Tax Newsletter

Spain

GARRIGUES

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1. Judgments

1.1 Corporate income tax. – Refunds of taxes precluded by EU law must be recognized in the fiscal years the taxes were paid

Supreme Court. Judgments of February 6, February 8 and February 12 2024 (appeals 5690/2022 and 7/2022)

According to the Supreme Court, EU law does not define the procedural avenues for obtaining refunds of taxes held to be precluded by that law, and each member state has the task of determining the conditions for these refunds. Member states are nevertheless bound by the principle of equivalence, meaning that they cannot lay down more restrictive methods for refunding taxes precluded by EU law than for refunding incorrectly paid taxes precluded by their national legislation (as is the case with taxes held to be unconstitutional).

Therefore, the timing of recognition for tax purposes of these refunds must be guided by the need for full restoration of the legal position before the voided taxes were applied (*ex tunc* effects), which means that the refunded amounts must be recognized in the tax base for the year in which the tax was paid.

1.2 Corporate income tax. – A number of measures introduced by Royal Decree-Law 3/2016 have been declared unconstitutional

Constitutional Court. Judgment of January 18, 2024

The Constitutional Court has held unconstitutional a few of the corporate income tax measures introduced by Royal Decree-Law 3/2016 of December 2, 2016, on account of having been created by royal decree-law: (i) the limits on offsetting tax losses by entities or groups with net sales/revenues higher than €20 million, (ii) the limit on applying double taxation tax credits for the same taxable persons; and (iii) the obligation to revert in 20% parts any impairment losses on shares deducted in earlier years.

The effects of the judgment are not binding for tax obligations decided in a final judgment with res judicata effect, for assessments that have not been challenged or for self-assessments to which a correction had not been applied for on the date the judgment was delivered (January 18, 2024); regardless of its publication date (February 20, 2024).

In later decisions (dated February 22, 2024 - claims 00/06490/2023/00/00 and 00/05806/2023/00/00-), the Central Economic-Administrative Tribunal (TEAC) has now ruled that the tax management bodies must decide in favor of the filed applications for correction (under the legislation in force before the entry into force of Royal Decree-Law 3/2016), and order the necessary refunds to be made. The tribunal added that the administrative decisions that rejected the taxpayers' applications were issued in the only way possible at the time they were adopted (namely, under the assumption that the provisions that have now been rendered null and void were constitutional), and therefore strictly speaking this was not an order for reversion of procedure.

1.3 Personal income tax. – An expert appraisal made at the taxpayer's instance is not valid for determining the transfer price of shares in unlisted companies

Supreme Court. Judgment of January 12, 2024

The Personal Income Tax Law requires capital gains/losses arising from transfers of shares in unlisted companies to be determined as the difference between acquisition cost and transfer price of the transferred shares. Unless evidence is provided that the paid price matches the arm's length price, however, the transfer price cannot be below the higher of the equity figure relating to the shares (on the latest balance sheet before the due date for the tax) and the value resulting from capitalizing at 20 percent the average income figure as of the three fiscal year-ends before that due date.

The Supreme Court concluded that the application of this rule by the Supreme Court does not constitute an audit of reported values using the auditing methods under article 57.1 of the General Taxation Law (LGT), and therefore the legislation on the expert appraisal made at the taxpayer's instance is not applicable nor can it be used in relation to applications for correction of the tax authorities' assessment. The only way the taxpayer can challenge that assessment is by providing evidence that the paid price matches the arm's length price.

1.4 Personal income tax. – Volunteering to be laid off cannot be used as evidence that an individual layoff on objective grounds is not genuine

National Appellate Court. Judgment of December 20, 2023

An entity negotiated a new collective labor agreement, which gave rise to a material modification to the working conditions of the workforce. Once the process was under way, a period for workers to volunteer to be laid off was commenced in which workers could choose to be designated for termination of their contracts. The terminated contracts (of 28 workers) were recorded as layoffs on objective grounds. The inspectors found that this was really a modification to working conditions, because that was the employer's original objective (the initial intention was not to dismiss workers but instead to lower their pay). In the first case, the statutory amount of severance (exempt from personal income tax) is equal to 20 days' pay per year with a cap of 12 monthly payments; in the second, 20 days' pay per year with a cap of 9 monthly payments.

The National Appellate Court held, against this, that the employer's intention in the collective bargaining process is not inalterable, in other words, even if the original objective is to lower pay, what could happen, if any workers do not accept this reduction, is that the employer may choose to terminate their employment contracts. The relevant factor is that the layoffs were made and arose from the employer's unambiguous intention to terminate their employment contracts, as stated in the documents drawn up in the process.

This change of strategy, moreover, does not alter the existence of economic, production-related and organizational reasons, and therefore it cannot be denied that layoffs on objective grounds had taken place, even though, ultimately, based on the number of employees included, a collective layoff was not required.

Lastly, the unilateral nature of the decision to lay off employees is not altered where the workers are allowed to volunteer to be laid off, because the employer always reserves the right to approve ultimately which employees to lay off. In short, the defining elements of a

layoff on objective grounds ("or a collective layoff, because the grounds are the same") are the existence of the legal requirements and that the ultimate decision on the worker concerned lies with the employer.

1.5 Personal income tax. - The exemption for reinvestment in the taxpayer's principal residence may be applied after the reinvestment has taken place

Madrid High Court. Judgment of December 4, 2023

A taxpayer transferred his principal residence, and on his self-assessment, reported the gain obtained but did not apply the exemption for reinvestment because, at the end of the year in which the sale took place, he had not purchased a new principal residence. Within two years after that transfer, however, he purchased a new principal residence, and therefore considered that he had met the requirements for applying that exemption. Consequently, he applied for correction of his self-assessment so as to apply the exemption.

Madrid High Court validated application of the exemption in this case. In its opinion, even if the exemption is not applied in the self-assessment for the year in which the transfer of the first principal residence takes place, his right to apply it in the period after the period in which the law requires the reinvestment to be made remains unaltered.

1.6 Inheritance and gift tax. – The tax rules for the vesting of ownership are the rules that applied on the death of the first decedent

Supreme Court. Judgment of February 16, 2024

Following the death of an individual in 2012, their son received bare ownership of the assets in the estate; and their spouse, a lifelong usufruct. On the spouse's death in 2016, absolute ownership of the assets vested in the son, who filed an inheritance and gift tax self-assessment prepared under the rules in force in 2012, in other words, on the date of the death of the first decedent. The Balearic Islands Tax Agency concluded that the applicable rules were the rules in force on the vesting of ownership (2016), and rejected the right to apply the reductions in force in 2012.

The Supreme Court concluded that the tax rules applicable at the point when the heir acquires absolute ownership of the asset on expiration of the usufruct right that limited ownership are the rules applicable to the death of the first decedent (in other words, when ownership was divided). Therefore, any changes to the rules on reductions and tax credits that arise after the division of ownership do not affect the heir's tax liability.

1.7 Inheritance and gift tax. – An increase in the just compensation received by the heir following the decedent's death is subject to inheritance tax

Supreme Court. Judgment of February 01, 2024

An individual challenged the just compensation determined in a condemnation proceeding on a property owned by them and their claim was upheld. A later appeal to the authorities was dismissed after the death of that individual.

The Supreme Court held that (i) the greater just compensation received qualifies as a capital gain to be recognized for income tax purposes in the hands of the deceased individual in the year of their death (by filing a supplementary return); and that, additionally, (ii) this amount is subject to inheritance tax for the heir, because his right to that amount arises from his inheritance.

1.8 VAT. – A refund of amounts paid over due to accounting errors by the taxable person does not give rise to the right to receive late-payment interest

Court of Justice of the European Union. Judgment of February 22, 2024. Case C-674/22

Following certain amendments to the national legislation on municipal accounting, a Netherlands municipal council had to draw up a new allocation key for distributing input VAT between its (exempt and non-exempt) economic activities, and its non-economic activities. Retroactive application of a new allocation key, together with the correction of certain errors in the accounting records, resulted in a refund of part of the input VAT paid between 2012 and 2016.

The CJEU held that the VAT collected on account of errors attributable to the taxable person is not in breach of EU law. It underlined further that EU law does not preclude a member state from authorizing a taxable person to establish the rules for calculating the deductible VAT relating to its general costs by means of an allocation key drawn up under its responsibility.

Therefore, the excess VAT collected by applying the original key does not constitute an amount levied in breach of EU law, and therefore interest does not have to be paid on the refund of that amount of VAT.

1.9 VAT. – The Supreme Court examines the VAT treatment of the provision of vehicles to employees

Supreme Court. Judgment of January 29, 2024

A company provided vehicles for use by its employees outside flexible compensation plans. It deducted 50% of the amounts of the input VAT paid on leasing the vehicles and, due to not considering that the provided vehicles constituted a transaction subject to VAT, it did not charge VAT to its employees. The tax authorities found, against this, that the company could deduct the full amounts of input VAT paid; although precisely for that reason it should have charged VAT to its employees on the value of their private use of the vehicles.

The Supreme Court (in line with the National Appellate Court's earlier conclusion in the appealed judgment) set aside the assessment and concluded that the fact of the tax authorities having recognized the ability to deduct the entire amount of input VAT does not necessarily mean that provision of the vehicles constitutes a transaction for consideration subject to the tax. If the tax authorities considered that transactions for consideration took place, they should have provided evidence that there was consideration by the worker for the provision of use of the vehicle, which is something that does not occur outside a flexible or similar compensation system.

1.10 Tax on increase in urban land value. – Final assessments may be reviewed by the authorities based on the declaration of unconstitutionality in the constitutional court judgment dated May 11, 2017

Supreme Court. **Judgment of February 28, 2024**

The Supreme Court has changed its earlier interpretation and concluded that the declaration of unconstitutionality and partial rendering void of the legislation on the tax on increase in urban land value made by the Constitutional Court in a judgment dated May 11, 2017 (tax commentary dated May 18, 2017) allows the tax authorities to review at their own initiative, in the procedure for rendering void by operation of the law under article 217 LGT (due to falling within the case provided in point 1.g) of that article) any assessments of the tax that had become final due to not having been appealed within the time period and on condition that the scenarios involved have not been decided in final judgments with res judicata effect.

According to the court, that constitutional court judgment, related to cases where there has been no increase in the value of the land, did not include any clause limiting its effects, unlike its later judgment dated October 26, 2021 (alert dated November 3, 2021), which held unconstitutional and null and void a few articles of the Local Finances Law, related to the system for determining the taxable amount.

1.11 Tax on construction, installation projects and works. – An exemption that has already been recognized in a final decision cannot be questioned by reason of the final assessment of the tax

Balearic Islands High Court. **Judgment of September 15, 2023**

In the examined case, the municipal council recognized, in a final decision, that the taxpayer was entitled to an exemption from the tax on construction, installation products and works (ICIO). However, by reason of the final assessment of the tax it again audited fulfillment of the requirements for the exemption, and denied the right to apply it.

According to the Balearic Islands High Court, this examination is not valid, because the earlier recognition of the right to the exemption was set out in a decision that had become final. Steps of this type require the use of any of the special review procedures set out in the law for cases in which the decision concerned has become final.

1.12 Cadastral values. – The cadaster must assess any items of proof produced to evidence errors in calculation of the cadastral value

Madrid High Court. **Judgment of November 27, 2023**

According to Madrid High Court, the cadaster is required to assess any items of proof produced by interested parties which appear to contain evidence of a potential error in calculation of the property's cadastral value. In other words, the presumption of the truthfulness of information appearing on the cadaster and its potential prevalence over the Property Registry do not entitle the authority responsible for the cadaster to accept its values as valid without assessing items of proof produced by anyone appealing against these values.

1.13 The government's financial liability. – The decision declaring the tax on increase in urban land value unconstitutional does not automatically entitle taxpayers to indemnification

Supreme Court. Judgments of February 1, February 2 and February 5, 2024 (appeals 55/2023, 43/2023, 224/2023 and 226/2023)

The Supreme Court concluded that removal from the law of certain articles governing the method of calculating the taxable amount for the tax on increase in urban land value by the constitutional court judgment dated October 26, 2021 (alert dated November 3, 2021) does not automatically make payment of the tax illegal or make that payment constitute an actual loss from the standpoint of the government's financial liability.

To arrive at that conclusion, the court added, the interested party needs to evidence using the means of proof required by tax law (i) that the taxable event for the tax has not occurred, or (ii) that it has occurred in an amount other than that determined by the tax authorities using the objective assessment method; or, lastly, (iii) that the applied calculation rules were incorrect.

1.14 Tax management procedure. – The election between an exemption or tax credit for the avoidance of international taxation cannot be changed after the voluntary period has ended

Balearic Islands High Court. Judgment of December 4, 2023

The appellant elected to apply the tax credit for international double taxation in relation to dividends obtained and taxed abroad. Later, the appellant realized that the exemption provided in the law for income of this type was more beneficial, and therefore applied for correction of her self-assessment to elect the exemption. The Balearic Islands High Court concluded that these are two separate and incompatible tax regimes (an exemption as opposed to a tax credit), and consequently the taxpayer has to choose to apply one of them on filing a self-assessment. An election cannot be changed once it has been made.

1.15 Tax collection procedure. – A unilateral mortgage securing more than one tax debt cannot be partially released, even if one of those debts is set aside

Supreme Court. Judgment of January 23, 2024

The appellant took out a single unilateral mortgage on more than one separate properties to secure payment of two tax debts. One of those debts was set aside by a judicial court. At issue was whether the mortgage could be partially released. The Supreme Court concluded that where a unilateral mortgage has been provided on more than one registered property to stay enforcement of various tax debts, the setting aside of one of those debts by a judicial court (where the provided security continues to exist with respect to other tax assessments) does not give the party that entered into the security interest the right for the mortgage to be partially released. All of the above, on the basis of the principle of mortgage indivisibility (under article 122 of the Mortgage Law).

1.16 Tax collection procedure. – Local councils cannot order attachment measures on accounts open at branches of financial institutions located outside their municipalities

Supreme Court. Judgment of January 22, 2024

The Supreme Court has affirmed that a local authority cannot determine and order an attachment measure on money in accounts open at a financial institution outside that local authority's municipality. To attach those accounts, the local authority has to make the relevant request to the competent bodies of the autonomous community or central government, as applicable. This conclusion applies even if the attachment does not require the physical carrying out of steps outside the municipal area by the attaching authority (such as formally appearing at the office where the account is open).

1.17 Penalty procedure. – The setting aside of a penalty after an assessment has been rendered void on procedural grounds precludes a new penalty proceeding from being initiated

Supreme Court. Judgment of January 15, 2024

The Canary Islands Regional Economic-Administrative Tribunal rendered an assessment void on procedural grounds and ordered a reversion of procedure. Consequently, it also rendered the penalty decision void. In enforcement proceedings for the decision, AEAT ordered a new assessment and initiated a new penalty proceeding which ended with the imposition of a penalty.

The Supreme Court noted that the commencement of a new penalty proceeding in this case breaches the *non bis in idem* principle. It underlined also that in this case the new penalty proceeding cannot be considered to result from the reversion of procedure ordered by the regional tribunal, because that reversion was ordered only in relation to the assessment.

1.18 Review procedure. – The courts have to analyze whether assessments depart from principles determined in binding resolutions

Supreme Court. Judgment of January 22, 2024

Article 89.1 of the General Taxation Law (LGT) states that replies to requests for written tax resolutions are binding for tax authority bodies and entities. The Supreme Court has concluded that, if a taxpayer claims that an assessment did not meet a principle determined in a binding resolution, the court reviewing that assessment has to examine the binding effect of the resolution. To do so, it has to review whether the taxpayer's facts and circumstances match those described in the resolution concerned. If they do not match, the court may reject that the resolution is binding for the examined case and hold that the challenged assessment decision is in conformity with the law.

The court clarified that, in any event, resolutions are not binding on a judicial court, and therefore the court must examine whether the assessment is in conformity with the law.

1.19 Review procedure. – The one-day grace period is applicable for lodging judicial review applications

Supreme Court. Judgment of January 17, 2024

Article 135.5 of the Civil Procedure Law states that submissions and documents may be filed until 15 hours on the business day following the end date of the time period concerned ("day of grace" or one-day grace period). The Supreme Court held that this provision applies to the two-month period provided for lodging applications for judicial review.

2. Decisions

2.1 Corporate income tax. – TEAC accepts that directors' compensation for executive activities is deductible

Central Economic-Administrative Tribunal Decision of February 22, 2024

In our January 2024 newsletter we discussed that TEAC has reinterpreted the contractual relationship absorption doctrine (*teoría del vínculo*) in relation to the exemption for senior managers' severance payments.

It has now adopted this new interpretation in relation to the deduction of directors' compensation for executive activities. According to the tribunal, in the words of the Supreme Court, it is "absurd" that a director providing a genuine actual service falling outside their director services should not be paid for those services and that, if the director receives an amount of compensation, the right to deduct it should be denied for the payer, solely on the basis of the relationship absorption doctrine.

It added, however, that compensation for directors' services as such (non-executive activities) must be in compliance with corporate law to be deductible (non-compensated nature of the position and compensation system determined in the bylaws with a sufficient degree of certainty).

2.2 Nonresident income tax. – Income obtained by a nonresident as a result of not taking part in a motorcycle race is not considered obtained in Spain

Catalan Regional Economic-Administrative Tribunal. Decision of July 12, 2023

A non-Spanish resident racing driver took part in a race held in Spain, but suffered a fall which prevented him from finishing that race and taking part in later ones. He was nevertheless paid for the whole competition. The Catalan TEAR concluded that the definition of income derived from sporting activities (according to article 17 of the applicable tax treaty) includes all types of consideration related to that activity, interpreted broadly (advertising, sponsorship, press conferences, and so on). Spanish source income therefore includes both the remuneration for taking part in the race that he did not finish and any other remuneration closely linked to it.

The remuneration for the race in which he did not take part, however, is not considered to be obtained in Spain, because this remuneration does not arise from any direct activity in, or activity linked with, Spain (the nexus is the activity not the receipt of payment). This may be inferred from the commentaries on the OECD Model Convention, which place income received in the event of cancellation of a performance outside the scope of article 17.

2.3 VAT. – Input VAT paid by a holding company is not deductible where the issued invoices are insignificant compared with the size of its costs

Central Economic-Administrative Tribunal. **Decision of March 22, 2023**

A holding company had deducted input VAT on compensation paid to its directors. It had not, however, transferred its costs to the subsidiaries owned by it (the invoices issued to them were insignificant compared with the size of its costs).

TEAC reiterated the principle supported in its decision of September 18, 2019. Namely, based on the CJEU's case law in relation to the right to a deduction for holding companies, it concluded that, since in this case there is a disproportion between the amounts of input VAT paid by the company and the amounts it charges, it cannot be considered that it carries on an economic activity. In other words, even though the compensation paid to the directors is mandatory, this does not necessarily mean that the services they provide to the company are related to those provided by the company to its subsidiaries.

2.4 Administrative procedure. – Making notifications available at an enabled electronic address is comparable to an attempt to notify on paper

Galician Regional Economic-Administrative Tribunal. **Decision of July 21, 2023**

In this judgment the tribunal examines the effect of notification attempts where the notifications are sent to the enabled electronic address. According to the court:

(a) The rules on notification attempts in Law 30/1992 (designed for notification on paper) are transferable to making notifications available at the enabled electronic address, on condition that the process is properly recorded in the case file.

(b) Otherwise, a difference in treatment would arise between notifications made on paper and those supplied electronically, and additionally, receipt of the notifications would be left up to the interested parties, as would, ultimately, the computation of time periods for expiry of the time limit or a potential time bar for the procedure.

3. Resolutions

3.1 Corporate income tax. – In a contribution of a line of business the beneficiary company does not necessarily have to increase capital, if the transferor is its sole shareholder

Directorate General for Taxes. Resolution V3312-23 of December 28, 2023

A company is going to transfer three lines of business to three wholly-owned companies.

The DGT confirmed that each transaction constitutes, separately, a nonmonetary contribution of a line of business. It also recalled that, under the Corporate Income Tax Law, for these transactions to be able to apply the neutrality regime, the beneficiary companies must (i) increase their capital, by delivering the new shares to the transferor, or (ii) deliver treasury shares. The DGT added, however, that where the transferor is sole shareholder of the beneficiary companies that capital increase is not necessary (on condition that the transaction is valid under commercial law), because in these cases no capital gain arises at the transferor.

3.2 Corporate income tax. - Excess foreign tax is not deductible if the payer does not have staff or fixed places of business in the countries receiving the services

Directorate General for Taxes. Resolution V3307-23 of December 27, 2023

A company has granted a non-exclusive license to use certain trademarks and Internet domain names to nonresident companies and signed management and consulting services agreements with other nonresident companies. All its employees reside in Spain and travel occasionally to the countries receiving its services. The request for resolution concerned whether any amount of tax paid abroad that cannot be deducted from the gross tax liability (due to exceeding the amount that would have been paid in Spain on the net amounts of income, had they been obtained in Spain) may be treated as a deductible expense.

The DGT concluded that, in the examined case, the foreign tax is not paid for the performance of economic activities abroad, because the Spanish resident company does not have any staff or fixed places of business in the countries receiving its services (all the services are provided using staff established in Spain, who only travel abroad temporarily to deal with specific needs relating to the services). Therefore, although this requirement is not laid down in the law, the DGT considers that any excess tax paid abroad should not be treated as a tax-deductible expense for corporate income tax purposes.

3.3 Corporate income tax. – Tax losses transferred in a merger may be used by the absorbing company in the same order as the absorbed company would be able to do so

Directorate General for Taxes. Resolution V3198-23 of December 12, 2023

As a result of the merger of two companies, the absorbing company (A) would acquire a portion of the unused tax losses at the absorbed company (B). The other tax losses were prevented from being transferred by the limit determined in the neutrality regime (article 84.2 of the Corporate Income Tax Law).

The request for resolution concerned whether, to apply that limit, the oldest tax losses must be eliminated first (some of them arose while the absorbed company belonged to another tax group or was taxed individually). The DGT recalled that it is a reiterated principle in its written determinations that the neutrality regime allows the transferring company to acquire the transferring company's tax rights and obligations which are attributable to the transferred assets and rights. Therefore, if the tax neutrality regime is applicable, "*the tax losses arising at the absorbed company (Company B) may be offset at the absorbing company (Company A), subject to the requirements and limits set out in article 84 of the Corporate Income Tax Law, from when they are offset by the transferee company, regardless of the order in which they were applied, at the absorbing company".*

3.4 Personal income tax. - The transfer for no consideration of separate property to community property is taxable

Directorate General for Taxes. Resolution V0003-24 of January 30, 2024

It was asked whether the transfer for no consideration of separate property to community property implies the existence of a capital gain/loss for the transferring spouse, taxable for personal income tax purposes. The DGT adopted the interpretation supported by TEAC in its recent decision dated January 24, 2024 (January 2024 newsletter) and concluded that transfers of this type give rise to an alteration in the composition of the transferor's assets, creating a capital gain/loss for personal income tax purposes.

The capital gain/loss is equal to the difference between the transfer price and acquisition cost. If the result is a capital gain, it must be included in the savings component of taxable income; and if a capital loss is obtained, it is not computable, because it arises from a transfer for no consideration by *inter vivos* acts.

3.5 Personal income tax. – Tax law does not provide for the option of charging to workers withholdings claimed by the Spanish Tax Agency

Directorate General for Taxes. Resolution V3270-23 of December 19, 2023

A request for resolution was submitted on the option of charging to workers any withholdings claimed from the employer by the Spanish Tax Agency. The DGT reiterated its principle that, strictly in the tax field, there are no statutory or regulatory provisions allowing withholdings not made when income was paid to workers to be deducted, or allowing those amounts to be claimed from workers, although there may be other avenues for the withholding agent to obtain compensation from the payee.

3.6 Personal income tax. – Debt for equity exchanges involving debt acquired at a discount do not create a capital gain if the price paid matches the value of the received shares

Directorate General for Taxes. Resolution V3127-23 of December 4, 2023

A few individuals purchased at a discount a number of debts owed by a corporation. In a later debt for equity exchange, they received shares in the company with a market value matching the price paid to acquire the debts. According to the DGT, this transaction does not create a capital gain/loss at the transferor, because the amount paid to purchase the debt matched the value of the shares received in the debt for equity exchange.

3.7 Nonresident income tax. – Permanent establishments can apply the capitalization reserve rules

Directorate General for Taxes. Resolution V3250-23 of December 19, 2023

A nonresident company operating in Spain through a permanent establishment asked whether it can apply the capitalization reserve rules on its nonresident income tax return. The DGT concluded that it could, although it clarified that if the permanent establishment has an adequate capital structure for both the organization and the functions it performs, the increase in equity has to be computed at the permanent establishment, regardless of the changes in equity for the head office.

3.8 VAT. – Amounts of VAT charged by a catering company on canteen services for employees are not deductible

Directorate General for Taxes. Resolution V3342-23 of December 29, 2023

A company hired a supplier of catering services to provide, directly and on its own behalf, a canteen service to the company's employees. The company funds part of the price of the dishes for its workers. The supplier issues the company an invoice for the funded amount. The DGT affirmed that the employer is performing a payment function on behalf of a third party. In other words, it is not the customer for the canteen services. Therefore, it cannot deduct the VAT it pays on the funded price of those services.

3.9 Tax on increase in urban land value / audit procedure. – The tax authorities cannot audit self-assessments in which tax rules held to be unconstitutional were applied

Directorate General for Taxes. Resolution V3111-23 of November 29, 2023

The requesting party filed a self-assessment for the tax on increase in urban land value on a property inherited in February 2021. A reduction was applied in that self-assessment. Later, in September 2023, the property was transferred, and the right to that reduction was forfeited. The submitted request concerned whether, following the constitutional court judgment dated October 26, 2021 which held unconstitutional the method of determining the taxable amount for the tax, the requesting party is required to pay over the amount relating to that reduction.

The DGT replied that, in the described case, the tax authorities can no longer examine, audit or issue assessments even if the requirements for the applied reduction were not met, insofar as (i) the articles governing determination of the taxable amount and in force on the due date for the tax on increase in urban land value (February 2021) have been held unconstitutional and null and void by the judgment dated October 26, 2021; and (ii) the new rules on the tax on increase in urban land value (Royal Decree-Law 26/2021 of November 8, 2021) are only applicable to taxable events that occurred on or after November 10, 2021, and are not valid retroactively.

4. Legislation

4.1 The Annual Tax Control Plan has been published

On February 29, 2024, the Official State Gazette (BOE) published the decision of February 21, 2024 by the Directorate-General of the State Tax Agency, approving the general guidelines in the 2024 Annual Tax and Customs Control Plan. Featuring among its key guidelines:

(a) In the sphere of **tax information and assistance**, and specifically in relation to nonresident income tax**,** an informer has been created who will tackle structural issues relating to this tax.

(b) Concerning the **taxpayer registers**, the register of non-business entities will be cleaned up, focusing especially on foundations, cooperatives and associations, to verify fulfillment of the requirements to apply their special regimes.

(c) In relation to **audits of multinational groups, large companies and taxpayers and tax groups**, (i) the authorities will monitor application of the hybrid mismatch and international tax transparency rules and the rules on deduction of finance costs, as well as monitoring scenarios involving abuse of tax treaties and the multilateral convention, (ii) joint audits will be used more widely, (iii) compliance with the obligation to make withholdings on payments to nonresidents will be reviewed together with whether recipients are their beneficial owners; and (iv) audit work will be carried out on the digital services tax, the financial transaction tax, the temporary solidarity tax on large fortunes and the temporary taxes on energy, credit institutions and specialized credit institutions.

Additionally, priority will be given to reviewing controlled transactions, especially business restructurings, the pricing of intragroup transfers or assignments of various assets, especially the licensing of intangibles, the deduction of items that could erode the tax base (royalties, intragroup services) and financial transactions. Reiterated loss scenarios will also be reviewed.

For tax groups the focus will be placed on the application of tax credits (particularly technological innovation tax credits in relation to software and those created within economic interest groupings) and on compliance with the requirements to include entities in the tax group.

(d) In the field of **net worth and corporate analysis**, the following areas will be reviewed (i) the positions of non-Spanish nationals who come to Spain but are not taxed as residents on their worldwide income and the positions of residents who move domicile to another autonomous community, (ii) taxpayers in the high-spending power bracket, and (iii) the beneficial ownership of opaque companies with real estate assets in Spain.

(e) In relation to **concealment of activity and misuse of companies**, particular attention will be paid to (i) assets of beneficial owners that are hidden behind foundations, (ii) artificial divisions of economic activities for personal income tax and corporate income tax purposes, or (iii) corporate transactions serving as shelter for opaque income.

(f) In relation to **corporate income tax**, the authorities will review tax losses and other tax assets; look into whether tax credits designed to encourage certain activities are associated with the performance of genuine activities; and audit SOCIMIs together with their shareholders. And, with regard to **VAT,** they will review adequate compliance with the immediate information sharing system (SII), e-commerce transactions will be monitored and preventive control measures on the Intra-Community Operators Register will be adopted.

4.2 Approval of the trading values in the fourth quarter of 2023 for traded securities

The February 28, 2023 edition of the Official State Gazette (BOE) published Order HAC/172/2024 of February 26, 2023, approving the list of securities traded at trading venues, with their average trading values for the fourth quarter of 2023, for the purposes of (i) the 2023 wealth tax return and (ii) the annual information return on securities, insurance and income (form 198) for the same fiscal year.

4.3 Update to the payments that may be made by transfer to the tax authorities

The February 16, 2024 edition of the Official State Gazette (BOE) published the decision of February 13, 2024, updating and unifying the cases where payments to the central government tax authorities have to be made by transfer. Use of this payment method in any other case will require prior and explicit authorization from the head of the Collection Department.

4.4 Amendments to the personal income tax withholding rules

The February 7, 2024 edition of the Official State Gazette published Royal Decree 142/2024 of February 6, 2024, which (i) amends the limits below which withholdings do not need to be made from payments of earned income in cash or in kind, for the purpose of ensuring that the new minimum wage amount is not subject to withholdings; and (ii) approves new amounts reducing net earned income where it falls below certain thresholds. These new rules apply to earned income paid on or after February 8, 2024, which will require the relevant adjustment to be made to the withholding rate, if applicable. Payers may also elect to start applying the new rules from March 2024.

4.5 Rules passed on the new fiscal markings for tobacco products

Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 required unit packets of tobacco products to be marked with a unique identifier and security features and their movements to be recorded. At first, only cigarettes and roll-your-own tobacco were subject to the traceability system and the new security measures. However, the EU directive itself stated that starting on May 20, 2024 these new traceability and security systems would be mandatory for all types of tobacco products.

To include these new requirements in Spanish law, Order HAC/66/2024 of January 25, 2024 (published in the Official State Gazette on February 2, 2024) broadened this obligation to add tax markings including the same security features for all tobacco products.

5. Miscellaneous

The EU has updated the list of non-cooperative jurisdictions

The European Council decided to update the list of non-cooperative tax jurisdictions, at a meeting on February 20, 2024. It removed Bahamas, Belize, Seychelles and Turks and Caicos Islands the list of non-cooperative jurisdictions for tax purposes.

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