Tax Newsletter

GARRIGUES

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Contents

2.9 Administrative procedure. - The filing of an annual summary does not toll the right to request a refund of incorrect payments

2.10 Collection procedure. - Surcharges cannot be imposed on a supplementary return made to apply the method adopted by the DGT in a request for resolution of an issue submitted by a taxpayer which was not answered within the time limit

2.11 Penalty procedure. - Enforcement of a decision voiding a penalty decision is governed by the enforcement procedure

3. Decisions

3.1 Personal income tax. - Capital losses arising on gifts cannot be computed in any instance

3.2 Personal income tax. - If an incorrect classification of income is not subject to a penalty, tax auditors have to allow taxpayers to choose between cash and accrual method

3.3 Inheritance and gift tax. - A reduction for the elements used in an economic activity cannot be denied due to the non-employment nature of the contract between the heir and the joint property entity that conducts the business

3.4 Conflict in the application of tax provisions. - Tax management bodies do not have the power to declare that there has been conflict in the application of tax provisions

3.5 Management procedure. - A limited review may be commenced with a provisional assessment proposal, even if the taxpayer has not filed a return for the tax

3.6 Management procedure. – A refund derived from correction of self-assessment based on ruling in a judgment must be made with late-payment interest from date of incorrect payment

3.7 Management procedure. - Start of an audit automatically ends earlier limited reviews on same subject matter

3.8 Collection procedure. - If a couple has a separate property matrimonial arrangement, a bank account held only by the non-debtor spouse cannot be attached

3.9 Review and collection procedures / Mutual assistance. - Enforcement instruments issued under mutual assistance arrangements can only be challenged to TEAC on defined grounds

3.10 Penalty procedure. - A penalty may be imposed for not accessing the contents of a request for information notice within ten days from when it was made available to the taxpayer on the website

4. Resolutions

4.1 Corporate income tax. - Dividends are not subject to withholding tax if they meet the requirements to be exempt

4.2 Corporate Income Tax. - In coordination groups, fulfillment of the economic activity requirements will be determined for each entity individually

4.3 Personal income tax and corporate income tax. - Implications derived from granting a global share-based incentive plan

4.4 Personal income tax. - Meal vouchers for employees working remotely or with continuous hours are exempt

4.5 Personal income tax. - Tax treatment of financial contracts for differences

4.6 Transfer and stamp tax. - Remission of uncalled capital is not taxable

4.7 Tax on motor vehicles. - Change of ownership of a vehicle does not prevent the tax authorities from continuing to seek payment of unpaid tax from prior periods from the former owner, within the statute of limitations

5. Legislation

5.1 Publication of the annual equivalent rate for third quarter of 2021, for the purpose of characterizing certain financial assets for tax purposes

5.2 E-commerce: VAT and invoicing regulations amended and new returns and forms approved

5.3 Amendments in relation to energy tax

5.4 Form 179, Information return on homes rented out to tourists approved

5.5 New rules approved relating to the customs field, VAT and excise taxes on production, in relation to refueling and fitting out ships and aircraft, supplies at duty-free shops, and on board sales to travelers

5.6 Modification of the voluntary payment period for the tax on economic activities charges in 2021

5.7 Tax on certain digital services. Implementation of rules on the location of devices and procedural obligations

5.8 Mutual agreement procedures. - Amendment of regulations on mutual agreement procedures concerning direct taxation

5.9 Corporate income tax return forms for fiscal year 2020 have been published

1. VAT. - The 10% penalty for not including self-charged tax on a tax return violates principle of proportionality

According to the National Appellate Court, this penalty cannot be imposed if no loss has arisen for the public purse.

Article 170.Two.4 of the VAT Law states that it is a tax infringement to fail to include in a VAT self-assessment any self-charged VAT on transactions in which the taxable person is the customer. The penalty is equal to 10% of the amount of VAT chargeable on the transactions that were not included.

In a **judgment delivered on May 12, 2021** (on an appeal was handled by Garrigues), the National Appellate Court reviewed the case of an entity which had received an invoice for a transaction in which the self-charge mechanism should have been used. The company (which was fully entitled to deduct its input VAT) recorded the invoice in its invoice record book for VAT, but, by mistake, failed to include it in the self-assessment for the VAT period. The auditors found that the company's position had to be adjusted as follows:

(a) By including the self-charged VAT.

(b) By including also the input VAT arising from the self-charge.

(c) By recognizing the right to deduct that input VAT, due to the taxable person being in possession of the invoice and having recorded the transaction in the record book.

(d) By imposing the penalty, consisting of a fine equal to 10% of the VAT chargeable on the transactions not included in the self-assessment.

The National Appellate Court considered it reasonable to reprehend incorrect information on self-assessments to prevent fraud, under the case law of the Court of Justice of the European Union (CJEU). However, in line with that case law and under the basic principles underlying VAT, a penalty based on automatic parameters (in this case, a percentage penalty) without taking the circumstances of the case into account, in particular, the absence of a loss to the public purse, goes beyond what is necessary to ensure that purpose. For that reason, the court overturned the penalty.

2. Judgments

2.1 Personal income tax. - The generation period of an incentive for a former worker at the company should end when the worker left the company

Supreme Court. Judgment of May 6, 2021

A taxpayer received an incentive from a former employer. The incentive had been offered under a program in 2006 and was linked to the success of one of the investments made by the company, to which the taxpayer and other beneficiaries of the incentive had to contribute with their work. The taxpayer's relationship with the company ended in 2007, although that individual received the incentive in 2011 together with the other beneficiaries, as determined in the program.

The Supreme Court concluded that:

(i) The legal term "income generation period" must be taken to mean the period in which the recipient actually contributes to generating the income, even if the income becomes payable after the end of the employment relationship; because the issue concerns the generation of income, not the timing of recognition.

(ii) In the examined case, although the determination and quantification of the amount of the incentive occurred in 2011, its generation (for the employee who had left) occurred in under two years, because, after the employee's employment relationship had ended, the employee ceased to contribute to achievement of the goals to which the incentive was linked. Therefore, the taxpayer is not entitled to the reduction for multi-year income.

2.2 VAT. - The one month period for bringing economic-administrative claims between private parties starts to run from when it may be presumed that the official request to the other party has been rejected

National Appellate Court. **Judgment of April 19, 2021**

Where there is a discrepancy in relation to the VAT charge (among other matters), the General Taxation Law allows the difference of opinion to be settled though an economic-administrative claim between private parties, in which the issue will be settled by the economic-administrative tribunal. The period for filing the claim is one month.

In the case examined in this judgment, an entity asked another to issue an invoice to it (charging the relevant amount of VAT) in respect of a specific transaction. The request was sent using the bureaufax certified fax service on November 17, 2010. After the bureaufax was rejected and returned by the post office to the claimant on December 20, 2010, this entity filed an economic-administrative claim on January 21, 2011. The claim was not admitted by the tribunal after finding that it had been filed outside the time limit.

The appellant considered that the claim had been filed within that one-month period, because, in its opinion, the start date for the period should fall on December 20, 2010, the date on which the request had been returned by the post office.

The National Appellate Court, however, concluded that the time period for filing the claim starts after a month has run from when fulfillment of the obligation was formally requested. Therefore, since the bureaufax was sent on November 17, 2010, the start of the one month period for filing the economic-administrative claim should have been taken as December 17, 2010 (one month later, in other words). Because the claim was filed over a month later (January 21, 2011), it was correct not to admit it.

2.3 VAT. - VAT on tickets for boxes and seats at sporting and cultural events is deductible only if their use in the business is evidenced

National Appellate Court. **Judgment of April 16, 2021**

In this judgment, the National Appellate Court ruled on whether expenses relating to purchases of tickets for boxes or seats at sporting or cultural events must be classed as "shows and recreational services" or "client entertainment" or, otherwise, as marketing expenses (in which case they give entitlement to deduct the input VAT incurred).

TEAC concluded as follows:

(a) It first recalled that although expenses relating to entertaining clients may be deducted for corporate income tax purposes, the VAT on these items is generally not deductible.

(b) However, input VAT is deductible if the company can substantiate that the expenses are strictly professional, for which the burden of proof lies with the taxable person.

In the examined case, the company argued that they were marketing expenses because the reason for incurring them was to promote sales of its services. It also identified the beneficiaries of the tickets.

In the court's opinion, however, this proof was not sufficient because it had not been substantiated that the expenses were strictly business expenses, in other words linked to the company's trading activities. The complimentary tickets, according to the court, create a conducive environment for negotiating services to be provided, but they are still client entertainment expenses, and therefore the input VAT is not deductible.

2.4 Inheritance and gift tax - It is not necessary to continue an economic activity to claim the 95% reduction for 'mortis causa' acquisitions of a family business

Supreme Court. Judgment of June 2, 2021

The Supreme Court examined the requirement to continue the family business, needed to claim the 95% reduction for determining the taxable amount for inheritance and gift tax purposes.

In our alert on June 9, 2021 we discussed the case examined by the court and its conclusions.

2.5 Tax on construction, installation projects and works. - If the project or work is discontinued, the tax must be refunded with late-payment interest calculated from when the refund is requested

Supreme Court. Judgment of April 28, 2021

A case was reviewed involving an entity that discontinued the performance of a project. As a result, the entity was allowed a refund of the tax on construction, installation projects and works paid when it filed the provisional self-assessment of the tax.

The court examined what period has to be taken into account to calculate the late-payment interest. The entity argued that the interest must be calculated from the date on which the tax allowed to be refunded has been paid. The local authority argued to the contrary that the interest had to be calculated from the date on which the taxpayer requested a refund of the tax.

The Supreme Court upheld the local authority's appeal because it considered that, due to the project being discontinued by the interested party itself, late-payment interest only accrues from when the refund was requested.

2.6 Statute of limitations and creation of a right ('actio nata'). - If the cadaster notifies that a real estate asset was valued incorrectly, the excess real estate tax from prior years must be refunded, without applying the four-year limit

Canary Islands High Court. Judgment of November 18, 2020

The appellant had paid real estate tax for 2005 and later years by reference to the urban nature assigned for the purposes of the cadaster to the real estate asset it owned. In 2017, the cadaster recognized the rural nature of the plots of land, valid retroactively to January 1, 2005. As a result, the entity applied for a refund of the real estate tax it had paid since 2005. The local authority, however, argued that it was only entitled to a refund of the amounts incorrectly paid for non-statute barred years when the refund was requested.

The Canary Islands High Court considered, as the taxpayer did, that all incorrect amounts since 2005 had to be refunded, because the cadaster recognized the incorrect classification with retroactive effect to that year, besides which, until the cadaster had declared the existence of that incorrect classification, the taxpayer was unable to apply for a refund. The statute bar pleaded by the local authority did not therefore apply.

2.7 Extension of liability. – A gift recipient may be held liable for the giver's tax debt, including a debt arising after the gift

Supreme Court. Judgment of May 12, 2021

A father made gifts to his offspring and the tax authorities considered that it was done to prevent the government from collecting tax, concluding also that the recipients had participated in the concealment and therefore were liable for their father's tax debts (including those acquired after the gift).

The Supreme Court confirmed the principle determined in its judgment of March 11, 2021 (examined in our Tax Newsletter - April 2021) and concluded that the recipient may be held liable for the giver's tax debts (including any tax becoming due after the gift), if the tax authorities substantiate that a prior agreement existed between giver and recipient aimed at impeding or preventing the enforcement of future debts out of the debtor's assets.

2.8 Administrative procedure. - Late-payment interest cannot be claimed for the period in which the tax authorities delayed sending the administrative case file to the court

Supreme Court. Judgment of May 11, 2021

An assessment was issued to enforce a judgment partially upholding a claim which voided the appealed assessment and ordered a new one to be issued. It was asked whether the new assessment should exclude late-payment interest in respect of the time in excess of the 20 days that the tax authorities had to send the administrative case file to the court.

The Supreme Court's reply was that it should. According to the court, the lateness in sending the file is a delay attributable exclusively to the tax authorities, regardless of whether the appellant knows or has the documents needed for the tax authorities to

complete the file. It further specified that it is not necessary to have made this request in the claim filed in the application for judicial review, instead the tax authorities have to take it into account as a matter of course and not calculate interest for periods of delay not attributable to the taxpayer.

2.9 Administrative procedure. - The filing of an annual summary does not toll the right to request a refund of incorrect payments

National Appellate Court. **Judgment of April 28, 2021**

A taxpayer requested a correction of its self-assessments of personal income tax withholdings because they contained an error which had given rise to an incorrect payment. The request for correction was made more than four years after the self-assessments had been filed. However, that length of time had not passed since the annual withholdings summary for the year to which those self-assessments related had been filed. The tax authorities rejected the request for correction because they considered that the right to request a refund of incorrect payments had become statute-barred.

The debate centered on whether the annual summary returns filed by the entity had a tolling effect on the statute of limitations.

On the basis of the Supreme Court's settled case law finding that the filing of annual summary returns does not toll the tax authorities' right to assess the tax debt, the National Appellate Court arrived at the conclusion that, for consistency reasons, nor can those returns toll taxpayers' rights to request refunds of incorrect payments.

2.10 Collection procedure. - Surcharges cannot be imposed on a supplementary return made to apply the method adopted by the DGT in a request for resolution of an issue submitted by a taxpayer which was not answered within the time limit

Andalusia High Court. **Judgment of November 24, 2020**

In the examined case, the taxpayer had filed a request for resolution to the Directorate-General for Taxes (DGT) before filing a personal income tax return, but the DGT did not issue its resolution within the six month period allowed by the law. Therefore, at the end of the voluntary period for filing a self-assessment, it did so using the method it considered to be correct.

Later, the DGT issued its resolution reaching the opposite conclusion to that applied by the taxpayer in its self-assessment.

As a result, the taxpayer filed a supplementary self-assessment showing a balance due, which was followed by the assessment of a surcharge for the late filing of self-assessments.

Andalusia High Court concluded that in a case of this type no surcharge should be imposed because the supplementary return was filed as a result of a method adopted by the DGT in its reply to an issue submitted for resolution by a taxpayer, which moreover was not answered within the time period specified in the law. In the court's opinion, imposing a surcharge in this case would be tantamount to allowing the tax authorities to benefit from their own breach.

2.11 Penalty procedure. - Enforcement of a decision voiding a penalty decision is governed by the enforcement procedure

Supreme Court. **Judgment of May 5, 2021**

The Supreme Court examined what period the tax authorities have to enforce a decision by the Central Economic-Administrative Tribunal (TEAC) partially upholding a claim (voiding penalties and ordering new penalties to be issued in their place), and the effects of a potential breach of that period.

The Supreme Court had already ruled in its judgment of November 19, 2020 (examined in our Newsletter for December 2020) that the period for enforcing a decision voiding an assessment arising from a tax management procedure is one month and that a breach of that period does not make the enforcement decision void or voidable, it only means that late-payment interest cannot be imposed on the taxpayer.

Now it has affirmed that the same conclusion has to be drawn where it is a penalty decision that is voided by the economic-administrative tribunal. In other words, the enforcement procedure rules apply, not the penalty procedure rules.

3. Decisions

3.1 Personal income tax. - Capital losses arising on gifts cannot be computed in any instance

Central Economic-Administrative Tribunal. **Decision of May 31, 2021**

A transfer for no consideration may give rise to a capital gain or a capital loss. The Personal Income Tax Law, however, contains differing treatment for gains and losses in that, whereas gains are computable, losses are not.

The Valencian Regional Economic-Administrative Tribunal (TEAR), in a decision on September 30, 2019 (discussed in our Newsletter for March 2020), found (using a new method) that there are two types of losses that arise on gifts: an “economic capital loss” and a “tax capital loss”.

According to that TEAR, an “economic capital loss” is the loss that necessarily arises as a result of assets coming out of the giver’s capital without the receipt of any others in exchange. This is the loss which, in that tribunal’s opinion, is not computable on the giver’s personal income tax return.

Whereas a “tax capital loss”, which is the loss arising for the giver for personal income tax purposes due to the positive difference (as the case may be) between the cost value of the asset and its value for inheritance and gift tax purposes at the time of the gift. This loss, in the TEAR’s opinion, is indeed computable on the giver’s personal income tax return.

TEAC, however, concluded that the meaning of the law is clear, and therefore any capital losses arising on *inter vivos* transfers for no consideration are not computable for tax purposes, either at the aggregate cost value, or at the difference between cost value and market value.

3.2 Personal income tax. - If an incorrect classification of income is not subject to a penalty, tax auditors have to allow taxpayers to choose between cash and accrual method

Catalan Regional Economic-Administrative Tribunal. Decision of March 11, 2021

A professional football player transferred his rights of publicity to a company owned among the football player himself and several family members. The revenues from the transfer were reported as income from movable capital for personal income tax purposes. For the auditors, however, they were income from economic activities, so they issued an assessment reclassifying the revenues and recognizing them under the accrual method (even though there were deferred payments), and did not allow the taxpayer to choose the cash method. The assessment was not accompanied with a penalty.

The Catalan TEAR recalled that the legislation allows the taxpayer to choose the cash method instead of the accrual method. Because there was no other income from economic activities in the reviewed period, the football player had not chosen either method on his self-assessment. That is precisely why the auditors should have allowed the taxpayer to choose instead of directly using the accrual method.

In short, according to the tribunal, where an incorrect classification of income is not subject to a penalty, it is mandatory to allow the taxpayer to choose between the cash method and the accrual method.

3.3 Inheritance and gift tax. - A reduction for the elements used in an economic activity cannot be denied due to the non-employment nature of the contract between the heir and the joint property entity that conducts the business

Central Economic-Administrative Tribunal. Decision of March 25, 2021

The reduction for inheritance and gift tax purposes allowed for assets used in the decedent's individual business or professional activity requires, among other elements, that the heirs continue the activities previously carried on by the decedent.

In the examined case, leased real estate assets were inherited by several heirs, resulting in the assets coming to form a joint property entity. One of the heirs signed a contract with the joint property entity to manage the business activities. The tax authorities denied the right to claim the reduction to the taxable amount for inheritance and gift tax because it had not been substantiated that the contract was an employment contract and therefore it could not be regarded as proven that the business activities had continued.

TEAC recalled, however, that the Supreme Court requires, if there is any doubt, a purpose-based interpretation of the law to the effect that the economic activity previously conducted by the decedent has continued. It concluded therefore that the reduction should not be denied for purely procedural reasons related, in this case, to the employment nature or otherwise of the contract.

3.4 Conflict in the application of tax provisions. - Tax management bodies do not have the power to declare that there has been conflict in the application of tax provisions

Castilla-La Mancha Regional Economic-Administrative Tribunal. Decision of February 12, 2021

A foundation (A) had acquired a plot of land and had a school built on the land so as to lease it to another foundation (B) for it to carry on teaching activities there. In a management procedure it was concluded that an "abuse of law" had taken place. According to the tax management body, foundation A would not have been able to deduct its input VAT on the building work if it had carried on the teaching activities directly, because these are VAT exempt activities which do not give entitlement to a deduction. By leasing the building to foundation B, however, it was indeed able to deduct its input VAT.

Castilla-La Mancha TEAR ruled that the tax management body had brought to light facts and circumstances which, if they were true, could involve a case of conflict in the application of tax provisions. It considered, however, that the tax management body does not have the power to carry out these types of procedures, because article 136 of the General Taxation Law only gives this option to audit bodies.

3.5 Management procedure. - A limited review may be commenced with a provisional assessment proposal, even if the taxpayer has not filed a return for the tax

Central Economic-Administrative Tribunal. Decision of May 26, 2021

In this decision, TEAC recalled that the General Taxation Law allows a limited review to be commenced with an assessment proposal where the tax authorities have sufficient information to determine the amount of tax payable, regardless of whether or not the taxpayer has previously filed its self-assessment.

Therefore, according to the tribunal, it is allowed to accelerate the proceeding and achieve its purpose.

3.6 Management procedure. – A refund derived from correction of self-assessment based on ruling in a judgment must be made with late-payment interest from date of incorrect payment

Central Economic-Administrative Tribunal. Decision of April 22, 2021

A taxpayer reported on a personal income tax return a number of dividends distributed by a company which, after exercising its rights to appeal, had been classed as an entity subject to the holding companies regime by the National Appellate Court. Therefore, those dividends should not have been included in their recipient's taxable income for personal income tax purposes, which was why the recipient requested correction of the return and a refund of incorrect payments.

The tax authorities allowed the requested correction, although they considered that the refund has to be regarded as a refund under the legislation on the tax. For that reason, the late-payment interest was calculated by taking as the commencement date the day following the end of six months from when the judgment recognizing that the company that distributed the dividends was a holding company became final.

Based on the supreme court judgment on January 28, 2021, TEAC concluded, to the contrary, that these were incorrect payments which emerged as a result of the ruling in that national appellate court judgment, and for that reason late-payment interest accrues from the end of the voluntary filing period for the personal income tax self-assessment.

3.7 Management procedure. - Start of an audit automatically ends earlier limited reviews on same subject matter

Central Economic-Administrative Tribunal. Decision of March 23, 2021

A general audit was initiated which included the same scope as an earlier limited review. The audit ended with an assessment decision and a penalty decision.

Castilla-La Mancha TEAR concluded in its decision that, when the audit started, a formal administrative decision should have been rendered to end the earlier limited review. In the absence of that decision, it considered that a single procedure had existed - the audit - which had taken longer than the statutory period allowed for its completion. For this reason, according to the tribunal, the tax authorities' right to determine the tax debt had become statute-barred.

TEAC's conclusion on that principle was as follows:

(a) A notification of the start of an audit which includes the subject-matter of an earlier limited review automatically ends this review.

(b) For this to happen, it is necessary for the audit notice to take place before the limited review period has expired.

In short, according to TEAC, it is not necessary for an *ad hoc* administrative decision ending the limited review to be rendered, because it is sufficient for notice of the start of an audit to be given before the period allowed for completion of a tax management procedure has ended.

3.8 Collection procedure. - If a couple has a separate property matrimonial arrangement, a bank account held only by the non-debtor spouse cannot be attached

Castilla-La Mancha Regional Economic-Administrative Tribunal. Decision of February 26, 2021

After several enforced collection orders issued to a taxpayer married with a separate property matrimonial arrangement, an attachment was levied on a bank account held by his spouse, for which the taxpayer was an authorized party, but not an account holder. The tax management office defended this step because, in its opinion, the attached account, despite not being held by the debtor spouse, had his periodical pension payments fed into it.

Castilla-La Mancha TEAR concluded that a bank account cannot be attached if the only holder of the account is a person having no debts with the public finance authority, even though they are the debtor's spouse, if their matrimonial arrangement is a separate property system. If, however, it is substantiated that the funds paid into the account come from the debtor and that the account holder has cooperated to achieve the concealment of those funds, the tax authorities may hold this holder liable for the debt owed by the debtor, in the amount that they contributed to concealing.

3.9 Review and collection procedures / Mutual assistance. - Enforcement instruments issued under mutual assistance arrangements can only be challenged to TEAC on defined grounds

Central Economic-Administrative Tribunal. Decision of April 15, 2021

A Portuguese entity received a document called "Uniform enforcement instrument relating to Directive 2010/24/EU concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures". In that document, the Spanish government requested from Portugal the performance of steps to collect debts derived from assessments issued by the Spanish tax authorities from a Spanish company which had been absorbed by a Portuguese company.

The Portuguese company filed an economic-administrative claim with TEAC, in which it argued that the assessments on which that document was based had not been correctly notified to the absorbed Spanish company.

TEAC held that, under article 177 *decies* of the General Taxation Law, the grounds for objection against enforcement instruments issued under mutual assistance arrangements are defined and are different from those set out for enforcement instruments issued under domestic law.

Therefore, because the grounds submitted by the company were not on this list, TEAC concluded that it could not enter into examining them.

3.10 Penalty procedure. - A penalty may be imposed for not accessing the contents of a request for information notice within ten days from when it was made available to the taxpayer on the website

Central Economic-Administrative Tribunal. Decision of May 21, 2021

The tribunal examined the case of a taxpayer who had received a request for information at its enabled electronic address, which the taxpayer had not accessed within ten calendar days from when it was made available. For this reason, it was considered that the notice had been rejected and a penalty was imposed for an infringement consisting of resisting, obstructing or refusing to comply with steps by the tax authorities.

TEAC validated this penalty. According to the tribunal, that infringement does not require a physical or actual administrative decision to have existed, instead it is enough for that notice to have been served as required in the law. In other words, it is not possible to differentiate between someone who accesses a notice and does not reply to a request from the tax authorities, and someone no does not reply to that request either, on the pretext of not having accessed the validly served notice.

In short, according to the tribunal, in the examined case the necessary intentional element for imposing the penalty for the infringement mentioned may exist, even if the factors allowing relief from liability are observable.

4. Resolutions

4.1 Corporate income tax. - Dividends are not subject to withholding tax if they meet the requirements to be exempt

Directorate General for Taxes. Resolution V1154-21 of April 29, 2021

The requesting entity is the parent company of a group of companies that has elected the consolidated tax group corporate income tax regime. In relation to the dividends that the subsidiaries distribute to the parent company, it was concluded that:

(a) On the recipient company's individual return, an exemption may be claimed equal to the amount received as a dividend, less 5%, in respect of management expenses for the shares concerned. The remaining 5% may be included in its tax base.

(b) The amount included by the recipient in its individual tax base (that 5%) does not have to be eliminated from the tax group's tax base.

(c) These dividends are not subject to withholding tax.

All of the foregoing is if the requirements for exempt dividends under article 21.1 of the corporate income tax law are fulfilled.

4.2 Corporate Income Tax. - In coordination groups, fulfillment of the economic activity requirements will be determined for each entity individually

Directorate General for Taxes. Resolution V0880-21 of April 13, 2021

Two entities are owned by four shareholders with identical ownership interests. One of the companies leases real estate it owns to the other, for it to carry on its business activities there. It was asked whether the lessor company, which does not have any salaried employees, has an economic activity due to forming part of a group.

According to the official findings of the Spanish Accounting and Audit Institute (ICAC), Spanish accounting legislation defines two types of groups:

(a) A "subordination" group, as defined in article 42 of the Commercial Code, formed by a parent company and one or more subsidiaries controlled by the parent company.

(b) A "coordination" group, as defined in standard number 13 for the preparation of financial statements in the Spanish National Chart of Accounts, consisting of companies controlled by any means by one or more individuals or legal entities, who act jointly or are under single management in the form of bylaw agreements or clauses.

In the examined case, therefore, the two companies are part of a coordination group. For that reason, fulfillment of the requirements in relation to economic activity within the meaning of article 5 of the Corporate Income Tax Law does not have to be determined by reference to the two entities jointly, instead at each of those entities.

4.3 Personal income tax and corporate income tax. - Implications derived from granting a global share-based incentive plan

Directorate General for Taxes. Resolution V0789-21 of April 5, 2021

The requesting company belongs to a group of companies that has a global share-based plan for all the group's employees. The plan has the following features:

(a) For its implementation, the group set up a foundation to which the group companies make annual contributions according to the number of employee participants in the plan. Contributions to the foundation are invested in shares in the group's parent company.

The amounts contributed to the foundation are assigned to the employee participants under various predetermined parameters such as, for example, number of hours worked.

The employees do not contribute any amounts to the foundation.

(b) The assignment to employees of their rights in the plan is made by granting units, which award personal nontransferable rights.

(c) When the incentive is settled, its value will depend on the share price at that time.

(d) The incentive is paid in cash in a single period or in five annual payments. In this second case, the amount of the incentive is subject to any price fluctuations for the underlying shares.

In relation to this incentive plan, the DGT set the following guidelines:

(a) For personal income tax purposes

- The income derived from the units granted to employees is classed as salary income.

- The income must be recognized in the taxable period when the incentive becomes payable. Therefore, there is no income either when the units are granted or when the group companies make contributions to the foundation, instead when the employee is entitled to receive the incentive. The employer is required to make a personal income tax withholding at that time.

(b) For corporate income tax purposes

After a report was requested from the ICAC, the ICAC made a distinction between the following cases:

- Case 1, in which the Spanish subsidiary's only obligation consists of making its annual contributions to the foundation, and it has no legal, contractual or implied obligation to make any additional contributions if the foundation fails to meet its settlement obligations in relation to the incentives.

  In this case, we have long-term defined contribution income, and therefore contributions to the foundation must be recorded in the income statement as a personnel expense.

- Case 2, in which the income is long-term defined benefit income, so the subsidiary has to make additional contributions if the foundation does not meet its settlement obligations in full.

  In this case, a provision must be recognized in respect of the difference between the present value of the committed income and the fair value of the assets assigned to the commitments with which the obligations will be settled. This amount will be reduced by any costs in respect of past services yet to be recognized.

The expense must be included in the tax base for the taxable period in which it is allocated to its purpose, in other words, when the employee is entitled to receive the incentive and, therefore, the income becomes payable, regardless of whether it is one case or another.

For these purposes, the expense will not be considered to be allocated to its purpose if the obligation is discharged as a result of the employee not settling their rights or forfeiting them for any reason.

Moreover, because the described transaction is performed between related entities, it must be priced and documented as required by the legislation on this type of transactions.

4.4 Personal income tax. - Meal vouchers for employees working remotely or with continuous hours are exempt

Directorate General for Taxes. Resolution V1035-21 of April 21, 2021

In relation to the meal voucher exemption, the DGT concluded as follows:

(a) Employees working remotely are entitled to the exemption if the requirements in the legislation are fulfilled, and the daily 11 euro limit is met.

(b) The exemption is also applicable for workers with continuous working hours.

The DGT added that the exemption must include the necessary expenses for food to be delivered at the workplace or at the place chosen by the employee to perform their work on the days when the employee works remotely or teleworks, whether they are included by the company providing the food service on the invoice for the food, or have been invoiced separately by the company that delivered the food, although the aggregate exempt amount cannot exceed that daily 11 euro limit.

4.5 Personal income tax. - Tax treatment of financial contracts for differences

Directorate General for Taxes. Resolution V0885-21 of April 14, 2021

Financial contracts for differences are contracts concluded between a financial institution and a customer (usually there is a prior agreement setting out the general terms and conditions and requiring a cash account to be opened into which the funds derived from the contracts are paid), under which both parties agree to settle any differences arising in the value of an underlying asset between when a contract is opened and when it is closed or expires. The value is determined by reference to the market value of the underlying asset, to which the financial institution may add a margin or spread.

In relation to these contracts, the DGT set the following guidelines:

(a) If the only purpose of the margin is to provide security to the financial institution for any potential obligation that may derive from variations in the underlying asset (meaning that, when the contract has been settled and closed, that margin will be repaid to the client -although it may be used to offset losses arising on settlement-), the contracts will not be regarded as involving an assignment of own capital to third parties. The reason is that, in this case, the margin will not be a figure that has to be included to obtain or calculate the gain or loss, which will depend only on a random factor such as variation in the value that the underlying asset has on the market.

(b) In these cases, the gains or losses obtained by the taxpayer from settlements of contracts for differences must be classified as capital gains or losses for personal income tax purposes.

This capital gain or loss will be determined as the difference between the values of the underlying asset on opening and closing the contract, as they are determined in the contractual terms and conditions.

Any fees paid to the financial institution in respect of opening or closing contracts for differences are deductible for determining capital gains or losses.

Moreover, any amounts that the taxpayer might receive or have to pay the financial institution, in the case of a distribution of dividends during the term of the contract, will have to be computed with a plus or minus sign as applicable, to determine the capital gain or loss under the contract.

However, any interest paid by the taxpayer for maintaining contractual positions beyond the opening date, will not be computable for determining the capital gain or loss.

(c) The timing of recognition of capital gains or losses will depend on when the right to payment or payment obligation derived from the settlements that arise from the contracts is generated. If there are daily settlements which transfer to the client's account the loss or gain generated as a result of price fluctuations of the underlying asset for each day, then for tax purposes, it must be considered that a capital gain or loss has been obtained daily.

4.6 Transfer and stamp tax. - Remission of uncalled capital is not taxable

Directorate General for Taxes. Resolution V0839-21 of April 08, 2021

The following guidelines were provided in relation to the remission of uncalled capital:

(a) A capital reduction through remission of uncalled capital will not give rise to an assessment of transfer tax under the "corporate transactions" heading, nor will it be subject to the ad valorem stamp tax charge.

(b) If the company is wound up and liquidated, any amounts of uncalled capital that have been remitted for the shareholder and have not yet become due do not have to be included in the taxable amount for transfer tax under the "corporate transactions" heading.

4.7 Tax on motor vehicles. - Change of ownership of a vehicle does not prevent the tax authorities from continuing to seek payment of unpaid tax from prior periods from the former owner, within the statute of limitations

Directorate General for Taxes. Resolution V0005-21 of April 16, 2021

The requester wanted to purchase a vehicle on which the tax on motor vehicles had not been paid since 2008. To make the change of ownership with the traffic authority, proof needs to be provided of payment of the tax in the latest period (2019), so the individual tried to make the payment for that year. The local authority refused to accept payment for 2019 only, and sought payment of all unpaid tax bills for prior years.

The DGT concluded that, under the applicable legislation, it is only necessary for the registered owner to provide proof of payment of the tax on motor vehicles for the period immediately preceding the period in which the change of owner is made. The local authority cannot therefore seek payment from the new owner of all unpaid tax to be able to make payment of the tax for 2019.

However, a change of ownership of the vehicle does not prevent the local authority from continuing to seek payment from the person who was taxable person when the payments of the tax on motor vehicles were not made, subject to the statute of limitations period determined in the legislation.

5. Legislation

5.1 Publication of the annual equivalent rate for third quarter of 2021, for the purpose of characterizing certain financial assets for tax purposes

The June 29, 2021 edition of the Official State Gazette (BOE) published the Decision of June 24, 2021, by the Office of the General Secretary for the Treasury and International Finance, which sets out the annual effective interest rate for characterizing certain financial assets for tax purposes, this time for the third calendar quarter of 2021. The rates are as follows:

- Financial assets with a term equal to or shorter than four years. -0.352 percent.
- Assets with terms between four and seven years: -0.198 percent.
- Assets with ten-year terms: 0.478 percent.
- Assets with fifteen-year terms: 0.778 percent.
- Assets with thirty-year terms: 1.124 percent.

5.2 E-commerce: VAT and invoicing regulations amended and new returns and forms approved

The June 16, 2021 edition of the Official State Gazette published Royal Decree 424/2021, of June 15, 2021, amending the VAT Regulations (approved by Royal Decree 1624/1992, of December 29, 1992), the Invoicing Regulations (approved by Royal Decree 1619/2012, of November 30, 2012) and the General Regulations on tax management and audits (approved by Royal Decree 1065/2007, of July 27, 2007), thereby continuing the transposition into Spanish law of the EU legislation on VAT for e-commerce sales (which enters into force on July 1, 2021).

See our Alert dated June 16, 2021 for a summary of the main amendments.

Later, the following orders were published (a few were summarized in our alert on June 29, 2021):

(a) In the June 18, 2021 edition of the Official State Gazette:

- Order HAC/609/2021, of June 16, 2021, amending the orders approving form 036 (business taxation status notification form for registration, status change or cancellation on the list of traders, professionals, and withholding agents), form 037 (simplified business taxation status notification form) and form 030 (business taxation status notification form for registration on the list of taxpayers, change of address and/or variation in personal data).
- Order HAC/610/2021, of June 16, 2021, approving form 369 for self-assessment under the special single point of contact regimes under chapter XI of title IX of the VAT Law.
- Order HAC/611/2021, of June 16, 2021, approving form 035 to notify the start, modification or end of operations for which any of the special regimes have been elected.

(b) The June 24, 2021 edition of the Official State Gazette (BOE) published Order HAC/646/2021, of June 22, 202l, amending the orders approving forms 302, 322 and 390 and the regulatory and technical specifications for immediate information sharing.

5.3 Amendments in relation to energy tax

On June 25, 2021, the Official State Gazette published Royal Decree-Law 12/2021, of June 24, 2021, adopting urgent measures in the field of energy tax and in relation to electricity generation and on management of the regulation charge and the charge for the use of public water.

The main new legislation is summarized below.

(a) **VAT:** Effective between June 26 and December 31 2021, the VAT rate for intra-Community supplies, imports and exports of electricity is reduced to 10%, where they are made to:

- Holders of electricity contracts, in which installed capacity (cost of capacity) is below 10 Kw, regardless of the voltage level of the supply and the type of contract, where the arithmetic mean of prices on the daily market for the last calendar month before the month containing the last day of the billing period exceeded €45/MWh.

- Holders of electricity supply contracts who receive energy assistance relief and have been determined to be in a position of severe vulnerability or of severe vulnerability at risk of social exclusion.

(b) **Tax on the value of electricity output:** In the third quarter of 2021, relief from the tax on the value of electricity output is allowed for plants generating electricity and feeding it to the electricity system. Prepayments for the third and fourth quarters must be calculated by reference to this relief.

Moreover, for taxable period that commenced in 2020, Law 19/1994, of July 6, 1994, amending the economic and tax regime of the Canary Islands has been amended. That amendment has increased from 5.4 to 12.4 million the limit on the tax credit for investment in cinematographic productions and audiovisual series made in the Canary islands.

5.4 Form 179, Information return on homes rented out to tourists approved

The Official State Gazette of June 18, 2021 published Order HAC/612/2021, of June 16, 2021, approving form 179, Information return on homes rented out to tourists, and determining the conditions and procedure for filing it.

This form will have to be used to report the renting out of homes to tourists, where they are rented out on or after June 26, 2021 and where the intermediary service for them took place after that date.

The form has to be filed quarterly between the first and last day of the calendar month following the end of every quarter. The return for the second quarter of 2021 has to be filed with the return for the third quarter of 2021, in other words, between October 1 and November 2, 2021.

5.5 New rules approved relating to the customs field, VAT and excise taxes on production, in relation to refueling and fitting out ships and aircraft, supplies at duty-free shops, and on board sales to travelers

The June 8, 2021 edition of the Official State Gazette published Order HAC/559/2021 of June 4, 2021, approving rules relating to the customs field, VAT and excise taxes on production, in relation to the exempt refueling and fitting out of ships and aircraft other than private pleasure vessels or aircraft, together with sales at duty-free shops and for on board sales to travelers.

We have picked out the following news:

(a) The purpose of this order, in addition to updating the legislation in force on this subject, is to issue a single procedural instrument for three types of transactions, regardless of their customs status: (i) supplies to vessels and aircraft (refueling and fitting out), (ii) duty-free shops and (iii) sales on board vessels and aircraft.

(b) More specifically, it sets out the customs procedure for refueling and fitting out operations on ships and aircraft for goods not belonging to the European Union and for those falling within the VAT exemption allowed in article 22 of the VAT Law, including supplies at shops making on board sales and VAT exempt supplies of goods made by duty free shops under article 21.2 of the VAT Law.

(c) Additionally, in the field of excise taxes on production for alcohol and alcoholic beverages and for tobacco products, the procedure is defined for claiming the exemptions under article 9. 1.e) and 9.1.f) (refueling ships and aircraft), and article 21.3 and article 61.3 of the Law on Excise and Other Special Taxes (supplies of alcoholic beverages and tobacco products by duty free shops carried in travelers' personal luggage).

(d) It also defines the application for, and authorization and monitoring by the competent bodies of AEAT of, exempt refueling operations in international carriage by sea or air other than on private pleasure vessels or aircraft, or for ships used for salvage or assistance at sea in which the length of their voyages without a stopover exceeds 48 hours, by reference to the length of the voyage, the number of crew members and the passengers.

5.6 Modification of the voluntary payment period for the tax on economic activities charges in 2021

The June 10, 2021 Official State Gazette (BOE) published the Decision of June 8, 2021 by AEAT's Revenue Department, amending the voluntary payment period for the tax on economic activities in 2021 (national and provincial components).

The set period is between September 16 and November 22, 2021, both dates included.

The national and provincial charges must be paid through authorized credit institutions, with the payment document that will be sent to the taxpayer for this purpose. However, if the payment document is not received or is mislaid, the payment must be made using a duplicate, which can be obtained at the provincial or local AEAT tax offices for the province where the taxpayer's tax domicile is located, in the case of national charges, the offices for the province where the domicile at which the activity is conducted, in the case of provincial charges.

5.7 Tax on certain digital services. Implementation of rules on the location of devices and procedural obligations

The Tax on Certain Digital Services Law ("DST Law") has been implemented through Royal Decree 400/2021, of June 8, 2021, implementing the rules on the location of users' devices and the formal obligations relating to the tax, and amending the General Regulations on tax management and audit procedures and proceedings and implementing the common rules on procedures to manage, collect and inspect taxes, approved by Royal Decree 1065/2007, of July 27, 2007.

See our Alert dated June 9, 2021 for a summary of the main new provisions.

Later, the June 11, 2021 edition of the Official State Gazette published Order HAC/590/2021, approving self-assessment form 490. For a summary of this order, see our alert dated June 11, 2021.

Lastly, the June 29, 2021 edition of the Official State Gazette published the Decision of June 25, 2021 (see our alert on June 29, 2021), in which the DGT clarifies and interprets a few issues related to this tax.

5.8 Mutual agreement procedures. - Amendment of regulations on mutual agreement procedures concerning direct taxation

The June 9, 2021 edition of the Official State Gazette published Royal Decree 399/2021, of June 8, 2021, amending the regulations on mutual agreement procedures concerning direct taxation approved by Royal Decree 1794/2008, of November 3, 2008, and other tax provisions. The main new legislation was discussed in our alert on June 9, 2021.

5.9 Corporate income tax return forms for fiscal year 2020 have been published

The June 8, 2021 edition of the Official State Gazette (BOE) published Order HAC/560/2021, of June 4, 2021 approving the corporate income tax and nonresident income tax return forms for permanent establishments and for pass-through entities created in other countries but with presence in Spain, for the taxable periods commenced between January 1, 2020 and December 31, 2020.

In the same order instructions are issued in relation to the filing and payment procedure, and the general conditions and procedure for electronic fling are defined. Additionally, an amendment has been made to Order HAP/296/2016, of March 2, 2016, approving form 282, “Annual information return for aid received under the Canary Island Economic and Tax Regime and other state aid, derived from the application of EU Law” and establishing the conditions and procedure for filing it.

The main change is that the table with details of corrections to the amount on the income statement on page 19 of Form 200 (except for the correction in relation to corporate income tax) will have to be completed for all the adjustments on page 12 and page 13 of that form.

Notable among the other changes is the introduction of a new form (Schedule V) related to the reserve for investments in the Canary Islands, which is to be used to notify the materialization of advanced investments and their financing system and which have to be filed before filing the corporate income tax return for the taxable period in which the advanced investments are made.

Elsewhere, the same filing periods have been retained. The returns must be filed before July 26, 2021 if the taxpayer’s fiscal year is the same as the calendar year (July 20 if payment by direct debit is chosen).

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