

(a) Tax credits cannot be claimed on prepayments that are calculated by reference to the tax base. Therefore, if tax credits are claimed when the self-assessment is filed, the resulting refund arises from the legislation on the tax, and therefore late-payment interest only becomes payable if the refund is not made within six months from the end of the self-assessment period.

(b) However, if the taxpayer does not claim a tax credit (to which it is entitled) in its self-assessment, and it determined a refund due to the taxpayer that was lower than the amount it is entitled to receive, (all or part) of prepayments become incorrectly paid tax.

(c) Those amounts of incorrectly paid tax must be refunded with late-payment interest from the end of the period for filing the self-assessment and not from the end of a six month period from when application was made for correction of the self-assessment.

(d) Once the requested amount has been refunded without interest (as occurred in the examined case), new interest accrues on that interest from the date the refund is made.

The Supreme Court has now delivered a decision on the cassation appeal filed by the government lawyer against the national appellate court judgment and confirmed the appealed judgment.

2.17 Penalty procedure.- Individuals are entitled to remain silent in administrative penalty procedures also

Court of Justice of the European Union. Judgment of February 2, 2021. Case C-481/19

The examined case concerned an individual resident in Italy on whom a penalty was imposed for failing to cooperate due to not complying with requests made by the Italian Securities and Exchange Commission.

The Italian Constitutional Court submitted a reference for a preliminary ruling to the CJEU. It asked whether the right to the presumption of innocence and the right to remain silent (in other words, to avoid self-incrimination) are applicable in an administrative penalty proceeding, even though those principles stem from criminal law.

The CJEU concluded that they were. Namely, it noted that although article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms does not explicitly mention the right to remain silent, that right is a generally recognized standard which lies at the heart of the notion of a "fair trial".

It clarified, moreover, that while it is true that the right to remain silent cannot justify every failure to cooperate with the competent authorities (such as a refusal to appear at a hearing planned by those authorities or delaying tactics designed to postpone it), this right is not confined to statements of admission of wrongdoing or to remarks which directly incriminate the person questioned, but rather also covers the right not to provide information on questions of fact which may subsequently be used in support of the prosecution and therefore affect the penalty imposed on that person.

3. Decisions

3.1 Corporate income tax.- According to TEAC, the judgment holding Royal Decree-Law 2/2016 unconstitutional does not affect prepayments for 2018 and later years

Central Economic-Administrative Tribunal. Decisions of February 11, 2021 and of February 22, 2021

TEAC examined the scope of the constitutional court judgment, of July 1, 2020, holding Royal Decree-Law 2/2016 unconstitutional and null and void due to breaching substantive boundaries that cannot be overstepped by any legislative instrument of this type (article 86.1 of the Spanish Constitution). Among other elements, Royal Decree Law 2/2016 introduced the "minimum corporate income tax prepayment" and raised the tax rate on advance payments in cases where the minimum prepayment did not apply.

TEAC concluded that the judgment holding it to be unconstitutional affects the second and third prepayment for 2016 and the three prepayments for 2017 but not later prepayments, based on the following arguments:

(a) It argued that the defect caused by unconstitutionality found by the Constitutional Court was amended with the General Budge Law for 2018 (Law 6/2018, of July 3, 2018). Through this law, the system for quantifying prepayments under Royal Decree-Law 2/2016 became primary legislation.

After that defect caused by unconstitutionality had been remedied, TEAC concluded that it did not have the power to examine the other issues related to unconstitutionality submitted by the claimant (i.e. violation of the principle of economic capacity).

(b) It concluded moreover that, although the General Budget Law for 2018 entered into force on July 5, 2018, the measures relating to prepayments already affected the first prepayment for 2018, because the General Budget Law for 2018 itself stated that those measures applied to "*taxable periods commencing on or after January 1, 2018*". According to TEAC, this is a case of quasi- or partial retroactivity allowed by the case law.

3.2 Personal income tax.- Failure by one spouse to assign the right to the tax credit for a large family does not prevent the other spouse from claiming it

Catalan Regional Economic-Administrative Tribunal. Decision of June 26, 2020

Since January 1, 2015, the Personal Income Tax Law has allowed a tax credit for employees or the self-employed who are part of a large family. Where two or more taxpayers are entitled to claim it, the right to the tax credit may be assigned so that only one of them may claim it. If receipt in advance of the tax credit has not been elected, the right is deemed to be assigned to the taxpayer that claims the tax credit on their return. This circumstance must be stated on the self-assessments of every taxpayer entitled to the tax credit.

In the examined case, the interested party reported on their return that the right to the tax credit for a large family had been assigned to them and provided the taxpayer identification number of the assignor. The assignor, however, although they did not claim the tax credit, did not mention on their self-assessment that they had assigned that right to their spouse. The tax authorities denied the interested party's right to claim the tax credit in the amount relating to their spouse for this reason.

The Catalan TEAR rejected the tax authorities' arguments because it concluded that the assignment of the right to the tax credit was notified to the tax authorities on the interested party's return. Besides, it was not claimed by the assignor which evidences the taxpayers' intention to make that assignment. The court explained that it cannot be accepted that the inevitable consequence of a simple failure to make that specification on the assignor's return is forfeiture of the right, because the purpose of the tax credit is to reduce tax for workers with greater family obligations.

3.3 VAT.- Transactions that have tax as their only purpose in which the performed and reported steps are exactly the same are not simulated/sham translations

Central Economic-Administrative Tribunal. Decisions of December 15, 2020 in claims numbers 04029/2017 and 06351/2017

Two similar cases were examined in these decisions: a company providing VAT exempt services creates a new company for it to construct a building. The construction company deducts the whole amount of input VAT it incurred on the construction of the property, and after its construction has been completed, assigns it to the company providing the service for the building to be used in its activity.

The tax authorities made an adjustment and imposed a penalty for the activities carried out by the appellant, after finding that it had performed simulated/sham transactions.

In these decisions, TEAC concluded that the described structure should have been treated as a case of conflict in application of the law (not as a sham/simulated transaction), to the extent that the underlying business transactions were not forged, did not belong to an unreal structure and the steps that were performed were exactly the same as those that were reported. This, according to TEAC, is because the economic purpose sought by the parties (to recover the input VAT) could not be confused with the reason for the legal transaction, where there can be no doubt as to the substance of the concluded agreements. In view of the described arguments, TEAC ruled to overturn the issued assessments and imposed penalties.

3.4 Transfer and stamp tax.- The contribution of buildings with debt gives rise to two separate taxable events for transfer and stamp tax purposes: the corporate transaction relating to the contribution and a transfer of assets relating to the transfer of ownership in exchange for assuming debt

Central Economic-Administrative Tribunal. Decision of November 27, 2020

In this decision, TEAC examined the transfer and stamp tax on a capital increase transaction subscribed by several entities, which was carried out through a nonmonetary contribution of various buildings that were encumbered with mortgages securing several loans with outstanding balances.

Namely, TEAC looked into whether, in addition to a taxable event occurring as a result of the corporate transaction relating to the capital increase, an assessment is needed in respect of transfer tax for transfers for consideration on the transfer of buildings to the company, due to the company having assumed the debts of the contributing party.

TEAC concluded that in the examined case two transactions occur: the corporate transaction relating to a capital increase, and the transfer for consideration in which the price is the assumed debt. As a result, there are two separate taxable events: the first, in respect of a corporate transaction (at the value for which the building was transferred to the company which relates to the paid-up capital figure) and the second, in respect of a transfer for consideration (due to the transfer of part of the building that is paid for by assuming a debt belonging to the transferor), which are not incompatible with each other and the sum of the tax bases for both of them is equal to the aggregate value of the transferred building.

3.5 Transfer and stamp tax.- Audit work in relation to transfers for consideration tolls the statute of limitations for determining the tax debt in respect of stamp tax (connected obligations)

Extremadura Regional Economic-Administrative Tribunal. Decision of June 29, 2020

The case examined in this decision relates to a deed of sale for a property in respect of which a stamp tax self-assessment was filed.

The tax authorities commenced a limited review procedure which ended with an assessment report in respect of transfer tax on a transfer for consideration. Extremadura TEAR overturned that assessment because, as the taxable person argued, the transaction was instead eligible for stamp tax (and the ad valorem stamp tax payment is incompatible with transfer tax payment for transfers for consideration). After overturning the assessment, the tax authorities audited the value of the building and increased the taxable amount for stamp tax purposes.

In this decision, Extremadura TEAR examined whether the tax authorities' right to determine the stamp tax debt had become statute-barred. To do so, it referred to article 68.9 of the General Taxation Law, containing the rules on connected obligations. Namely:

(a) The law specifies that tax obligations are connected where any of their elements are affected or determined by those relating to another obligation or a different period.

(b) Therefore if the statute of limitations for the right to determine the tax debt is tolled as a result of an assessment in relation to a tax obligation, the statute of limitations for the same right in relation to connected tax obligations of the same taxpayer (and for the taxpayer's right to request refunds) is tolled, if certain tests are met.

Based on those arguments, Extremadura TEAR concluded that the work carried out on transfers for consideration tolled the statute of limitations for the tax authorities' right to assess stamp tax.

3.6 Audit procedure.- The obligation to respect the bilateral nature of adjustments relating to controlled transactions also applies in relation to challenges of the assessments of both parties

Central Economic-Administrative Tribunal. Decision of February 2, 2021

It had been found in an audit that the salary income of a sole director and shareholder of a company should be increased. In line with the tax authorities' obligation to make a bilateral adjustment, a greater deductible expense was attributed at the company.

The tax authorities appealed against the Catalan TEAR's decision setting aside the personal income tax adjustment that had been made, although they did not challenge the Catalan TEAR's decision relating to corporate income tax, which became final. Therefore, the adjustment continued to be discussed only in relation to the portion of the controlled transaction that had an adverse effect for the personal income taxpayer (the increase in revenue for the shareholder), whereas the related increase in expense for the company through which the performed work was billed was dropped.

TEAC concluded that the challenging action by the authorities is inconsistent with the principle of the bilateral nature of the adjustment which governs controlled transactions, because it places the adjustment as a whole clearly at risk of an imbalanced outcome. If the lodged appeal had been upheld it would be necessary to recover the bilateral nature of the adjustment, which would run counter the final nature of the Catalan TEAR's decision relating to corporate income tax. Therefore, because adjustments necessarily have to be bilateral, the solution provided by TEAC to the procedural asymmetry described meant that the appeal lodged by the authorities had to be dismissed and the pricing method for the controlled transaction had to be that determined in the final decision by the Catalan TEAR.

3.7 Audit procedure.- The facts in a notice of assessment signed in agreement cannot be challenged, whereas the legal comments can

Central Economic-Administrative Tribunal. Decision of December 15, 2020

A company underwent an audit which ended with the issue of an auditors' assessment report signed in agreement and another signed in disagreement. The report signed in agreement included certain delays in the production of documents by the company in a tax audit, which were considered to be delays attributable to the taxpayer in both reports.

In a challenge of the assessment in the report signed in agreement, the company pleaded a breach of the maximum length of the audit, on the basis that the delay in the production of documents had not hindered the normal course of the auditors' work.

TEAC held that the signature of an auditors' assessment report in agreement means that the objective data it contains cannot be questioned (including the dates provided to determined the alleged delays). Whereas objections to legal issues are indeed allowed, such as the existence or otherwise of a delay attributable to the taxpayer for the purpose of considering whether the maximum length of the audit has been exceeded.

TEAC therefore entered into examining the delays attributed to the taxpayer and concluded (in light of the applicable legislation before the reform of the General Taxation Law by Law 34/2015) that the impact of those delays on the course of the audit was not correctly substantiated by the tax authorities. As a result, TEAC held that the auditors had not complied with the maximum length for audits and that the tax authorities' right to determine the tax debt became statute-barred.

3.8 Penalty procedure.- The stay of time periods due to the state of emergency includes the time period for fulfilling requests

Murcia Regional Economic-Administrative Tribunal. Decision of September 11, 2020

On April 20, 2020 a taxpayer was served a request to produce certain documents in relation to VAT. The request was fulfilled on June 2, 2020. The tax authorities imposed a penalty on the taxpayer for a tax infringement under article 203.4 of the General Taxation Law, on the basis that the request had not been fulfilled within the time limit.

Murcia TEAR recalled that, under article 33 of Royal Decree-Law 8/2020, of March 17, 2020, in the wording provided in additional provision one of Royal Decree-Law 15/2020, of April 21, 2020, the period between March 14 and May 30 2020 should not be included for the purposes of computing the time period for fulfilling administrative requests (among other elements).

In other words, in the examined case the time period for fulfilling the request must start to run on June 1, 2020. Since it was fulfilled on June 2, 2020, the penalty needs to be set aside.

4. Resolutions

4.1 Corporate income tax.- Clarification of when the obligation to withhold tax on interest accrued on convertible debentures arises

Directorate General for Taxes. Resolution V3538-20 of December 11, 2020

A private equity fund provides funding to Spanish companies issuing convertible bonds traded on multilateral trading facilities. The bonds give entitlement to various types of interest. The Directorate General for Taxes (DGT) looked at when the obligation to withhold tax on that interest arises:

(a) Fixed annual interest on the face value of the bond, payable quarterly until the conversion, maturity or early redemption date, as applicable.

In this case, the obligation to withhold tax on interest arises when the interest is payable. That point is determined by the maturity dates specified in the offering document for its settlement or payment, or when it is recognized in an account.

(b) Fixed annual interest, called “compoundable interest payable in cash” or “PIK-cash interest”, which is compounded on the bond's principal sum determining a compounded interest capitalization system, and which will be paid on the conversion date (and if conversion does not occur, on the bonds’ maturity or early redemption dates).

The obligation to withhold tax on this interest arises on the date when the event determining termination of the bond arises.

(c) Fixed annual interest, called “convertible compoundable interest” or “PIK-convertible interest”, which is convertible into or exchangeable for the company’s shares. If its conversion or exchange does not occur or the right to do so is not exercised in full, the interest is paid in cash on the bond’s maturity or early redemption date.

In this case, the obligation to withhold tax arises when the interest is paid to the bondholder by handing over shares in the issuing company. If no conversion takes place, the obligation to withhold tax arises when termination of the bonds occurs through early redemption or maturity.

4.2 Corporate income tax.- The DGT clarifies principles for claiming tax credit for dividends on shares acquired before 2015

Directorate General for Taxes. Resolution V3533-20 of December 10, 2020

A parent company purchased in December 2006 all the shares in an entity from three individuals resident in Spain. In May 2007, another subsidiary of the purchaser absorbed the entity acquired in 2006. The tax neutrality regime was elected for the transaction.

In relation to the ability to claim the double taxation credit allowed in transitional provision twenty third of the Corporate Income Tax Law (LIS), the following principles were specified:

(a) The parent company may apply that provision to dividends from the post-merger company as if the merger had not taken place, under the principle of subrogation set out in both article 90 of the Revised Corporate Income Tax Law (TRLIS) and in article 84 of the Corporate Income Tax Law (LIS).

(b) Therefore, if it can be proven that the transferring individuals included in their tax bases an amount equal to the dividend before January 1, 2015:

(i) The gain arising at the subsidiary relating to the additional price paid on the acquisition over and above the equity existing at that time must decrease the tax value of the investment (by the positive difference between the purchase price of the investment and the value of the contributions made by the shareholder individuals).

(ii) The parent company is entitled to a tax credit in respect of the dividend, which cannot exceed the result of multiplying the dividend by the tax rate required in the personal income tax legislation for savings income.

However, if the transferors used abatement multipliers and the capital gain was not actually included in taxable income for personal income tax purposes, the tax credit may be claimed partially in the following fraction:

- In the numerator, any gain that has been included in taxable income for personal income tax purposes.
- In the denominator, the aggregate gain generated by the transfer.

If the sellers included the gains in their savings component of taxable income in different taxable periods with varying tax rates, an average charge must be calculated (by reference to the amount included and the applicable tax rate in each taxable period).

(iii) The credit may only be claimed in relation to dividends from income generated by the absorbed entity's assets. If it cannot be determined which set of assets (that of the absorbing company or that of the absorbed company) generated the income that is being distributed, an element that must be substantiated by the taxpayer through any means of proof permitted by law, an allowable reasonable principle is a proportional distribution by reference to the market value of the net assets of the absorbed company when the merger takes place with respect to the aggregate net assets of the post merger entity.

(iv) The right to claim the tax credit arises when the income is distributed, not when proof of effective taxation of the transferring shareholders for personal income tax purposes becomes available, even though this proof is a requirement for claiming the tax credit.

4.3 Corporate income tax.- The expense in respect of a stock options plan for a subsidiary's employees is deductible for the subsidiary when the shares are awarded

Directorate General for Taxes. Resolution V3529-20 of December 10, 2020

A group's parent company offered a stock options plan on its own shares to employees of its Spanish subsidiary. No agreement was signed between the two entities under which the subsidiary had to pay the parent company.

Despite this, the DGT concluded as follows:

(a) Because the subsidiary's employees received options in fiscal years 2009, 2011 and 2013, in those years a personnel expense had to be recognized for accounting purposes at the subsidiary with a credit to equity, in the amount determined by accounting legislation. That expense should have been treated as non-deductible in those fiscal years.

(b) Later, when the employees exercise those options, by purchasing shares in the parent company, the subsidiary can deduct the expense recognized earlier for accounting purposes.

4.4 Nonresident income tax.- The new definition of dependent agent under BEPS Action 7 does not apply to treaties not based on the 2017 edition of the OECD model tax treaty

Directorate General for Taxes. Resolution V3549-20 of December 11, 2020

A company resident in Germany is the parent company of a group engaged in the manufacture and sale of plastic components in various industries. The products are manufactured by limited risk manufacturers acting on behalf of the parent company. After acquiring the products, the parent sells them, either to the end customer, or to other group companies, acting as regional distributor.

In this second scenario, it relies on local agents, a role fulfilled in Spain by a Spanish subsidiary. The agent acts on its own behalf and follows the parent company's instructions in its relationships with customers. It does not have the authority to conclude contracts with customers for and on behalf of the German parent company, or to bind the parent company through its actions.

The submitted issue concerned whether the German company has a permanent establishment in Spain as a result of the definition of dependent agent.

According to the DGT:

(a) The Germany-Spain tax treaty must be interpreted according to the OECD model tax treaty.

(b) The latest version of this model tax treaty is the 2017 edition. Although this version does include the changes made as a result of the adoption of the Report on Action 7 of the OECD/G20 Base Erosion and Profit Shifting Project.

(c) The changes are only intended to be prospective, so the new commentaries do not affect the interpretation that Spain had been making of versions before that issued in 2017.

(d) Therefore, since the tax treaty is not based on the current 2017 edition of the OECD model tax treaty, it must be interpreted according to the commentaries on the 2014 edition.

(e) According to those commentaries from 2014, the German entity does not operate in Spain through a permanent establishment, in view of the described facts.

(f) A different conclusion could be drawn if the Spanish subsidiary's functions related (in practice) to material tasks carried out to finalize and close contracts. For these purposes, the fact that the Spanish company belongs to the same group as the parent company is not a determining factor for concluding that a permanent establishment exists in Spain, unless the subsidiary has and habitually exercises the authority to sign contracts for and on behalf of the parent company, in which case the specific activities carried on by the subsidiary would have to be examined.

4.5 Personal income tax.- A capital reduction to offset losses does not generate income for the shareholder

Directorate General for Taxes. Resolution V3594-20 of December 17, 2020

A company is going to reduce its share capital to offset losses.

According to the DGT, because this reduction is not made to return capital payments, it does not have any effect on the shareholder's income.

The acquisition cost of the redeemed shares must be distributed proportionally among the other shares with the same characteristics, and that portion must keep the acquisition date relating to the redeemed shares.

4.6 Personal income tax.- The DGT gives its view on the personal income tax on a "concertina" (simultaneous capital reduction and increase) transaction

Directorate General for Taxes. Resolution V3574-20 of December 17, 2020

The issue was submitted by a shareholder in a company that has performed two transactions simultaneously:

(a) A reduction of share capital to zero by redeeming all its shares.

(b) Immediately followed by a capital increase, fully subscribed by the shareholder.

According to the DGT:

(a) As a general rule, capital reductions do not generate income for personal income tax purposes unless their purpose is to refund capital payments.

(b) If their purpose is to refund capital payments an amount of income may arise equal to the difference between the amount refunded and the acquisition cost of the shares concerned.

(c) If, as in the case described, the capital reduction does not give rise to either an increase or reduction in net assets, the acquisition cost of the redeemed shares must be included in the acquisition cost of the shares resulting from the subsequent capital increase (but they must retain their holding period). Therefore, for the purposes of future transfers of the new shares, a distinction must be made between the acquisition cost and the holding period of each of the two components of the shares.

In short, in the acquisition cost of each of the shares subscribed in the capital increase, a distinction must be made between:

- The portion relating to the acquisition cost of the shares obtained in the capital increase, for which the acquisition date is the subscription date for the shares.

- The portion resulting from distributing among the new shares the acquisition price of the shares redeemed in the capital reduction, for which the holding period is that relating to those redeemed shares.

4.7 Personal income tax.- Salary differences payable as a result of an unlawful loan of workers must be attributed when the judgments recognizing them become final

Directorate General for Taxes. Resolution V3542-20 of December 11, 2020

The requesting entity had been taken to court in various employment proceedings and held liable for an unlawful loan of workers, which gave rise to various payments in respect of salary differences.

The DGT examined when those salary differences had to be attributed and concluded that as a general rule the differences recognized in a judgment or decision delivered in a court conciliation hearing must be attributed when the judgment or decision becomes final.

Any other salary difference not recognized in a judgment, such as may arise, for example, as a result of the reinstatement of the worker at the entity before the judgment becomes final, must be attributed in the period it becomes payable.

If the recognized sum was generated in a period longer than two years the 30% reduction allowed for multi-year income may be applicable, if the income is attributed in only one taxable period.

Where a salary difference is paid after the end of the period in which it must be attributed:

(a) The employer must characterize the paid income as a payment in arrears and withhold 15% tax.

(b) The worker must file an additional self-assessment to attribute the income to the correct fiscal year, on which no penalty, late-payment interest or surcharge may be imposed.

4.8 Personal income tax.- Capital loss from an uncollectible debt caused by winding up of the debtor company must be included in general component of taxable income

Directorate General for Taxes. Resolution V3536-20 of December 10, 2020

The request was submitted by an individual holding an indirect equity investment in a company to which it had also lent money to fund its activities. The company had been wound up and liquidated and the requesting individual had only recovered a very small part of the funds lent to it.

Consequently:

(a) A capital loss arises equal to the unrecoverable amount of the loans.

(b) This loss must be included in the general component of taxable income for personal income tax purposes, because it does not arise from a transfer or assets.

4.9 Personal income tax.- Clarification of timing of allocation of various items received as a result of recognition of an unjustified dismissal

Directorate General for Taxes. Resolution V3507-20 of December 9, 2020

In November 2020 an employer recognized in a court conciliation hearing the unjustified nature of a dismissal that took place in April 2019. As a result of that recognition, in that same November 2020 payments were made to the employee in respect of various items. The DGT found that the timing of allocation of those items was as follows:

(a) Severance: must be attributed to the period in which the court conciliation hearing becomes final (2020, in the examined case).

(b) A long-term incentive, payable on dismissal (if it is held unjustified): must be attributed to the period in which it becomes payable, in other words, in which unjustified dismissal is recognized in a court conciliation hearing (2020, again).

(c) A bonus offered in 2017 and which should have been paid in 2018, but is paid when the conciliation hearing is held: must be attributed to the period in which it becomes payable (2018). Therefore, a supplementary self-assessment must be filed for 2018 between the date the incentive was received and the end of the filing period for the immediately following return, on which no penalty, late-payment interest or surcharge may be imposed.

4.10 Tax on economic activities.- Client's offices where the workers provide the services making up the taxable person's activity do not qualify as premises used in its activity

Directorate General for Taxes. Resolution V3546-20 of December 11, 2020

A company manages various services for its clients, for which it has a leased office. Additionally, the entity sends its workers to the client's premises to coordinate with other subcontractors providing the services or to carry out the work requested by those clients themselves. It was asked whether, for the purposes of the tax on economic activities, the company must report as premises used in its activity, its clients' premises in addition to the office it has leased.

The DGT concluded that, because the company has no power of decision regarding its clients' offices, these offices cannot be treated as premises used in its activity. Therefore, the entity only has to report as premises used in its activity in relation to this tax the office it has leased due to being the only permanent establishment from which it actually provides its services.

5. Legislation

5.1 Approval of form 05 relating to the special tax on certain means of transport

The February 27, 2021 edition of the Official State Gazette (BOE) published Order HAC/171/2021, of February 25, 2021, approving form 05, relating to the special tax on certain means of transport which came into effect on March 1, 2021.

Among other new legislation, it includes the exemption under article 80.1 of Universities Organic Law 6/2001, of December 21, 2001, for means of transport registered in the name of universities in the context of their research, teaching or study activities, and creating for this purpose a new exemption code “UNI”.

Moreover, the form must be filed online, unless it relates to individuals, who may continue filing it on printed forms.

5.2 Approval of the trading values in the fourth quarter of 2020 for traded securities

The February 27, 2021 edition of the Official State Gazette (BOE) published Order HAC/173/2021, of February 25, 2021, approving the list of securities traded at traded venues, with their average trading value for the fourth quarter of 2020, for the purposes of:

a) The 2020 wealth tax return.

b) The annual information return on securities, insurance and income.

5.3 Electricity tax: List of enrolled taxpayers and form 560 modified

Published on February 27, 2021, Order HAC/172/2021, of February 25, 2021 establishes the structure and functioning of the list of enrolled of taxpayers for the tax on electricity and approves form 560 “Special tax on electricity. Self-assessment”.

The rules in this order will apply to tax falling due on or after October 1, 2021, so the previous form 560 will have to be used for filing late, supplementary or correction returns relating to assessment periods before that date.

The following articles of Order HAP/2489/2014 of December 29, 2014 will remain in force until that date: article 1 on entry on the territorial registry, article 2 on the electricity identification code, and article 3 on approval of form 560.

5.4 Japan-Spain tax treaty published

The February 26, 2021 edition of the Official State Gazette (BOE) published the Convention between Japan and the Kingdom of Spain for the Elimination of Double Taxation with respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance of December 3, 2020, made in Madrid on October 16, 2018. Following are the main elements of this treaty that have replaced the one currently in force:

a. The tax charged on **dividends** may not exceed:

- 5% generally.

- 0%, if the beneficial owner is:

  (i) A company which has owned directly or indirectly at least 10% of the voting power of the company paying the dividends throughout a twelve month period. To calculate this period no account will be taken of changes of ownership that would directly result from a corporate reorganization (i.e. merger or division).

  (ii) A recognized pension fund, provided that certain requirements are met (in the case of a recognized pension fund in Spain, contributions made by an individual who is a resident of Spain to the fund must be deductible in computing that individual's taxable income).

Without prejudice to the foregoing rules, dividends which are deductible in computing the taxable income of the company paying the dividends may be taxed at 10%, if the beneficial owner is a resident of the other contracting state.

b. The tax charged on **interest** may not exceed:

- 0%, if the effective owner is resident in the other state.

- 10%, if the interest is determined by reference to any of the following items in addition to which the beneficial owner of the interest is resident in the other state:

  (i) Receipts, sales, income, profits or other cash flow of the debtor or a related person to the debtor.

  (ii) Any change in the value of any property of the debtor or a related person to the debtor.

  (iii) Dividends, partnership distributions or similar payment made by the debtor or a related person to the debtor.

  (iv) Other similar interest to that mentioned above.

By logical inference, if the interest is determined by reference to any of the above items and the beneficial owner is not resident in the other state, then there is no limit on the taxation at source in the treaty.

c. **Royalties** are not taxable at source, as a general rule.

d. The following is notable in relation to **capital gains**:

- Gains derived by a resident of a state from the alienation of shares of a company or comparable interests (such as interests in a partnership or trust) may be taxed in the other state if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived at least 50 per cent of their value directly or indirectly from immovable property, situated in that other state.

- Where an individual ceased to be a resident of one state and has become a resident of the other state and where the unrealized gains on that individual's property was taxed in the first-mentioned state (exit tax), that other state must make an appropriate adjustment to the taxable base of, or the amount of, tax charged when calculating the gain obtained on the alienation of those assets.

e. **Silent partnership contract**

Article 20 determines that any income derived by a silent partner who is a resident of Spain in respect of a silent partnership (*Tokumei Kumiai*) contract or another similar contract may be taxed in Japan according to the laws of Japan, provided that such income arises in Japan and is deductible in computing the taxable income of the payer in Japan.

f. **Double taxation tax credits:** Both states allow deduction from tax liability as methods for eliminating double taxation. It is stated also for Spain, however, that where in accordance with any provision of the treaty income derived by a resident of Spain is exempt from tax in Spain, Spain may, in calculating the amount of tax on the remaining income of that resident, take into account the exempted income (exemption with progression).

The stated date for entry into force is May 1, 2021, and its effective date is January 1, 2022.

Exceptions to this are article 25 (Exchange of information) and article 26 (Assistance in the collection of taxes) which will have effect from May 1, 2021, without regard to the date on which the taxes are levied or the taxable year to which the taxes relate.

5.5 Rules adopted on the procedure for paying tax debts by bank transfer

The February 4, 2021 edition of the Official State Gazette published the Decision of January 18, 2021, by the Directorate General for AEAT, defining the procedure and terms and conditions for the payment of debts by transfer through approved collection institutions.

The decision took effect on March 15, 2021.

Debts will be able to be paid by bank transfer (i) where the taxpayer elects to make the payment remotely and does not hold an account at an AEAT-approved collection institution, and (ii) where payments are made from countries outside Spain.

This system will be allowed in relation to debts resulting from administrative assessments, generally, with the following exceptions:

(a) Self-assessments:

(i) Special tax on certain means of transportation (form 576).

(ii) Charge for administrative management of gambling activities (form 602).

(iii) Charge for exercising jurisdictional powers in civil and judicial review areas (form 696).

(iv) Self-assessment of late-payment interest and surcharges for the voluntary adjustment under article 252 of the General Taxation Law (form 770).

(v) Self-assessment of tax liability in respect of items and periods where no form is available on AEAT's website for the voluntary adjustment under article 252 of the General Taxation Law (form 771).

(vi) Tax on financial transactions, where the payment is made by the central securities depository.

(b) Assessments:

(i) Attachment proceedings on accounts held at credit institutions (form 003).

(ii) Assessments by Finance Authority Offices: (i) Payments to the General Depository Agency (form 060), (ii) contributions in respect of passive rights (form 061) and (iii) other non-tax payments (form 069).

(iii) Charges forming part of state budget funds (forms 790 and 990) and charges forming part of funds in the budgets of public authorities (forms 791 and 991).

6. Miscellaneous

6.1 Transfer pricing: AEAT provides guidelines for determining arm's length range in an analysis of controlled transactions

The Finance and Tax Audit Department issued on February 25 a note (see here) tackling various issues related to calculating the arm's length range and selection of the right point in that range, in an analysis of controlled transactions.

We discussed that note in our alert on February 26, 2021.

6.2 European Union updates tax haven blacklist

In a meeting on February 22, 2021, the Council of the European Union adopted a set of conclusions on a revised EU list of non-cooperative jurisdictions for tax purposes.

The changes to the list took into account the ratings published recently by the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes regarding the exchange of information on request.

Dominica has been included for the first time and Barbados was removed from the list of non-cooperative jurisdictions for tax purposes (contained in Annex I to the conclusions).

Annex II discusses the state of play concerning jurisdictions that do not yet meet all the international tax rules, but have made sufficient commitments to reform their tax polices.

6.3 VAT: AEAT has issued a note on the principle of complete adjustment

AEAT's Finance and Tax Audit Department has drawn up a note summarizing the interpretation methods determined by the Supreme Court in its case law concerning complete adjustments of VAT.

According to that case law, where a tax audit is conducted on a taxpayer, the tax authorities must necessarily apply the complete adjustment principle. Meaning that they must look at all the components of the subject-matter in the scope of the audit work, on both the negative and positive side for the taxable person.

After examining the latest Supreme Court judgments in depth, the decisions delivered by TEAC on this subject, as well as the various issues that in its opinion arise in relation to the complete adjustment of VAT, AEAT concluded as follows:

(a) The tax authorities have an obligation to apply the principle of complete adjustment. Therefore, where a tax charge is held unjustified, the tax authorities must conduct a simultaneous examination of the right to a refund.

(b) Complete adjustment is also required in fraud or abuse cases, without precluding the tax authorities' right to impose penalties.

(c) A complete VAT adjustment may only be considered, in relation to the refund of an incorrect payment of tax, if the supplier has paid over the charged amounts of VAT.

Where there is a difference between the amount charged on an invoice and the amount paid over, only the amount actually paid over may be refunded. The same conclusion must be drawn where the self-assessment of the person who charged the tax incorrectly contains nondeductible amounts of input VAT, and these amounts must be subtracted from the refundable amount.

(d) Provided that denial of the right to a defense does not arise for the other party to the relationship, the refunds must be handled "simultaneously" in the audit (without having to commence a procedure for correction of the self-assessments of the person who charged the VAT under articles 26 through 129 of the Regulations on the application of taxes).

However, where a discrepancy exists between the person charging and the person incurring the charge, or where the charge that is found to be incorrect has effects on the deduction of input VAT, a proceeding for the application of taxes must be initiated on the person who charged the tax incorrectly, which must be separate from the proceeding conducted on the customer for the VAT charge, although the two proceedings should be coordinated.

(e) The base for the penalty as defined in article 191 of the General Taxation Law contains the amounts not paid over as a result of the unjustified deduction of VAT, and that base does not have to be reduced by the amounts to be refunded as a result of the complete adjustment.

More information:

Tax Department

Follow us:

GARRIGUES

Hermosilla, 3

28001 Madrid, Spain.

T +34 91 514 52 00 **F** +34 91 399 24 08

garrigues.com