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TAX NEWSLETTER

GARRIGUES

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1. Supplementary returns filed to implement tax auditors' interpretation cannot result in surcharges

National Appellate Court concludes in two judgments that surcharges cannot be assessed where the supplementary returns are filed to implement a tax audit interpretation in later years falling outside the scope of that audit.

The General Taxation Law contains surcharge rules applying where parties with tax obligations file late returns voluntarily and spontaneously, in other words without a prior request from the tax authorities. These surcharges vary according to the length of time that has run from the end of the voluntary filing period. They amount to 5%, 10% or 15% if the return is filed after up to three, six or twelve months, respectively; and to 20%, if they are late by twelve months or more. In this last case, late-payment interest also becomes chargeable in respect of the period that has run from the end of those twelve months.

These surcharges apply also where supplementary returns are filed, in other words, where the return was filed within the time limit but that return was later corrected and resulted in a greater amount of tax to be paid over or in a lower amount to be refunded than in the original return.

In practice, the tax authorities are imposing these surcharges indiscriminately without regard to the reason for filing a supplementary return. The courts have been clarifying for some time, however, that those surcharges are not allowed to be assessed where the supplementary return originated from a procedure by the authorities that has effects on periods falling outside the scope of the review. This often happens for example where the assessment proposed in a notice is based on tax credits that the party with tax obligations has already used in returns for later periods, which forces the taxpayer to file supplementary returns for those later years if the auditors do not broaden the scope of their work.

This view was taken by the National Appellate Court in judgments dated December 13 and December 21 2018, in which it concluded that late-filing surcharges are not allowed to be assessed where the returns result from audit work on prior years.

2. Judgments

2.1 Corporate income tax.- Fair price must be reported in the fiscal year when the property is occupied

Supreme Court (Criminal Chamber). Judgment of February 13, 2019

As a result of a property acquisition by eminent domain conducted in a procedure for urgent cases, the public authority paid a fair price to the owner of the acquired property (a company). The fair price was determined in 2009, although it was paid in two instalments, between 2009 and 2010, and occupancy did not take place until 2010. The company did not include the income arising from acquisition by eminent domain on its corporate income tax returns for either 2009 or 2010; although it later filed a supplementary return for 2010 to include that income. This supplementary return, however, was filed after receiving a summons to make a statement as a party under investigation for a criminal offense against public finance in relation to corporate income tax for fiscal year 2010.

It was submitted to the Supreme Court that the income should actually have been reported in 2009, not in 2010, which rendered any potential criminal conviction null and void because the proceeding related to fiscal year 2010. And, for this same reason, there would be no criminal liability for the

company (in addition to that of the director) because the liability of legal entities was not recognized in the legislation until the reform of criminal law in 2010.

In relation to these arguments, the Supreme Court concluded that the income arising from a property acquisition by eminent domain must be recognized for corporate income tax purposes in the period when occupancy of the acquired elements occurs. According to the court, this may be concluded from rulings by the Spanish Accounting and Audit Institute (ICAC), according to which the assets must be retired when they are handed over by signing the certificate recording the delivery of the price and occupancy, at which time the relevant gain (or loss) must be recognized in the income statement of the company concerned.

2.2 Nonresident income tax.- The CJEU reinterprets eligibility for exemptions in parent-subsidiary and interest and royalties directives

Court of Justice of the European Union. Judgments rendered on February 26, one, in joined cases C-116/16 and C-117/16, and the other, in joined cases C-115/16, C-118/16, C-119/16 and C- 299/16.

As discussed in depth in our commentary dated March 6, 2019, the CJEU has rendered two judgments bringing relevant elements for interpreting the parent-subsidiary directive and the interest and royalties directive. For further information on these judgments, that commentary is available HERE.

2.3 VAT.- VAT refund may be denied if formal requirements are fulfilled after assessment becomes final

Court of Justice of the European Union. Judgment of February 14, 2019, case C-562/17

Spanish law sets out special treatment allowing traders and professionals not established in Spanish VAT territory, or in the Canary Islands, Ceuta or Melilla, to obtain a refund of input VAT on acquisitions and imports of goods and services made in that territory.

In the case giving rise to this judgment the authorities had denied a refund of the input VAT incurred by a Swiss company because the invoices had formal defects which were corrected only after denial of the refund had become final, as a result of which the Spanish authorities stood by their decision not to grant a refund.

The CJEU supported this decision by arguing that EU legislation does not preclude a member state from placing time limits for correcting invoices with errors to exercise the right to a VAT refund, provided the equivalence and effectiveness principles are met.

2.4 Transfer and stamp tax.- Supreme Court clarifies taxable amount for payment of mortgage debt with property

Supreme Court. Judgments of January 31, 2019, February 6, 2019 and February 4, 2019.

The Supreme Court examined in three judgments the taxable amount for transfer tax purposes (as a transfer for consideration) in transactions for payment of mortgage debts with property.

The court concluded that, according to a combined interpretation of article 10 and article 46.3 of the Revised Transfer and Stamp Tax Law, the taxable amount for these transactions is the higher of (i) the amount of the outstanding mortgage debt that is discharged through the transaction, and (ii) the actual value of the transferred property.

2.5 Tax on increase in urban land value.- Payment of debts with property is exempt even if the transferee is not the mortgage

Madrid Court no 19. Judgment of February 06, 2019

Under the Local Finances Law, payment of mortgage debts with property transferred in exchange for discharging those debts is exempt from the tax on increase in urban land value.

Madrid Court no 19 concluded, in a recent judgment, that this exemption must be considered applicable also when the property is transferred to a third party other than the mortgage lender, if the mortgage lender accepts the property as payment.

2.6 Cadastral valuations.- In certain exceptional scenarios the cadastral value may be challenged when appealing against real estate tax assessments

Supreme Court. Judgment of February 19, 2019

A supreme court judgment settled the debate over whether the cadastral valuation of a property (not appealed at the time and therefore final) may be challenged when challenging a real estate tax assessment.

The court confirmed that an indirect challenge of this type is possible in certain exceptional scenarios allowing the principle of legal certainty to give way to other principles.

The judgment examined one of the scenarios considered exceptional: the property had been classified as urban and appeared with this classification in the notice of the relevant cadastral valuation. The local authority used this classification to issue the real estate tax assessments. The property, however, was an urban property for development on which an urban development plan had not been approved. According to the Supreme Court's case law and the judgments of various high courts (rendered after that notice of the cadastral value), any land awaiting approval of the plan for its development must be classified as rural land.

The Supreme Court concluded that if case law rendered after the individual notice of cadastral values evidences that the land was not correctly classified, the real estate taxpayer is allowed to question the cadastral valuation when challenging the assessments of that tax (indirect challenge). The justification for this is that when the notice of the comparative valuation method report and the cadastral value was issued, the taxable person could not know that later case law, and therefore could not be expected to challenge the cadastral value directly.

2.7 Cadastral valuations.- An approved urban development plan is not sufficient to classify land as urban for cadastral purposes

Valencia High Court. Judgment of December 20, 2018

A judgment by Valencia High Court examined the case of a plot of land for which an urban development plan had been approved more than a decade earlier, although the programmed development work had not started. For this reason, the court concluded that it must be treated as rural land for the purpose of determining its cadastral value.

The court specified, on the basis of case law from the Constitutional Court, that the cadastral value for land must be determined according to "what is there" and not what planning provisions say "should be there".

2.8 Tax procedure.- Information obtained from information collection procedure is only allowed to be used in another procedure if the first has expired

Supreme Court. Judgment of February 27, 2019

In a case examined by the Supreme Court, the tax authorities initiated a limited review procedure which ended with the issue of an assessment. The information used to issue that assessment had been obtained in a taxpayer information audit initiated almost two years earlier, in which the authorities never rendered a decision bringing it to an end.

The Supreme Court accepted that the tax authorities are allowed to use in certain procedures the information obtained in others. It affirmed, however, that the items of proof and documents gathered in information collection procedures only remain valid and effective if all the various types of protection afforded to citizens have been observed.

For these purposes, it needs to be taken into account that the procedures for obtaining information are subject to a time limit (six months in the case of taxpayer information audits); and therefore if that time limit is not observed, the tax authorities are only allowed to use the proof obtained if the procedures have been held to have expired and ended.

2.9 Tax procedure.- New information may be submitted in economic-administrative jurisdiction

Supreme Court. Judgment of February 21, 2019

The Supreme Court reiterated the theory it established in a judgment rendered on September 10, 2018 (summarized in our Tax Newsletter - September 2018) on the ability to plead information and produce items of proof in the economic-administrative jurisdiction that were not pleaded or produced to the tax management or audit authorities.

The court mentioned as an exception cases where the late production of documents is due to abuse or malicious purposes on the part of the interested party, which must appear justified in the case file.

3. Decisions

3.1 VAT.- Where the price agreed with the tax authorities is inclusive of VAT, the excess output VAT must be refunded to the supplier

Central Economic-Administrative Tribunal. Decision of December 12, 2018

TEAC reviewed an application for a refund of incorrect payments filed by a local council against an incorrect charge (at the standard instead of the reduced rate) by one of its suppliers.

According to the court, the local council is not entitled to a refund of the excess amount charged because the VAT rules relating to the price of government contracts determine that the price of these contracts includes VAT, so the agreed fee cannot be changed (either increased or decreased) as a result of fluctuations in the VAT rate. In other words, public authorities are required to pay the overall price for the contract and the related distribution between taxable amount and tax charge is irrelevant.

In short, it is the supplier that is entitled to a refund of the excess amount charged, due to being the party actually harmed by the error made.

This decision reiterates the interpretation in the decision of July 17, 2014.

3.2 Audit procedure.- TEAC alters its interpretations on the calculation of certain audit time periods

Central Economic-Administrative Tribunal. Decision of February 19, 2019

TEAC examined, in a recent decision, how certain time periods in the context of an audit must be calculated:

(i) The maximum length of audit work: TEAC adapted its interpretation to the Supreme Court's interpretation in its judgment of April 4, 2017 and affirmed that the time period ends on the same date in the month concerned as the date of the notification of the start of the audit. Before this decision, TEAC had argued that the time period ended on the day before the day of the month relating to the start date of the period.

(ii) Calculation of the time period, after an accepted notice of assessment, for the assessment to be deemed to have occurred: once a month has elapsed from when an accepted notice of assessment is signed, the assessment is deemed issued and notified if a decision by the assessment body has not been notified in that time period (with any of the contents envisaged in article 156.3 of the General Taxation Law). According to TEAC, this one month period is calculated from date to date and is applicable to audits initiated before or after January 1, 2018.

It must be taken into account that this interpretation is set only to determine when the assessment is deemed issued and notified, and does not clarify how the time periods for appealing against the assessment and payment of the tax debt must be calculated, and therefore, in principle, they must continue to be calculated date to date plus one day.

3.3 Economic-administrative procedure.- It is mandatory to join economic-administrative claims filed against an assessment and a penalty if failure to join them alters jurisdiction

Central Economic-Administrative Tribunal. Decision of December 12, 2018

A taxpayer was issued an assessment and imposed a penalty. The taxpayer filed an economic-administrative claim with Madrid Regional Economic-Administrative Tribunal (TEAR), whereas, against the penalty, by reason of the amount, it filed an economic-administrative claim with TEAC.

In this context, TEAC recalled that, although the law allows two separate claims to be filed with two different authorities, the joining of those claims, insofar as they relate to an assessment and the associated penalty and that joining them alters the jurisdiction rules, is mandatory

In the specific case brought, Madrid TEAR had already settled the claim relating to the assessment, and therefore the mandatory joining of claims with Madrid TEAR could not be done. Despite this, as a result of the analysis described above, TEAC ruled that the jurisdiction to hear the claim against the penalty lay with Madrid TEAR, and for that reason it decided to forward the proceeding to that tribunal to settle the claim relating to the penalty.

3.4 Requests for information.- A general request for information on the legal profession as a whole is precluded by the law

Central Economic-Administrative Tribunal. Decisions of February 14, 2019

TEAC has settled two economic-administrative claims filed against two requests for information. In both decisions TEAC took into account the interpretation set by the Supreme Court in a judgment rendered on November 13, 2018 (Tax Newsletter – September 2018), but reached different conclusions in each case, according to the differences between them:

(i) In one case, it set aside the request sent to the General Council of the Spanish Legal Profession asking for information regarding the lawyers and court procedural representatives who had taken part in court proceedings in two specific years at any court or tribunal based anywhere in Spain. Among other information, they requested the dates of their participation in the proceedings, the amounts disputed in the lawsuit, and the identities of their clients. TEAC set aside the request because its contents were practically identical to that set aside by the Supreme Court in its judgment.

(ii) By contrast, it confirmed a request sent to a specific bar association requesting information relating to the reports or opinions issued by that association in relation to invoices of its members and, only in relation to them, identification of the proceeding in which those invoices had been disputed and the invoices concerned were requested. TEAC held that in this case the request is sufficiently specific and defined and that, additionally, it had tax relevance. It concluded therefore that the interpretation in the discussed supreme court judgment of November 13, 2018 did not apply and the request was valid.

4. Rulings

4.1 Personal income tax.- Amounts yet to be decided in arbitral award are reported when the award becomes final

Directorate General for Taxes. Ruling V0127-19 of January 18, 2019

The Personal Income Tax Law contains a special rule on when to recognize income not paid in full or in part because the right to receive it or its amount have yet to be determined in a court judgment. In these cases, the unpaid amounts are attributed to the tax period in which the judgment becomes final.

The DGT ruled that this special recognition rule applies equally where, instead of a court judgment, the right to receive a type of income or its amount depend on an arbitral award.

4.2 Personal income tax.- The ratchet is considered newly generated where its determination depends on a board resolution

Directorate General for Taxes. Ruling V0106-19 of January 16, 2019

The shareholders at a company signed an agreement in 2012 in which they undertook to approve a ratchet system for certain executives. The specific intention was for the executives that remained at the company to have an incentive linked to the sale of shares in the company, and its amount would depend on the price obtained in the sale.

The incentives system was ultimately approved in March 2016 and it was left up to the board to decide, when the time came, on who the beneficiaries would be and the amount to be received by each one. In February 2017 a change of control of the company occurred and, after the relevant board resolution was adopted, the incentive was paid.

The DGT concluded that the incentive to be received as result of that change of control is classed as normal salary income, in other words, without entitlement to the 30% reduction, because it was not generated over a period longer than two years.

The reason for this is that the right to the incentive did not arise with the shareholders' agreement in 2012 (because at that time only an undertaking to approve the incentives plan took place) but in 2016 and the period between this 2016 plan and the change of control was not longer than two years. Moreover, entitlement to the incentive was newly created with the board resolution (after the change of control occurred), and therefore there is no reason to consider that the incentive had a generation period longer than two years.

4.3 Personal income tax.- Multiyear income obtained before 2015 affects the income obtained in later years

Directorate General for Taxes. Ruling V0108-19 of January 16, 2019

Since 2015, multi-year income has benefitted from special treatment (30% reduction) where it is generated over more than two years if, additionally, in the previous five tax periods no other salary income was received and given the same treatment (with certain particular provisions on income arising from termination of employment). Before 2015, the law did not lay down this second

requirement but instead a more general condition that the income could not be periodical or recurring.

In this case, the DGT examined the case of a worker who (i) received in 2017 an amount of salary income with a generation period longer than two years, and (ii) had already received another amount in 2013 which received the special treatment for multi-year income.

According to the DGT, the new requirement linked to something that had happened in the previous five tax periods came into force on January 1, 2015, and no transitional regime had been provided in the law. For this reason, the income obtained in 2017 cannot benefit from the 30% reduction, because in 2013 (four years earlier) an amount of income was received that was treated as multiyear income.

4.4 Personal income tax.- Income from work performed before moving to Spain is not treated as obtained there

Directorate General for Taxes. Ruling V0088-19 of January 15, 2019

The worker was beneficiary of a restricted stock units plan when she was resident in Ireland. In 2018 she moved to Spain and elected the special tax regime for inbound expatriates (which allows the worker to be taxed in Spain only on the income obtained there). In that same year, 2018, the restricted stock units were cashed out.

The DGT took the view that the salary income generated as a result of cashing out the restricted stock units cannot be treated as income obtained in Spain, because the restricted stock units were awarded as compensation for work performed in another country before the worker moved to Spain. As a result, it is not taxable in Spain or therefore subject to withholding tax there.

4.5 VAT.- VAT group treatment is not applicable to two Spanish subsidiaries of a non-established parent company

Directorate General for Taxes. Ruling V0039-19 of January 4, 2019

In line with the letter of the Spanish law, the DGT took the view that the ability to apply the VAT group treatment is confined to what are known as "vertical groups", meaning groups in which there is a parent company that has firm financial, economic and organizational links with its subsidiaries.

This parent company must be established in Spain, since the article did not determine that two companies established in Spanish VAT territory wholly owned by a non-established company satisfy the requirements to be eligible for the special treatment (unlike what happens in the corporate income tax treatment for consolidated tax groups).

5. Legislation of interest

5.1 Change to stamp tax on deeds for loans secured with a mortgage

Law 5/2019 of March 15, 2019, on real estate loan agreements was published in the Official State Gazette (BOE) on March 16.

In relation to stamp tax it introduced new legislation determining that the benefits and exemptions established for taxable persons in this or other legal provisions in relation to the variable stamp tax charge (notarial documents) are applicable only where the taxable person is determined as established in paragraph two of article 29 of the Revised Transfer and Stamp Tax Law (unless expressly provided otherwise).

In other words, as a general rule, this means that these benefits and exemptions will not be applicable to loans secured with a mortgage in which the lender is treated as the taxable person.

5.2 Approval of the 2018 personal income tax and wealth tax return forms

Order HAC/277/2019 of March 4, 2019, approving the forms for 2018 personal income tax returns and wealth tax returns was published in the Official State Gazette (BOE) on March 13, 2019 and notably specifies the following:

(a) **Time periods for personal income tax and wealth tax returns**:

- All taxpayers may obtain their **draft return** and file it via the draft/return processing service (RentaWEB), regardless of the types of income obtained.

- The **filing period** for the draft return and both the personal income tax and wealth tax returns falls between April 2 and July 1, 2019, inclusive.

  If the payment of both taxes is to be made directly from a bank account, the period will end on June 26, 2019, unless only the second installment is to be paid from a bank account, in which case the period ends on July 1.

  Taxpayers who pay in installments and do not wish to pay the second installment at an authorized depository institution will have until November 5, 2019, inclusive, to pay that installment by way of form 102.

  If the first installment is to be paid directly from a bank account, taxpayers will have until September 22, 2019, inclusive, to pay the second installment in the same manner.

(b) Regarding **how to file returns**, this year the option of obtaining the personal income tax return and the related payment or refund documents on a printed form has disappeared; in other words, the personal income tax return must be filed online (on AEAT's website), or over the phone, or at AEAT's offices by requesting an appointment, and taxpayers also have the option of confirming the draft return at the offices authorized by the autonomous communities, cities with a charter of autonomy and local authority entities. The wealth tax return, as in previous years, may only be filed online.

(c) **Various changes have been made to the personal income tax return**, notably in the caption for "income from economic activities under the direct assessment method", two new boxes have been added for tax deductible expenses to identify utility costs (where part of the taxpayer's principal residence is used for the economic activity) and the living expenses incurred by the taxpayer in carrying on their activity.

5.3 Changes to the return forms for the tax on fluorinated greenhouse gases

On March 6, 2019 the Official State Gazette (BOE) published Order HAC/235/2019 of February 25, 2019, amending form 586 ("Recapitulative return on transactions with fluorinated greenhouse gases") to comply with the amendment introduced by Royal Decree 1075/2017 of December 29, 2017 to the Fluorinated Greenhouse Gases Regulations (approved by Royal Decree 1042/2013, of December 27, 2013).

According to this amendment to the regulations, all transactions for acquisitions, imports, intra-Community acquisitions, sales or supplies, or self-supplies of fluorinated greenhouse gases performed by manufacturers, importers, intra-Community acquirers, resellers or waste managers must be reported on the form, regardless of whether they are subject, not subject, or exempt from the tax. Under the previous rules on the return (in Order HAP/369/2015, of February 27, 2015), the obligation to file a return only arose in relation to transactions for purchases, sales or supplies of fluorinated gases that were exempt or not subject.

The order entered into force on March 7, 2019.

5.4 Incentives related to real estate tax and transfer tax in the repealed royal decree-law on housing and rental have been brought back

Royal Decree-Law 7/2019 of March 1, 2019, on urgent measures regarding housing and rental was published in the Official State Gazette on March 5, 2019 and came into force the day after. In the tax field it reproduces the measures brought in through Royal Decree-Law 21/2018 of December 14, 2018, on urgent measures regarding housing and rental, which was later repealed after failing to obtain approval by the Lower House of the Spanish Parliament (Resolution by the Lower House of the Spanish Parliament, published by Decision dated January 22, 2019 –BOE of January 24, 2019-). More specifically:

(a) An exemption from transfer and stamp tax has been introduced for lease agreements related to housing for stable and permanent use.

(b) In the field of real estate tax:

  (i) It has removed the obligation of tax authorities or public entities to charge the real estate tax cost to tenants, in the case of properties for residential use with rent restricted by law.

  (ii) Local councils with a surplus are now allowed to use that surplus to increase their supply of public housing. For that reason, a reference to program "152. Housing" has been included in additional provision sixteen of the Revised Local Finances Law, effective since January 1, 2019.

  (iii) Local councils are also allowed to establish a reduction of up to 95% to the real estate tax charge for homes rented at a restricted price.

  (iv) It sets out the rules and safeguards related to the definition of "permanently unoccupied residential property", for local councils to apply certain surcharges.

5.5 Approval of the average trading values in the fourth quarter of 2018 for traded securities for wealth tax purposes

On February 28, 2019, the Official State Gazette published Order HFP/202/2019 of February 20, 2017, approving the list of securities traded at traded venues, with their average trading value for the fourth quarter of 2018, for the purposes of the 2018 wealth tax return and the annual information return on securities, insurance and income.

6. Miscellaneous

6.1 European Union updates black list and grey list of non-cooperative jurisdictions for tax purposes

Following the Ecofin meeting held on March 12, 2019, the European Council has decided to update the list of non-cooperative jurisdictions for tax purposes (the EU's "black list" and "grey list").

Until now only 5 jurisdictions had been placed on the **black list** (of non-cooperative jurisdictions) appearing in the Annex to the Council Conclusions dated December 5, 2017: American Samoa, Guam, Samoa, Trinidad and Tobago and the US Virgin Islands.

Another 10 jurisdictions have now been added to the list, as a result of not implementing their commitments since the previous black list was prepared: Aruba, Barbados, Belize, Bermuda, Dominica, Fiji, Marshall Islands, Oman, United Arab Emirates and Vanuatu.

The **grey list** (of jurisdictions cooperating with the EU to reform their policies in tax matters, appearing in Annex II to the Council Conclusions dated December 5, 2017) has also been revised:

(a) Of the jurisdictions included in the original screening process, 25 have now been cleared.

(b) On the grey list, 34 jurisdictions will continue to be monitored and the European Council has decided to grant 11 of those 34 jurisdictions an extension of the time limit for meeting the necessary commitments to reform their policies in tax matters. The specific agreed commitments were to implement the automatic exchange of information, to sign and ratify the OECD Multilateral Convention on Mutual Administrative Assistance, to adapt their tax legislation by amending or eliminating harmful tax regimes or to implement the minimum measures or standards for implementing BEPS, among others.

6.2 Spanish finance authority releases notice on how to legalize interposed companies

The Spanish Tax Agency has published an information notice setting out the methods to be used to legalize interposed companies, with the express aim of enabling voluntary compliance with tax obligations, advising of practices that could be interpreted to be against the law, and lastly, of reducing lawsuits.

We discussed this law in our Tax Alert dated February 26, 2019.

6.3 Leave granted for cassation appeal on the interpretation of effective "use or enjoyment" for certain services to be subject to Spanish VAT

Supreme Court. Order of January 16, 2019.

In this order, the Supreme Court held that there is cassational interest in discerning whether the marketing consulting and advisory services provided by a company established in Spanish VAT territory to a customer established in Gibraltar, not in Spanish VAT territory, and engaged in providing online gaming services through digital platforms, are subject to VAT.

In particular, the case involves clarifying whether those services, by being provided by a company established in Spanish VAT territory, must also be regarded as effectively used or enjoyed in that territory.

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