Tax Newsletter

Spain

GARRIGUES

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1. Judgments

1.1 Freedom of establishment. – Not allowing branches of nonresident companies to apply tax credits that other types of entities or branches can apply runs counter to EU law

Court of Justice of the European Union. Judgment of December 21, 2023. Case C-340/22

The Portuguese solidarity tax levied on the banking industry applies to resident credit institutions and to Portuguese branches of nonresident credit institutions. The tax base contains those institutions' liabilities (balance sheet items representing debts to third parties with the exception of those treated as own funds). This means that resident credit institutions and resident subsidiaries may deduct from their tax bases their own funds (and debt instruments treated as own funds). Whereas due to not having their own personality or their own funds, the branches of nonresident credit institutions are unable to make that deduction.

The Court of Justice of the European Union (CJEU) held that freedom of establishment precludes national legislation such as that described, because it makes it opening branches in Portugal less attractive for banking institutions domiciled in other member states.

1.2 Corporate income tax. – Converting into equity a debt from a dormant company subject to a ground for winding up creates taxable income for that company

Catalan High Court. Judgment of October 26, 2023

A company that had been dormant since 2009 was subject to a ground for winding up. Its primary shareholder held a claim against the company. In 2013, the shareholder subscribed in full to a capital increase and contributed its claim, making the shareholder's ownership interest increase by the nominal amount of that claim. Tax auditors reassessed this transaction as a remission of debt between the shareholder and the company, which gave rise to an amount of (taxable) income for the recipient company equal to the amount by which the actual value of the contributed debt exceeds the value of the shares received in exchange (by reference to the company's position).

The Catalan High Court confirmed the tax auditor's view on the basis that the value of the shares received by the shareholder was clearly far lower than the nominal amount of the contributed debt.

1.3 Personal income tax. – Childcare expenses give entitlement to maternity tax credit

Supreme Court. Judgments of January 8, 2024 (appeals 2779/2022 and 4995/2022)

Under the Personal Income Tax Law, the maternity tax credit may be increased where the taxable person has paid childcare expenses for a child under three at childcare centers or authorized preschool learning centers. The tax authorities considered that the only valid expenses for applying the credit were childcare expenses paid to centers which, together with the specific operating permits for this activity, also had authorization to operate as a learning center, granted by the competent education authority.

Taking the opposite view, the Supreme Court concluded that the authorization laid down by the law for childcare centers or preschool learning centers (for the purposes of the tax credit) is not that granted by the relevant education authority (which is only laid down for preschool learning centers), but instead that needed for commencing and operating childcare activities at childcare centers.

1.4 Personal income tax. – Excess withholdings must be repaid to the worker, as the person liable for tax

Supreme Court (Labor Chamber). Judgment of January 8, 2024

A worker received an incorrect amount of salary from his employer. At issue was whether the repayment to the employer must be based on the net amount received or the gross salary payment, including any personal income tax withholdings that the company made. The Supreme Court concluded that the worker must repay the gross amount to the employer.

According to the court:

(a) The legal relationship for collection of the incorrectly paid amount is built around a creditor (the employer) and a debtor (the worker). Therefore, the worker must refund to the employer the whole amount of salary received incorrectly, which has to be the gross amount.

(b) The worker will also have a right to receive from the public finance authority (after filing an application) a refund of the withheld amounts with late-payment interest. The court recalled that the employer has a legal obligation to make withholdings, but the person liable for tax is the worker. In other words, if the payment made to the Public Treasury was incorrect "the tax authorities have to refund it to the person liable for tax, which is the worker, whereas the employer does not have any avenue for applying for that refund."

1.5 Personal income tax and inheritance and gift tax. - The transfer of separate property to community property is not taxable as a gift, although it gives rise to a capital gain for personal income tax purposes

Supreme Court. Judgment of January 10, 2024. **Central Economic-Administrative Tribunal.** Decision of January 23, 2024

The Supreme Court examined a case in which a married couple with community property subscribed to a mutual fund using money that was the wife's separate property.

According to the court, it cannot be considered that there has been a gift subject to inheritance and gift tax, because the beneficiary of the transfer for no consideration is the community property itself. The court recalled that it had adopted the same conclusion in a judgment dated March 3, 2021 (summarized in our April 2021 newsletter).

Taking the opposite view, TEAC held that in this type of transactions a capital gain occurs for personal income tax purposes, which does not fall into any of the cases, set out in the law, of exempt income or income not subject to tax.

1.6 VAT. - Input VAT on purchases of goods and services used for the basic research activity conducted by a university is deductible

Supreme Court. Judgments of December 15, 2023 (appeals 4235/2022 and 4384/2022)

At issue was whether input VAT on goods and services used for the basic research activity conducted by a university is deductible. According to the tax authorities, if the basic research does not involve the conduct of a business activity subject to VAT, it does not give entitlement to deduct input VAT on purchases of the goods and services used. In other words, the right to deduct is only allowed if the basic research activity is targeted at projects designed for business use.

The Supreme Court reached the opposite conclusion, and shared the following thoughts:

(a) From one angle, the court noted the EU case law stating that input VAT is deductible if the associated expenses bear a direct and immediate relationship with transactions on which VAT is charged or if they are part of the general costs making up the price of transactions subject to and not exempt from VAT.

(b) From another, it noted its earlier case law and recalled that the goods and services used in the basic research activity may be necessary to carry out taxable transactions (even though the projects may not give rise to consideration immediately and directly), which entails an economic benefit for the general research activity.

No distinction is needed, therefore, between basic research and applied research for the purposes of the input VAT tax credit, because both types of research are closely linked.

1.7 Real estate tax. - EU law does not preclude the exemption for a real estate asset owned by a religious institution used for rental

Supreme Court. Judgment of December 13, 2023

The CJEU concluded in a judgment dated June 27, 2017 (case C-74/16) that the exemption from the tax on construction, installation projects and works (ICIO) applicable to the Catholic Church could in certain cases amount to State aid precluded by EU law.

By contrast, in this new judgment the Supreme Court concluded that the real estate tax exemption for real estate assets owned by certain not-for-profit religious entities and which are used for rental is not precluded by EU law, because it is not a selective measure that has the potential to distort or threaten competition in the market (in addition to which, the appellant local government entity had not provided evidence to the contrary). In other words, the court did not consider that the conclusions reached in the judgment relating to the tax on construction, installation projects and works applied in this case.

1.8 Real estate tax. - The procedure to claim refunds of incorrectly paid tax is valid for recovering the excess arising from reducing the cadastral value

Supreme Court. Judgment of December 21, 2023

A taxpayer initiated in December 2018 a cadastral procedure for correcting discrepancies. Following a reduction of the cadastral value, the taxable person applied for a refund of the excess amount paid in 2018 and in 2019. Both assessments had become final because they had not been appealed within the time limit for doing so.

The Supreme Court concluded that the new cadastral value has effects in the future, due to arising from a procedure for correcting discrepancies (confirming the interpretation in its earlier judgment dated June 3, 2020 -July-September 2020 newsletter-).

It nevertheless acknowledged the taxable person's right to recover the excess real estate tax paid in 2018 and 2019, even though the assessments for those fiscal years had become final. The right procedure for exercising that right, the court concluded, is the procedure for refunding incorrectly paid tax.

1.9 Tax on construction, installation projects and works. - The taxable amount does not include the cost of machinery used to carry on an activity conducted at an industrial plant

Canary Islands High Court. **Judgment of October 26, 2023**

According to the Canary Islands High Court, the taxable amount for the tax on construction, installation projects and works relating to construction work to build an industrial plant that will engage in processing and extracting substances from fruit and vegetables does not have to include the machinery needed to conduct that activity.

The court underlined that, under the Supreme Court's case law and the written determinations of the Directorate General for Taxes, if it relates to elements that are perfectly separable from the project and have a distinct identity from the construction work itself (as was proven in the proceedings), the cost of the machinery cannot be treated as part of the taxable amount for the tax on construction, installation projects and works.

1.10 Enforcement of joint and several liability. – A business succession does not exist for the purpose of enforcing liability for tax if the transferring company has not ceased its operations

National Appellate Court. **Judgment of October 31, 2023**

The tax authorities enforced liability on a company for the debts of another, due to considering that the first company had acquired an activity (for the production of alcoholic beverages) from the second.

The National Appellate Court set aside the enforcement of liability because the statute of limitations had expired although it examined the facts of the case anyway. The court recalled that, to seek this type of liability, a business succession needs to have taken place in the terms of article 42.1.c) of the General Taxation Law (LGT). In the examined case, however, the tax authorities did not prove that this type of succession had taken place, because they did not even show (i) that the transferor company had ceased its operations in relation to the transferred activity and (ii) that the transferee had acquired sufficient elements enabling it to continue that activity. In the absence of that evidentiary material, it must be held that there has not been a transfer of a business, but rather simply a transfer of assets.

1.11 Penalty procedure. – Penalties cannot be levied in the event of involuntary mistakes

Galician High Court. **Judgment of November 28, 2023**

The tax authorities imposed a penalty on a taxpayer who had incorrectly reported capital gains on his personal income tax self-assessment, even though the tax authorities themselves acknowledged that the performed transactions were complex and there were difficulties associated with their tax treatment. The Galician High Court set aside the penalty on the basis that adequate evidence of intentional wrongdoing had not been provided.

Among other factors, the court underlined that the taxpayer is "entitled to make a mistake" and that the existence of a potential mistake must be examined by the tax authorities when assessing intentional wrongdoing. In this examination, the complexity of the rules and of the procedures has to be taken into account. That conclusion is not inconsistent with the fact, among others, that the appellant had accepted the reassessment, because doing so does not imply accepting intentional wrongdoing. In our blog dated January 30, 2024 we examined this judgment in detail.

2. Decisions

2.1 Corporate income tax. - Where a tax is held unconstitutional, but a limit is placed on its effects, refunds will have to be recognized in the fiscal year they are obtained

Central Economic-Administrative Tribunal. **Decision of December 18, 2023**

The tribunal examined the period in which refunds obtained after a tax is declared to be unconstitutional (the tax on plants with an impact on the environment, in this case) have to be recognized for corporate income tax purposes, (i) whether in the period when the tax was paid, or (ii) in the period when the refunds are received.

TEAC concluded that the answer to this question depends on whether the judgment declaring the law unconstitutional imposes a restriction on its effects: (i) if there is a restriction on its effects, the provisions in the supreme court judgment dated March 25, 2010 (rec. 135/2008) must apply and the refunded amounts have to be recognized in the period the incorrect payment was made, in other words, when the expense relating to the tax declared unconstitutional was recorded; (ii) if, by contrast, there is a limit on its effects, the interpretation determined in the national appellate court judgment dated June 23, 2021 (rec. 346/2018) must be observed and the refunds must be recognized in the period they are obtained.

TEAC recalled however that, in a decision dated April 19, 2023, the Supreme Court has admitted cassation appeal 7/2022 for consideration, which poses a similar issue (recognition of refunds obtained from a tax precluded by EU law).

2.2 Personal income tax. – TEAC reinterprets the theory of the bond in relation to the exemption for top-managers' severance pay

Central Economic-Administrative Tribunal. Decision of December 18, 2023

In this decision the tribunal examined the personal income tax liability for severance payments made by a company in relation to terminations of various employment relationships and relationships for services. The tax auditors considered that those severance payments could not benefit from the exemption under article 7.e) of the Personal Income Tax Law, in some cases because there had been a mutual agreement between company and worker rather than a genuine dismissal, and, in others, because the *theory of the bond* applied. Based on that doctrine, the auditors concluded that the exemption could not be applied to the severance payments relating to the relationship for services (because the law does not require mandatory severance payments for termination of this type of relationship), or to the period preceding the commencement of that relationship for services, because the prior employment relationship had not been suspended.

TEAC made an interesting analysis of the prima facie evidence considered by the tax auditors to conclude whether there had been a genuine dismissal or a mutual agreement; and changed its interpretation in relation to the *theory of the bond* in light of the recent supreme court judgments dated June 27 and November 2, 2023 (summarized in our publication dated July 6, 2023 and in our November 2023 newsletter) and the CJEU's interpretation in its judgments dated November 11, 2010 (Danosa case, C-232/09) and May 5, 2022 (HJ case, C-101/21), discussed in our May 2022 newsletter.

In relation to this last point, TEAC concluded that the top-management relationship does not automatically give way to the relationship for services binding the directors to the company in view of the recent case law adopted by the Supreme Court and the CJEU. In other words, "the existence of the relationship for services is not sufficient, by itself, to determine that, based on the priority of the organic relationship for services, binding the directors and board members to the company, the top-management employment relationship should be disregarded along with the potential exemption for part of the severance payment received that may arise from this relationship".

On another note, TEAC recalled that the exemption may be applied, in cases of terminations of top-management relationships, where there has been (i) unjustified dismissal (20 days' salary per year with a cap of 12 monthly payments), or (ii) withdrawal by the employer (7 days' salary per year with a cap of 6 monthly payments), as determined by the Supreme Court's case law in the case of withdrawal, and by the National Appellate Court 's case law in the case of unjustified dismissal.

Whereas, TEAC noted, there is no exemption for objective dismissals of senior managers, because in these cases, the Top-Management Royal Decree does not determine any minimum amount of severance (disregarding the labor courts' standard that in these cases the Workers' Statute must be applied - 20 days/12 monthly payments -).

2.3 Tax collection procedure. – Liability for concealing income from the main debtor's economic activities relates to the entire amount of concealed income, without subtracting expenses

Central Economic-Administrative Tribunal. Decision of December 12, 2023 (Principle 2)

TEAC analyzed a case of joint and several liability under article 42.2.a) of the LGT, relating to the liability of anyone who causes or cooperates in the concealment or transfer of assets or rights of the person liable for tax for the purpose of obstructing the tax authorities' work. According to the LGT, the scope of this liability is restricted to the value of any goods or rights that the public finance authority could have attached.

According to TEAC, the limit must be calculated by reference to the gross value of the concealed assets or rights, without subtracting expenses (including any related to the debtor's activity), because the law does not contain any rule allowing this subtraction, besides which, that subtraction is contrary to the aim sought by the law, which is to protect the tax authorities' collection activities.

3. Legislation

3.1 Implementing regulations published on the obligations of digital platform operators (DAC7) and on the new correction self-assessments

On January 31, 2024, the Official State Gazette published Royal Decree-Law 117/2024 of January 30, 2024, dealing with a range of implementing regulations. The main new legislation in the tax field is summarized below.

(a) **Digital platform operators (DAC7).** Law 13/2023 of May 24, 2023 introduced some new reporting and due diligence obligations for digital platform operators (see our alert dated May 25, 2023). Implementing regulations have now been adopted for these new obligations.

The first information return will have to be filed within two months running from the entry into force of the ministerial order approving form 238. Order HAC/72/2024 of February 1, 2024 (Official State Gazette, February 5, 2024) has approved that form which will have to be filed by April 6, 2024. The form is for reporting information relating to the immediately preceding year.

The first register notifications relating to these reporting obligations will have to be filed on or after February 6, 2024, the date of the entry into force of that Order HAC/72/2024, which also approves form 040.

(b) **Correction self-assessments.** Implementing regulations have been published for the new correction self-assessments introduced by Law 13/2023 of May 24, 2023. For a summary of these implementing regulations, see our publication dated January 31, 2024.

(c) **Reporting obligation of cross-border tax planning arrangements (DAC6).** The legal regime on the obligation to report cross-border tax planning arrangements, stemming from Council Directive (EU) 2018/822 of 25 May 2018 (DAC6) has been amended. Namely:

(i) In line with the findings in the CJEU judgment dated December 8, 2022 -case c-694/20- (summarized in our December 2022 newsletter), the obligation imposed on **intermediaries subject to legal professional privilege** to notify the exercising of their right to that privilege to other intermediaries who are not their clients has been removed.

(ii) Additionally, regulations have been adopted on a new **specific reporting obligation** for certain tax planning arrangements relating to the specific hallmarks under **category D** in Annex IV of DAC-6 concerning the automatic exchange of information and beneficial ownership. A new specific reporting form is expected to be approved in this connection (namely, form 239).

(d) **Amendments in the field of tax collection**

(i) Following the approval of Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015, on payment services in the internal market, payment institutions and electronic money institutions have been included as potential providers of cashier services and authorized collection institutions for AEAT.

In relation to tax payments made through authorized collection institutions, the validation system for payments has been amended to adapt it to new technology and Easter Monday has been designated as a non-business day for collection purposes, so that the sums collected by authorized collection institutions may be paid over to the Public Treasury in the same collection fortnight.

(ii) Clarification has been provided regarding calculation of the amount of security where split payments are requested in the enforced payment period. The security has to include any surcharges that fell due in the enforced payment period.

(iii) In relation to the automatic offset of debts with public entities, the notification of commencement of the procedure has been removed, to bring it into line with the automatic offset procedures of other parties with outstanding debts from the public finance authority.

(iv) A few changes have been made to the legal rules on transferring attached assets by auction.

(v) Lastly, in relation to the liability associated with an assessment linked to an offense, the legislation now includes the requirement for a formal accusation of the liable person in the criminal proceedings to be able to be held liable for the tax debt.

3.2 Amendments have been made to several tax return forms

Order HAC/56/2024, of January 25, 2024, amending several ministerial orders, was published in the Official State Gazette (BOE) on January 31, 2024. The following specific amendments have been introduced:

(a) **Information on dividend payments.** Information returns (193 and 296) and self-assessment returns (123 and 216) have been amended in relation to withholdings from dividends.

Notable in relation to form 296 are the amendments relating to income obtained from marketable securities which passes through a chain of intermediaries in Spain and abroad. The aim is for each filer to report the previous payer and, in the Recipient ("*Perceptor*") field, the next step in the payment chain.

Additionally, two schedules have been created for "Marketable securities. List of payments to taxpayers" and "Marketable securities. List of payment certificates", for them to be used by the last intermediaries in Spain who are, also, filers of form 296 and authorized by the legislation to apply for a refund of withholdings for taxpayers.

(b) **Exempt earned income in kind.** The Startups Law (commentary published in December 2022) made the exemptions for income in kind applicable to those obtained by nonresidents. Now an amendment has been made to Order EHA/3290/2008 to exclude that type of income from the exception to the obligation to file form 216 and new codes have been created in the information return on form 296.

(c) **Form 210.** A standard format has been provided for the payment or refund document for form 210, technical improvements have been added and an option has been given to group together on a yearly basis the income obtained from leasing or subleasing real estate.

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