Tax Newsletter

Spain

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1. Judgments

1.1 Corporate income tax. – The neutrality regime cannot be elected for a partial spinoff in which part of a business unit is transferred

Valencia High Court. **Judgment of December 14, 2022**

In a partial spinoff, company A transferred various properties to company B. The company performing the spinoff was engaged solely in property leasing, an activity that was continued, on the spun-off properties, by the beneficiary of the spinoff. The transfer of the properties was not accompanied by either human resources or by the liabilities related to the leasing activity. The neutrality regime was elected for the transfer, so the individual shareholder of A, who received shares in B, did not include any capital gain on their personal income tax return.

The tax authorities took the view that the neutrality regime could not be applied, because the items transferred in the spinoff did not constitute a line of business, but only part of one, and therefore the individual shareholder had to be liable for personal income tax on the capital gain obtained by transferring their shares in A.

The Valencia High Court adopted the tax authorities' view. According to the court, for the neutrality regime to be elected for partial spinoffs, the spun-off assets, rights and liabilities must be able to be used alone to conduct an independent economic operation, distinguishable from the other activities of the company performing the spinoff and identifiable at the acquiring company. In this case, a line of business was not spun off; instead an existing independent economic operation was divided into two, and the two companies continued conducting the leasing activity that the company performing the spinoff had previously conducted alone.

1.2 Personal income tax. – The validity of residence certificates issued by other tax authorities for the purposes of a tax treaty cannot be questioned

Supreme Court. **Judgment of June 12, 2023**

The Supreme Court examined the validity of residence certificates issued by the authorities of other states and concluded as follows:

(i) The domestic tax authorities and courts do not have the authority to decide on the circumstances in which a tax residence certificate was issued by another state with which Spain has signed a tax treaty. Those certificates are therefore presumed valid.

(ii) A signatory state to a tax treaty cannot unilaterally decide on the existence of a residence conflict, without applying the specific rules in the tax treaty for these cases. In other words, when faced with a residence conflict, the rules provided in the treaty for resolving this type of conflict must be applied, without regard to any domestic laws containing rules on the subject.

In particular, the "tiebreaker" rule relating to the "centre of vital interests" is broader than the "center of economic interests" concept in article 9.1.b) of the Personal Income Tax Law, and this will have to be taken into account for the appropriate purposes. The court recalled that, according to the commentaries on the OECD model

convention, to analyze the "centre of vital interests" regard must be had to the person's family and social relations, occupations, political, cultural or other activities, place of business, the place from which they administer their property, etc., and all these circumstances must be examined as a whole.

In other words, by contrast to Spanish law, it is not only economic relations that have a bearing, personal relations do too.

1.3 Personal income tax. – The rules governing personal income tax on transfers of property received under succession clauses or agreements are constitutional

Constitutional Court. **Judgment of May 24, 2023**

The "*apartación*" mechanism for agreed exclusion from forced heirship is part of usage and customs in Galicia and consists of a succession clause regarding a future inheritance, according to which the excluded heir acquires certain assets of the excluding individual (future decedent) while they are alive. Its tax treatment was until recently consistent with its nature as a transfer for no consideration by reason of the death of the taxpayer. In other words, (i) no capital gain or loss arose for the transferor (as if the assets had been acquired by inheritance) and; (ii) the transferee updated the value of the received assets. As a result, in the subsequent transfer of the assets by the beneficiary under the succession clause, they were only taxed on the income generated following acquisition of the assets under the succession clause.

However, Law 11/2021, of July 9, 2021, on measures to prevent and combat tax fraud (the Anti-Fraud Law; see commentary) amended article 36 of the Personal Income Tax Law, to lay down that the transferee under a succession clause must be subrogated to the same value and acquisition date as the assets had for the original owner, if the transferee transfers them at any time in the five year period following the clause, or following the death of the original owner, if sooner. Therefore, and subject to the limits mentioned, the law makes taxable the capital gain generated in the period between the original acquisition of the asset and its transfer under a succession clause or agreement. This amendment only applies to transfers of assets made after the Anti-Fraud Law came into force.

The Constitutional Court dismissed the appeal by the Galician regional government (Xunta de Galicia) and declared the amendment constitutional. According to the court, the legislature has broad latitude for designing taxes, which enables them to lay down anti-avoidance rules to prevent abusive tax planning. Additionally, the challenged article does not breach (i) the ability-to-pay principle, because it taxes a manifestation of real and actual wealth obtained from the transfer of the assets acquired under a succession clause; or (ii) the equality principle, because a transfer under a succession agreement or clause is distinguished from inheritance on death as defined in the law insofar as that transfer, similarly to gifts, has effects in the present.

Lastly, the court rejected that the challenged article has retroactive effects, because it only applies to transfers of assets made after its entry into force and does not affect the validity or terms and conditions of any succession clauses concluded before that date.

1.4 Nonresident income tax. – The burden of proof for abuse preventing the parent-subsidiary exemption from applying lies with the tax authorities

Supreme Court. Judgment of June 8, 2023

Article 14.1 h) of the Nonresident Income Tax Law contains an anti-abuse provision under which the parent-subsidiary exemption cannot be applied in respect of the payment of dividends where a majority of the parent company's voting rights are held, directly or indirectly, by individuals or legal entities not resident in the European Union (EU) or in the European Economic Area (EEA) (with an exchange of information provision), unless there are valid economic reasons and substantive business reasons supporting the formation and operations of the parent company.

Following an exhaustive examination of the case law of the Court of Justice of the European Union (CJEU), the Supreme Court concluded that it lies with the tax authorities, not with the taxpayer, to prove satisfaction of the conditions for application of this anti-abuse provision, for which they will have to use the various means of providing information contemplated in tax treaties or in the exchange of information directive.

Proof of an abusive practice requires the simultaneous existence of a number of objective circumstances evidencing that, despite formal fulfillment of the requirements laid down by EU legislation, the objective sought by this legislation has not been achieved; and of a subjective element consisting of the intention to obtain an undue advantage by creating artificial conditions.

1.5 Wealth tax. – Denying a nonresident's right to apply the income/wealth limit breaches free movement of capital

Balearic Islands High Court. Judgment of February 1, 2023

Article 31 of the Wealth Tax Law allows taxable persons to reduce (subject to certain limits) their prior gross wealth tax liability where the sum of that liability and their gross personal income tax liability is higher than 60% of their taxable income for personal income tax purposes.

This limit is not applicable for individuals liable for wealth tax as nonresident taxpayers. According to the Balearic Islands High Court, this difference in treatment breaches the right to free movement of capital, because it places a greater tax burden on nonresidents than on residents, which is not justified by an existing objective difference or reason in the public interest.

1.6 VAT. – The supply of tolling services for the parent company does not make the subsidiary a fixed establishment

Court of Justice of the European Union. Judgment of June 29, 2023 in case C-232/22

The CJEU examined in this judgment whether the supply of tolling services by a subsidiary to its parent company gives rise to the existence of a fixed establishment for VAT purposes in Spain.

The court recalled that, as it has stated in earlier judgments, this option is not available, unless the parent company has the right to dispose of the subsidiary's resources as if they were its own. Therefore, as a general rule, the supply of those services will not create, for the parent company, a fixed establishment in Spain, even if the work is carried out on an exclusive basis.

1.7 VAT/complete adjustment. – Where an incorrect VAT charge is adjusted, it must be analyzed whether a right to a refund must be recognized for the person who paid the input VAT

Supreme Court. Judgment of May 17, 2023

Tax auditors denied a company's right to deduct input VAT because the VAT had been incorrectly charged.

The Supreme Court concluded that, in these cases, under the complete adjustment principle, the tax authorities should have taken the steps needed to conclude as to whether the company had the right to a refund of those VAT payments. The taxable person cannot, therefore, be made to carry out a procedure for correction of self-assessment returns and refund of incorrectly paid tax.

TEAC made a similar finding in a decision dated May 23, 2023, in which it changed its earlier interpretation along these lines.

1.8 VAT. – The 10% reduced rate does not apply to house repairs where the legal customer for the services is the insurance company

National Appellate Court. Judgment of May 17, 2023

It was examined whether the 10% reduced rate could be charged on repair services provided at the homes of private parties, where the price of the repairs had been paid by an insurance company.

In contrast with the decisions delivered by various high courts, the National Appellate Court affirmed that, without needing to examine the clauses of the insurance policies, it has to be concluded that, where the customer for the repair service is the insurance company not the homeowner, the reduced rate cannot be charged. It also confirmed the administrative penalty for having charged that rate.

This conclusion appears to contravene the VAT Directive, insofar as it states that the reduced VAT rate is applicable (where the member state in question has availed itself of this option, which Spain has) to services for "repairing private dwellings". Despite this, the National Appellate Court did not consider it necessary to submit a question for a preliminary ruling to the CJEU on the interpretation of EU legislation.

1.9 Transfer and stamp tax. – The Supreme Court examines the tax liability relating to ownership proceedings for the resumption of a right of an ongoing nature

Supreme Court. Judgments of April 11, 2023 and May 16, 2023

Ownership proceedings enable unregistered situations to be adapted to registered ones; where, for example, the current owner of a property did not acquire its right from the person who appears as the registered owner, due to the existence of intermediate transfers that were not registered.

Article 7.2.C) of the revised Transfer and Stamp Tax Law provides that ownership proceedings are transfers of assets for the purposes of the tax, unless "evidence is provided that the tax has been paid or of an exemption or non-taxable nature with respect to the transfer, in which the related title is replaced with them and in respect of the same assets as those forming the subject-matter of either one or the other, except as regards the statute of limitations which will start to run from the date of the proceeding, record or certificate".

In these new judgments, the Supreme Court examined the treatment of ownership proceedings for transfer and stamp tax purposes and concluded as follows:

(i) The title that is attempted to be substituted or replaced through an ownership proceeding to resume interrupted rights of an ongoing nature is that relating to acquisition of the property by the taxpayer, not that relating to a prior transfer or transfers from the registered owner of the property to the taxable person. The exclusion of the taxable event where the payment has been made or the transaction is exempt or not taxable must relate, therefore, to the title that may be registered and which is attempted to be obtained to resume the right of an ongoing nature.

(ii) There is therefore one taxable event which consists of the decision formalizing approval of the ownership proceeding to resume the right of an ongoing nature.

(iii) The statute of limitations that might have been considered to expire with respect to the title that is replaced through the ownership proceeding does not extend to the taxable event formed by the decision on the ownership proceeding, for which the statute of limitations will run from the date of the decision approving it.

1.10 Tax on increase in urban land value / review procedure. – If a local authority has posed obstacles to a refund of the tax, it must be ordered to pay costs, even if it ultimately agreed to the refund in an out-of-court arrangement

Madrid High Court. Judgment of February 17, 2023

A taxpayer applied to a local authority for correction of a self-assessment for the tax on the increase in urban land value, and requested a refund of the tax payment made. The local authority did not expressly decide on either the application for correction or the subsequent appeal for consideration brought against rejection of the application by administrative silence.

In the subsequent judicial review proceeding brought by the taxpayer against the presumed dismissal of that appeal for consideration, the taxpayer relied on the constitutional court judgment dated October 26, 2021, which held to be unconstitutional and null and void certain articles of the legislation on the tax on increase in urban land value (alert dated October 26, 2021). The local authority nevertheless continued with its objection to the taxpayer's claim. Almost a year after that judgment was published, the local authority resolved to recognize out of court the taxpayer's right to a refund of the tax payment. In view of this, the court delivered a decision ordering termination of the proceeding due to out-of-court settlement of the taxpayer's claims, without ordering the local authority to pay costs.

In an appeal against this decision, brought by the taxpayer, Madrid High Court concluded that the local authority deserved to be ordered to pay costs as a result of its conduct throughout the proceedings (in the administrative proceeding and in the subsequent judicial review proceeding), even though it recognized the taxpayer's claims out of court.

1.11 Penalty procedure. – The base for the shareholder's penalty must take into account the surplus amount paid over by the company, if the administrative adjustment is based on the existence of a sham transaction

Supreme Court. Judgment of June 6, 2023 and judgment of June 8, 2023

Article 191.1 of the General Taxation Law states that the base for a penalty related to a tax infringement is the amount not paid over with the self-assessment as a result of the commission of the infringement.

In a judgment dated June 6, 2023, the Supreme Court examined what the base for the penalty must be in relation to adjustments to controlled transactions resulting in an increase of the taxable income of the individual shareholder on their personal income tax return, while the paying company's corporate income tax base is also reduced; and concluded that in these cases the base for calculating the shareholder's tax penalty must be the amount not paid over on their self-assessment, without deducting the amount paid over by the company.

The court recalled that the characterization as controlled transactions must be reflected consistently and uniformly across every implication and consequence of the adjustment made. In other words, "it cannot be suggested that the legal entity and the individual were actually the same person for the purposes of supporting a type of offset of the financial loss, while at the same time admitting that these are controlled transactions, a scenario that presupposes the existence of two different parties".

In its judgment of June 8, 2023, however, it reached the opposite conclusion (in other words, it accepted that the base for the shareholder's penalty must take into account the adjustment for the company) because, in this case, the auditors did not adjust the shareholder's position by making a pricing adjustment to its transactions with the company, but rather considered that they had reported a sham transaction for professional services provided through an interposed person. This case, according to the court, involved a confusion of taxable persons from a tax standpoint, and therefore the base for the shareholder's penalty must be calculated from the standpoint of the overall loss to the tax authorities.

The court criticized in this second judgment the different treatment given by AEAT with respect to similar situations; and concluded that legally (and more so where penalties are concerned) "it cannot be allowed, especially since nothing is supported, for the same legally defined event to be decided in such different ways; nor can the choice between applying article 16 of the General Taxation Law, or controlled transactions be left to the authorities' discretion (or at least with no support), without fatally harming the principles of the prevalence of the law and legal definition".

1.12 Penalty procedure. – It cannot be dismissed that a person acted on the basis of a reasonable interpretation of the law without analyzing the circumstances of the case

Supreme Court. Judgment of May 23, 2023

Article 179.2.d) of the General Taxation Law provides that a penalty cannot be levied if a person has acted on the basis of a reasonable interpretation of the law.

The Supreme Court concluded that finding whether a person is precluded from liability requires specific reasons supporting the reasonableness of the taxpayer's interpretation, as a specific part of the decision on fault.

For this reason, the court held that it had to set aside a penalty supported by a simple reference (by the tax authorities) to the absence of complete proof of the interpretation submitted by the taxpayer, without considering the circumstances of the case and the reasonableness of that interpretation. Finding otherwise would breach the principle of the presumption of innocence, because a penalty cannot be levied based purely on their objective conduct, without substantiating the existence of even the slightest amount of fault or intent to defraud.

1.13 Extension of liability. – If a penalty imposed on the main debtor is set aside, the extension of the tax debt to the director held to be liable must be set aside also

Supreme Court. Judgment of June 5, 2023

Article 43.1.a) of the General Taxation Law states that where legal entities have committed tax infringements, the de facto or de iure directors of those legal entities are secondarily liable if they did not perform the necessary acts incumbent on them to fulfill the tax obligations and duties, acquiesced to the non-fulfillment by those dependent on them or adopted resolutions that made the infringements possible. Their liability also extends to penalties.

The Supreme Court has clarified that this condition for secondary liability for tax requires the liable person to be a director and that the company has committed an infringement (objective requirement); in addition to which the liable party must be at fault and their conduct must have been a determining factor in the commission of the tax infringements by the company (subjective requirement). Therefore, if an infringement by the main debtor is dismissed, all the liability of the person held to be liable will cease to exist, not just in respect of the penalty, but also in respect of the assessment, if any, linked to that infringement.

1.14 Extension of liability. – The tax authorities cannot justify extension of liability for a company's debts to its director based only on their objective status as director

Catalan High Court. **Judgment of January 13, 2023**

A basketball club committed various tax infringements for which penalties were imposed. The tax authorities held to be secondarily liable for the penalties the person who was director when those infringements were committed, under article 43.1.a) of the General Taxation Law. In the administrative decision declaring liability, the tax authorities held that the appellant's conduct was fault-based, on the understanding that, by being part of the club's board of directors, they "allowed" the tax infringements at issue to be committed.

The court held that these reasons were insufficient for finding the existence of fault in the director's conduct (a necessary requirement under that article for holding the director liable for the debts and penalties of the main debtor). The court singled out that the club carried on very different types of activities (schooling, transferring and acquiring players, taking part in leagues, etc.), and for that reason it is not reasonable to consider (without any conclusive proof) that all the directors, simply because of their status as such, participated in the management and direction of all those activities.

The tax authorities, the court stressed, have to expressly explain what role the person held liable had in the actual management and direction of the company, and the relationship (causal link) between those direction activities actually carried out and the commission of the infringement in respect of which liability is extended. Acting otherwise would breach the principles of legal certainty, legitimate expectation and good administration and the principle of culpability.

2. Decisions

2.1 Corporate income tax. – In the assessment resulting from a tax audit tax credits already applied by the tax payer in prior years cannot be applied

Central Economic-Administrative Tribunal. Decisions of April 25 (6448/2021) and of May 29 (7228/2022) 2023

Article 119.4 of the General Taxation Law allows the taxpayer to request, in the assessment determined by a procedure for the application of taxes, the application of unused amounts for offset or deduction in the years that were audited. However, it does not allow those tax assets to be modified, by filing additional tax returns or applications for correction, after the procedure concerned has commenced.

TEAC concluded in these decisions that the law, drafted in these terms, does not allow to be applied in the tax authorities' assessment any tax assets that had not been used at the end of the period included in the scope of the review, but had already been used by the taxpayer at the time the adjustment was made. In other words, tax assets that are not available when the review by the tax authorities ends cannot be *disapplied*.

2.2 Corporate income tax. – The inclusion of prepayments on a corporate income tax self-assessment does not toll the statute of limitations for the right to apply for a refund of incorrect amounts included in those payments

Central Economic-Administrative Tribunal. Decisions of March 28, 2023 (3202/2022 and 3638/2022)

In these decisions, TEAC clarified that the corporate income tax return is not the same as an application for refund of prepayments made by the taxpayer in the period, because what is being requested (in these cases) is a refund of the final tax payable determined in the self-assessment (after subtracting the prepayments and withholdings that had been made). Therefore, the inclusion on that return of advance payments of tax cannot be considered a formally evidenced step by the taxpayer for the purposes of considering the statute of limitations to be tolled for the right to apply for a refund of incorrectly paid amounts in this respect.

The tribunal recalled that prepayments are defined in the tax legislation itself as separate obligations from the main tax obligation, and therefore an application for correction made by anyone seeking a refund of incorrect amounts in respect of a prepayment must necessarily relate to the self-assessment of the fraction in respect of which the payment was made and not to the annual self-assessment of the tax.

2.3 Personal income tax. – TEAC makes a definitive ruling on the allowance for descendants and child support payments made under a court decision

Central Economic-Administrative Tribunal. Decisions of May 29, 2023 (8646/2022) and (10590/2022)

TEAC examined application on a personal income tax return of (i) the allowance for descendants and (ii) the child support rules, and determined the following principle to make a definitive ruling:

(i) In cases involving guardianship and shared custody of children following a separation or divorce judgment, both parents are entitled to apply the allowance for descendants, which must be divided equally, regardless of the time the children live with each of them.

(ii) Under the legislation in force, the allowance for descendants is incompatible with the special treatment for child support payments under a court decision (consisting of a reduction to the tax scale), which can only be applied by the parent who pays those child support payments and who has not been assigned guardianship and custody of the children, not even on a shared basis.

(iii) The allowance for descendants may be applied also, however, by any parent who contributes to meeting their financial needs, even if they have not been assigned guardianship and custody of the children, and they also do not make support payments under a court decision.

2.4 Personal income tax. – The tax on late-payment interest that was not reported under the principle determined by the Supreme Court in 2020 does not need to be adjusted, even though this principle was amended in 2023

Central Economic-Administrative Tribunal. Decisions of May 29, 2023 (2478/2022 and 8937/2022)

The Supreme Court concluded, in a judgment dated December 3, 2020 (appeal 7763/2019) (see our December 2020 newsletter), that any late-payment interest paid by the tax authorities when they refund incorrect payments is not subject to personal income tax because otherwise its compensatory purpose would be prevented from being met.

However, in a judgment dated January 12, 2023 (appeal 2059/2020) (see our January 2023 newsletter), it amended this principle and concluded that this is a capital gain which must be included in the general component of taxable income; an interpretation expressly accepted by the DGT in resolution V0238-23 of February 13, 2023.

TEAC concluded that personal income tax self-assessments filed without including late-payment interest (before the Supreme Court changed its principle) must be protected by the principle of legitimate expectations, which prevents the tax authorities from adjusting, to the detriment of the taxpayer, past scenarios in which the taxpayer applied the case law principle in force when their self-assessment was filed.

2.5 Personal income tax. – To determine tax residence in Spain each day must be analyzed according to the available proof

Central Economic-Administrative Tribunal. Decisions of March 28 (4045/2020) and of April 25 (4812/2020) 2023

Under the Personal Income Tax Law, it must be considered that a taxpayer has their principal residence in Spain, among other tests, where they spend more than 183 days, in a calendar year, in Spain. Spanish tax resident status also determines personal income taxpayer status. In these decisions, TEAC concluded that, when analyzing the time spent in Spain test, three types of days must be taken into account:

(i) Days with certified presence: those in which the time spent by the person in Spain or abroad may be evidenced with an unquestionable means of proof (passport, transport tickets, bank account movements). In these cases, after the person's presence in a country has been evidenced (even if for a few hours), the day concerned automatically counts, without needing to evidence time spent over several consecutive days.

(ii) Presumed days: those in respect of which, although there is no direct proof, presence in Spain may be presumed indirectly, due to the small number of consecutive days falling between two certified presences. These days count as time spent in the country, unless a certified presence outside Spain is evidenced.

(iii) Days of sporadic absence: those which, according to the wording of the law, are added to the days of actual presence (equal to the sum of certified presence days and presumed days) to determine whether the time spent in Spain is longer than 183 days.

2.6 Corporate income tax. – The correction of accounting errors has effects in the fiscal year in which they are detected, even if the financial statements are restated

Central Economic-Administrative Tribunal. Decisions of April 25, 2023 (3751/2021 and 5941/2021, Principle 1 and Principle 2)

In these decisions, TEAC applied the principle determined by the Supreme Court in its judgment of October 25, 2021 (appeal 6820/2019) (November 2021 newsletter) and concluded that any accounting errors detected in the financial statements for prior periods must be corrected in the fiscal year in which those omissions or inaccuracies are noticed.

It clarified in this respect that, when the Spanish Chart of Accounts states that that correction must have retroactive effects, it refers to the fact that, in the subsequent period, an adjustment will have to be made to recognize in the entity's equity the cumulative effect of variations in assets and liabilities derived from prior periods; not to the fact that the effects of the adjustment must be made valid retroactively in those prior periods.

The fact that the financial statements for the period in which the error existed are restated to correct those already filed and they are registered at the commercial registry does not detract from this, because that restatement (in addition to being precluded by accounting rules, which only allow this where the financial statements are not final) will have effects in the period when the correction is made.

For all these reasons, TEAC concluded that self-assessments for prior years cannot under any circumstances be corrected due to the existence of an accounting error.

2.7 Nonresident income tax. – To apply tax benefits under tax treaties a tax residence certificate issued for the purposes of the tax treaty must be produced

Central Economic-Administrative Tribunal. Decisions of February 23 (4129/2020) and of April 25 (3967/2020 and 4104/2020) 2023

The issue consisted of determining what means of proof the taxpayer must produce to evidence their tax residence for the purposes of a tax treaty. Having such tax-resident status allows the person to be taxed in accordance with the distribution of taxing powers between the signing states and ultimately allows them to apply the tax benefits under the tax treaty.

TEAC recalled that the solution to this issue lies in the Spanish tax legislation itself, which determines the cases where an “ordinary” certificate is required (only evidencing residence in a given country), and those where the certificate has to be “qualified” (meaning that besides evidencing that the interested party is tax resident in that country it also has to evidence that they are resident for the purposes of the tax treaty). Both certificates have to be issued, in every case, by the competent tax authorities.

The ordinary certificate, according to TEAC, is required, for example, where exemptions under the domestic legislation are applied or for the deduction of expenses by EU residents. Whereas a qualified certificate will need to be produced where the taxpayer seeks to apply the tax benefits provided in the tax treaty itself.

3. Resolutions

3.1 Corporate income tax. - Obtaining administrative permits for an activity is not a purely preparatory step for the purposes of applying the exemption for capital gains on transfers of shares

Directorate General for Taxes. Resolution V0863-23 of April 12, 2023

The DGT analyzed a transfer of shares in a company that will engage primarily in conducting and operating online gambling activities. When the transfer was made, it had carried out all the tasks and formalities needed to obtain the necessary administrative permits to carry on the activities, and incurred significant expenses and investments to obtain them (the value of those administrative permits is greater than 50% of the value of the company's assets).

According to the DGT, the capital gain obtained on the transfer of the shares may benefit from the exemption under article 21 of the Corporate Income Tax Law, if, among other requirements, the commencement of an economic activity has taken place, in other words, of an organization, for the taxpayer's own account, of means of production and human resources, or of either of them, belonging to the taxpayer itself or to third parties, for the purpose of participating in the production or distribution of goods or services in the market.

Although the confirmation of those circumstances is a question of fact which will have to be analyzed, in each case, by the verification and investigation bodies, it appeared in the described case that the activity could be considered to have commenced, insofar as the tasks performed were not simply preparatory for the activity of selling online gambling, but instead were a stage of that sales activity which determined a sequence of steps clearly geared towards the production or distribution of goods and services in the market.

3.2 Personal income tax. – Compensation paid to workers after their dismissal does not lose earned income status

Directorate General for Taxes. Resolution V0831-23 of April 10, 2023

A bank employee obtained a mortgage with advantageous terms due to being a worker at the bank. Later their employment contract was terminated in a collective layoff procedure, in which it was agreed that the same terms and conditions would continue to be applied to serving employees in relation to their loans.

The DGT concluded that the income in kind that the worker will receive after being dismissed, equal to the difference between interest at the market rate and at the rate agreed with the bank, will be classed as earned income, insofar as it derives from a prior employment relationship.

3.3 Personal income tax. – A brief period of unemployment does not mean having to forfeit the right to continue applying the special regime for workers sent to Spain

Directorate General for Taxes. Resolution V1034-23 of April 26, 2023

An individual who is going to elect the special regime for workers sent to Spain asked whether they will be excluded from the regime if they subsequently lose their job, if this occurs within the period for applying that regime (in other words, in the year they acquire tax residence in Spain and the following five years).

The DGT reiterated the interpretation given in resolution V2652-17 of October 18, 2017, by concluding as follows:

(i) A strict interpretation of the legislation would preclude the ability to apply the regime for taxpayers who, due to being unemployed or inactive, cease to carry out the work that made them eligible for the regime, even if transitionally for very short periods.

(ii) However, the purpose of the regime is to attract talent to Spain, and therefore it is reasonable for the right to apply it not to be forfeited if the taxpayer is unemployed or inactive briefly, for reasons beyond their control; in other words, if in a short period they commence a new employment relationship fulfilling the requirements for the regime.

3.4 Inheritance and gift tax. – Nonresidents are not taxable in Spain on the inheritance of shares in nonresident entities whose real estate assets in Spain represent less than 50% of the value of those companies

Directorate General for Taxes. Resolution V1207-33 of May 9, 2023

A person who is tax resident in Germany is going to inherit from their father, also tax resident in Germany, shares in a German company with the form of a GmbH & Co. KG. Its assets include a real estate asset which is below 50% of the entity's assets.

According to the DGT, this person will not be subject to inheritance tax as a nonresident taxpayer, because (i) they are not resident in Spain but instead in Germany, and besides, (ii) they are not going to acquire assets or rights which are located, may be exercised or have to be fulfilled in Spain.

4. Legislation

4.1 New personal income tax credits are created as an incentive for the use of electric vehicles and the reduced VAT rate on food is extended

Royal Decree-Law 5/2023 of June 28, 2023. was published in the Official Gazette for June 29, 2023. Besides creating new personal income tax credits as an incentive for using electric vehicles and extending the reduced VAT rate on food, it allows accelerated depreciation for recharging infrastructure for corporate income tax purposes and extends certain benefits for those affected by the volcano eruption on the island of La Palma.

These tax measures were analyzed in our alert dated June 30, 2023.

4.2 Publication of the annual equivalent rate for the third quarter of 2023, to characterize certain financial assets for tax purposes

The Official State Gazette for June 26, 2023 published the decision of June 20, 2023 of the Office of the General Secretary for the Treasury and International Finance, which sets out the effective annual interest rate for the third quarter of 2023, to characterize certain financial assets for tax purposes. The rates are as follows:

- Financial assets with a term equal to or shorter than four years: 2.597 percent.
- Assets with terms higher than four, but equal to or shorter than seven years: 2.547 percent.
- Assets with ten-year terms: 2.807 percent.
- Assets with fifteen-year terms: 3.074 percent.
- Assets with thirty-year terms: 3.182 percent.

4.3 Approval of forms 504, 505 and 507 in relation to excise taxes on movements of guaranteed consignments

Law 11/2023 of May 8, 2023 made excise tax amendments in relation to guaranteed consignment procedures, introduced the new concepts of "consignor" and "certified consignee" and removed the concept of "authorized recipient".

To implement the new procedures introduced by that law, Order HFP/626/2023 of June 14, 2023, published in the Official Gazette for June 17, 2023, has approved the implementing rules in relation to movements of guaranteed consignments, set out the provisions governing registration on the regional register and, lastly, approved the following tax forms:

- Form **504**: "Application for authorization of consignment or receipt of products subject to excise taxes on production, bound for or coming from other European Union countries."
- Form **505**: "Authorization of consignment or receipt of products subject to excise taxes on production, bound for or coming from other European Union countries."
- Form **507**: "Application for refund under the guaranteed consignment system."

4.4 Implementation of VAT relief for the armed forces and excise tax relief

Published in the Official State Gazette for June 14, 2013, Royal Decree 443/2023 of June 13, 2023 has approved the Regulations implementing tax relief for the armed forces of EU member states forming part of a defense effort under the common security and defense policy and sets out the procedure its application, and amends the Regulations on excise and other special taxes, approved by Royal Decree 1165/1995 of July 7, 1995.

Although the decree entered into force on June 15, 2023, the regulations implementing the tax relief relating to the armed forces will take effect from July 1, 2022 and the amendment of the Regulations on excise and other special taxes, from January 1, 2022.

The later Official Gazette for June 22, 2023 published Order HFP/645/2023 of June 20, 2023, approving form 381 for applications for refunds of input VAT paid by the armed forces of any EU member state other than Spain on acquisitions related to efforts within the scope of the common security and defence policy.

Additionally, this order makes changes to the existing exemption certificate for VAT and for excise taxes on supplies of goods and services made in the context of diplomatic or consular relations and on supplies to international organizations or to the armed forces of member states forming part of NATO, other than Spain, to adapt them to the new relief introduced for defense efforts by the armed forces of a member state in another country in the context of the common security and defence policy and with respect to the EU's measures in response to the COVID-19 pandemic.

4.5 Publication of the form for reporting the temporary solidarity tax on large fortunes

The Official State Gazette for June 12, 2023 published Order HFP/587/2023 of June 9, 2023, approving form 718 on the temporary solidarity tax on large fortunes and determining the place, manner and periods for filing it, as well as the conditions and procedure.

For a summary of the main new tax legislation introduced by the order, see our alert drawn up on the same date.

4.6 The exempt threshold for providing security for split or deferred tax payments granted by autonomous community authorities is raised from €30,000 to €50,000

Published in the Official State Gazette for June 10, 2023, Order HFP/583/2023 of June 7, 2023 raises from €30,000 to €50,000 the exempt threshold for the obligation to provide security with applications for deferred or split payments of debts in respect of devolved debts that the autonomous communities are responsible for collecting.

This order came into force on June 11, 2023 and any applications for deferred or split payment which were being processed on that date will continue to be governed by the provisions in the legislation in force on the filing date of the application concerned.

That threshold had already been increased in relation to debts governed by public law managed by AEAT and by the bodies and agencies of the central government public treasury under Order HFP/311/2023 of March 28, 2023 (see our March 2023 newsletter).

4.7 Change to the voluntary payment period for tax on economic activities charges for 2023 in respect of the national and provincial amounts

Published in the Official State Gazette for June 1, 2023, the decision of May 25, 2023 by the Revenue Department at AEAT, amends the voluntary payment period for tax on economic activities charges for fiscal year 2023 in respect of the national and provincial amounts and determines the place for payment of those charges. That period runs between September 15 and November 20 2023.

5. Miscellaneous

Notification of completion of the internal procedures for application of the multilateral treaty with Bulgaria and South Africa

The Official State Gazette for June 10, 2023 published the Notification by Spain to the secretary general of the OECD, as depositary of the multilateral convention to implement tax treaty related measures to prevent base erosion and profit shifting (BEPS), done in Paris on November 24, 2016.

By making this notification Spain has confirmed conclusion of the internal procedures for the convention's provisions to take effect in relation to the tax treaties signed with Bulgaria and South Africa.

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