2020

May

TAX NEWSLETTER

GARRIGUES

Latest developments and legal trends - Legislation of interest

News Roundup - Judgments

CONTENTS

2.4 Interpretation of EU law.- A national court does not have to adopt the most favorable interpretation of a provision of national law after that interpretation has been held incompatible with EU law

2.5 Legislative amendments.- It is not contrary to the principles of legal certainty and legitimate expectation for the amendment of a tax rate to come into force in a very short period and without a transitional arrangement

2.6 VAT.- A permanent establishment for VAT purposes is not inferable from the fact of having a subsidiary

2.7 Tax on increase in urban land value.- The authorities have to issue as many tax assessments as there are taxable persons

2.8 Tax on increase in urban land value.- Restriction on applying for a refund of final assessments of the tax on increase in urban land value in a proceeding to set aside a decision that is null and void by operation of the law

2.9 Tax on increase in urban land value.- To calculate length of ownership it is irrelevant whether the plot had not been urban land since its acquisition

2.10 Tax on financial transactions.- The free movement of capital does not preclude the legislation of a member state which taxes financial transactions involving derivative financial instruments that have as their underlying asset an instrument issued by a company from that state

2.11 Inheritance and gift tax.- Personal items cannot include income generating assets, assets used in activities, cash, or marketable securities

2.12 Form 720.- Imposing a penalty for every account not reported on Form 720 falls outside the proportionality principle

2.13 Collection procedure. - The principles of effectiveness and tax neutrality require the calculation of interest on excess amounts of deductible VAT retained by a state in infringement of EU law to ensure that adequate compensation is received

2.14 Management procedure.- VAT recapitulative statements and annual summaries of personal income tax withholdings do not interrupt the statute of limitations for the right to assess

2.15 Management procedure.- Rectification of a self-assessment return cannot be refused for procedural reasons only

2.16 Audit procedure.- The examination of self-assessments in which tax loss carryforwards have been reported does not prevent those losses from being examined in a later audit

2.17 Tax options.- High courts issue contradictory decisions over whether tax loss carryforwards are a tax option

3. DGT resolutions and TEAC decisions

3.1 Corporate Income Tax.- New resolutions on valid economic reasons in restructuring transactions have been published

3.2 Personal income tax.- If, after a pay-out of additional paid-in capital generating income from movable capital, income is distributed, the acquisition value will be reduced to the extent of that income

3.3 VAT – COVID-19.- Zero rate applies to supplies of medical equipment to all institutions, agencies and entities in the public sector

3.4 Wealth tax.- The shares of private equity firms acquired within three years after their registration with the CNMV are not held to comply with statutory or regulatory obligations

3.5 Collection procedure.- The persons liable for tax may apply for deferred or split payment of debts in respect of withholdings with shifted liability

4. Legislation

4.1 The voluntary payment period for the 2020 tax on economic activities charges has been determined

1. Supreme Court: Use of the principle of dynamic interpretation for tax treaties has limits

The Spanish Supreme Court has concluded that tax treaties cannot be interpreted on the basis of later model conventions or of the commentaries on those models.

As we discussed in our alert dated May 26, 2020 (view here), in the case giving rise to the supreme court judgment of March 3, 2020 (cassation appeal 5448/2018), it had been concluded that the Swiss branch of a Spanish resident company could not be characterized as a permanent establishment. In the view taken by the tax authorities, and later, the National Appellate Court, the activity carried on by the branch was simply ancillary, which rules out the existence of a permanent establishment.

It was not taken into account in these conclusions that the branch was being treated as a permanent establishment for direct taxation purposes in Switzerland or that this conclusion gave rise to double taxation, because it rejected the Spanish company’s right to claim the international double taxation credit under the Spain-Switzerland tax treaty.

This interpretation by the tax authorities and by the National Appellate Court was not founded on the definition of permanent establishment in the Spain-Switzerland tax treaty, instead on the definition in a later model convention and on the commentaries accompanying that model convention; even though these definitions were clearly different.

The Supreme Court concluded categorically that the commentaries on the model convention are not sources of law, especially since the definition of the term permanent establishment they contain is substantially different from that provided in the applicable model convention.

For these purposes, the court continues to allow the use of “dynamic interpretation” for tax treaties; as long as it does not involve ignoring the system of sources of Spanish law, or applying, as occurred in the examined case, a different definition of permanent establishment from that covenanted between the two contracting states.

2. Judgments

2.1 Corporate Income Tax.- EU law precludes a national law that does not allow the compatibility of horizontal and vertical consolidation

Court of Justice of the European Union. Judgment of May 14, 2020. Case C-749 /18

A Luxembourg company -A- (with parent company in France) formed part of a tax group with subsidiaries resident in Luxembourg (vertical consolidation). Company A performed the functions of controlling company of the group.

Two Luxembourg companies -B and C- owned by the same French parent company (although A did not have an ownership interest in them), applied in December 2014 to form part of the tax group in fiscal years 2013 and 2014 (horizontal consolidation).

The authorities refused this request for the reason that company A did not own shares in B and in C, and the vertical and horizontal regimes are not compatible in the same group. For all the subsidiaries to be part of the same group, the existing group needed to be dissolved and a horizontal tax group formed by including all the subsidiaries. This dissolution would have adverse consequences because the minimum existence requirement for the original vertical group (five years) would not be met, which would make it necessary to adjust the tax position of the entities in that group.

The judicial review court with jurisdiction upheld the claim seeking to include the subsidiaries in the group in and after 2014, but dismissed it for 2013, because the application had been filed in 2014 and the law requires it to be made before the end of the year in which inclusion in the group is sought.

The Court of Justice of the European Union (CJEU) concluded that these rules undermine freedom of establishment, in that they are detrimental to cross-border scenarios with respect to purely internal scenarios with comparable circumstances, and no overriding public interest reasons were claimed in the proceeding that would justify this difference in treatment.

It held, however, that the principles of equivalence and effectiveness were not breached by the fact of not allowing consolidation where the application has not been made within the time limit (in the examined case, in 2013). In that regard:

The CJEU recalled that EU law only precludes a national authority from pleading expiry of a reasonable limitation period where the conduct of the national authorities, together with the existence of the time bar, deprives a person completely of the chance to assert their rights before the national courts.

In this case, the companies had the chance to file at any time, during 2013, an application for horizontal fiscal consolidation, pleading the incompatibility of Luxembourg law with EU law. Because they filed their application in 2014, it is acceptable only to allow consolidation to start from that fiscal year.

2.2 Personal income tax.- If directors are not compensated for their services as such, their contributions as self-employed workers cannot be deducted

Madrid High Court. Judgment of October 14, 2019

The court examined the case of a company director who did not receive any salary income from the company. On his personal income tax return, however, he reported an expense in respect of the cost of his social security contributions as a self-employed worker.

Madrid High Court concluded in this judgment that it is not allowed to deduct that expense in this case. In the court's view, because he does not receive salary income for performing his services as director, it is not mandatory for the director to be included in the self-employed workers social security program, therefore the paid contributions are not deductible.

2.3 State aid.- EU law precludes applying a national limitation period to the recovery of state aid where the expiry of that limitation period is mainly due to delayed enforcement of the recovery obligation

Court of Justice of the European Union. Judgment of April 30, 2020. Case C-627/18

The Portuguese government implemented a credit facility program to help reduce the debt burden of companies in the farming and livestock industries, which was used by a company resident in Portugal.

The European Commission adopted a decision in 2000 finding that the program amounted to state aid incompatible with the common market, and required Portugal to remove that program and recover the aid that had been granted. As a result of that decision, the Portuguese government requiered the appellant company to repay the aid. In view of the repeated absence of any reply, an enforced collection procedure was initiated.

The Portuguese company challenged the enforcement procedure, by claiming that the obligation to repay the received amounts had expired under Portuguese law (five-year period).

The following questions were referred for a preliminary ruling:

a) Whether the ten-year limitation period provided for the Commission's powers to recover aid to be exercised applies only to relations between the European Union and the member state to which the decision to recover aid is addressed, or whether it applies also to relations between the member state and the beneficiary of the aid considered incompatible with the internal market.

   The CJEU concluded that the ten-year limitation period applies only to relations between the European Union and the member state. You are reminded that in Spain this ten-year limitation period applies under article 262.1 of the General Taxation Law.

b) Whether EU law precludes applying a national limitation period that is shorter than the ten-year period mentioned above to the recovery of interest accruing on the aid that is incompatible with the internal market.

   In relation to this point, the referring court submitted to the CJEU the position shared by both the Portuguese authorities and the appellant company that the five-year period provided for in the national rules could apply to the recovery of interest relating to the aid at issue and therefore constitute an obstacle to the recovery of that interest.

   The CJEU held that allowing the time bar on the interest relating to unlawful aid due to the national authorities complying with the European Commission's recovery decision with a delay would render recovery of the full amount of that aid practically impossible and deprive the EU provisions on state aid of effectiveness. Accordingly, it clarified that the principle of legal certainty that the rules on limitation periods seek to ensure cannot constitute an obstacle to recovery of aid incompatible with the internal market, and underlined that restoration of the situation existing before the illegal aid was granted is a necessary requirement to preserve the effectiveness of EU law.

The CJEU concluded therefore that EU law precludes application of a limitation period of the kind at issue, both in cases where it has expired even before the Commission adopts the decision holding an item of aid illegal and ordering its recovery, and where expiry of the statute of limitations is due mainly to a delay incurred by the authorities for enforcement of the decision.

2.4 Interpretation of EU law.- A national court does not have to adopt the most favorable interpretation of a provision of national law after that interpretation has been held incompatible with EU law

Court of Justice of the European Union. Judgment of April 23, 2020. Case C-401/18

A Czech road freight company transported fuel from various member states to the Czech Republic. The Czech tax authorities took the view that the company's operations were not confined to the transport of fuel under an excise duty suspension arrangement; it also resold the fuel to other economic operators established in the Czech Republic. Accordingly, they concluded that the place of the acquisitions made by the company was not in the Czech Republic but in the member states where the fuel was located when it was loaded to be transported. In keeping with that conclusion, they refused to allow the company to deduct VAT on the acquisitions.

The court with jurisdiction to hear the appeal concluded that Czech law was ambiguous, in that the national law that transposed the VAT Directive allowed taxable persons to assume that the fact that goods are transported to another member state under an excise duty suspension arrangement affects the conditions which govern the transfer of the right to dispose of those goods as owner.

As a result of this conclusion, the Czech court submitted the following request for a preliminary ruling to the CJEU: whether EU law precludes a national court (confronted with a provision of national tax law, which has transposed a provision of the VAT Directive, and is open to several interpretations) from adopting the interpretation that is most favorable to the taxable person, after the CJEU has held that such an interpretation is incompatible with EU law.

The CJEU recalled:

a) That it had already held (before the transactions concerned took place) that the requirements applicable to the transport of goods under an excise duty exemption arrangement in no way affect the conditions for the right to dispose of those good as owner, as provided for in the VAT Directive.

b) That not interpreting Czech law according to this case law, by taking temporal criteria into consideration, would constitute a restriction on the temporal effects which may be allowed only in the actual judgment ruling on the interpretation, and which, however, was not allowed.

The CJEU concluded therefore that EU law precludes an interpretation such as that contained in the request for a preliminary ruling referred to it.

2.5 Legislative amendments.- It is not contrary to the principles of legal certainty and legitimate expectation for the amendment of a tax rate to come into force in a very short period and without a transitional arrangement

Court of Justice of the European Union. Judgment of April 30, 2020. Case C-184/19

A Romanian company sold certain types of fermented beverages on which it charged excise duty at 0%. The Romanian tax authorities issued an assessment adjusting the charged rate, because on the date the sales occurred, they were subject to a higher rate of excise duty. The company filed an appeal to the referring court, pleading, among other arguments, that the regime that amended the rate was published without providing for a transitional regime and that it came into force only eight days after publication of the legislation concerned. For those reasons, the taxpayer considered that the principles of legal certainty, tax neutrality and tax certainty had been breached.

The CJEU concluded as follows:

a) The sudden and unexpected adoption of a law that removes a right, which taxable persons have enjoyed until then, without allowing the necessary adaptation period, and without this being required for the sought aim, may infringe the principles of legal certainty and protection of legitimate expectations.

b) However, in circumstances such as those involved in the main proceeding, the conditions justifying the necessary adoption of a transitional regime cannot (according to the court) be observed to exist. Moreover, the principles of legal certainty and protection of legitimate expectations do not preclude a national law that amends the excise duty on certain types of fermented beverages without providing for a transitional regime, even if that amendment enters into force a few days after publication of the law.

2.6 VAT.- A permanent establishment for VAT purposes is not inferable from the fact of having a subsidiary

Court of Justice of the European Union. Judgment of May 7, 2020. CaseC-547/18

The Polish authorities argued in the case examined in this judgment that a subsidiary resident in Poland constituted a permanent establishment of a Korean company.

As we discussed in our alert on May 11 (see here), the requests for preliminary rulings concerned whether (i) the existence of a permanent establishment of a company may be inferred by a supplier of services from the fact that that company has a subsidiary in the member state concerned, and, (i) if the answer is no, whether it is required to examine contractual relationships between the parent company and its subsidiary to confirm whether they determine the existence of a permanent establishment.

The CJEU ruled that a supplier of services cannot infer the existence, in a member state, of a permanent establishment of a company established in a non-member state from the mere fact that that company has a subsidiary there; and additionally, that a supplier of services is not required to inquire, for the purposes of such an assessment, into contractual relationships between the two entities.

2.7 Tax on increase in urban land value.- The authorities have to issue as many tax assessments as there are taxable persons

Valencia High Court. Judgment of February 5, 2020

Three individuals transferred properties of which they were co-owners and reached an agreement with the authorities (according to the facts described in the judgment) determining that only one of them would appear as taxable person in assessments of the tax on increase in urban land value.

Valencia High Court recalled in this judgment that it is not allowable for the tax authorities, as a result of an agreement reached with the taxable persons, to attribute the whole tax debt to only one of them, because taxable person status is not transferable.

The court recalled that the taxable person is the person required by the law to perform the main tax obligation and the procedural obligations associated with it, and therefore it is not allowable for the tax authorities to attribute the whole tax debt to only one of several taxable persons. Finding otherwise would be a breach of the principle of economic capacity, because it means that one of the transferors will be taxed on an inexistent gain. This does not preclude the parties from agreeing over how the tax liability will be paid.

In keeping with the above reasoning, the court rendered the issued assessments void.

2.8 Tax on increase in urban land value.- Restriction on applying for a refund of final assessments of the tax on increase in urban land value in a proceeding to set aside a decision that is null and void by operation of the law

Supreme Court. Three judgments dated May 18, 2020

In a judgment delivered on May 11, 2017, the Constitutional Court found that, in cases where a loss in value has occurred between the purchase and sale dates of the property, articles 107.1, 107.2.a) and 110.4 of the Local Finances Law, with the wording provided in Legislation Royal Decree 2/2004, of March 5, 2004 (TRLRHL), had to be held unconstitutional null and void.

The Supreme Court concluded in three judgments delivered on May 18 that assessments that became final before the decision holding those articles unconstitutional cannot be held null and void by operation of the law. See our alert on this judgment.

2.9 Tax on increase in urban land value.- To calculate length of ownership it is irrelevant whether the plot had not been urban land since its acquisition

Catalan High Court. Judgment of December 27, 2019

The appellant had acquired a rural piece of land that was reclassified as urban land. In a subsequent transfer of the land, it was raised whether the tax on increase in urban land value had to be calculated by reference to all the years the land was owned or only those when it had been classified as urban land.

The Catalan High Court concluded that the generation period to calculate the taxable amount for the tax on increase in urban land value must be calculated by reference to every year the property was owned, including the years when the plot was classified as rural land; because the plot's land-use classification only has relevance when the taxable event occurs, which is when the land is transferred.

2.10 Tax on financial transactions.- The free movement of capital does not preclude the legislation of a member state which taxes financial transactions involving derivative financial instruments that have as their underlying asset an instrument issued by a company from that state

Court of Justice of the European Union. Judgment of April 30, 2020. Case C-565/18

Italian law levies a tax on, and lays down administrative obligations and the filing of a return for, financial transactions involving derivative financial instruments that have as their underlying asset an instrument issued by a company established in Italy. The responsibility for payment of that tax and for fulfillment of those obligations lies with the parties to the transaction, regardless of where the transaction is concluded or of the residence of the parties; or even of any intermediaries involved in carrying out the transaction.

A company having its registered office in France, which had carried out certain transactions in relation to derivative financial instruments whose underlying assets were shares in Italian companies, applied for a refund of the tax paid in Italy. In the appeal proceedings brought against the decision to refuse that refund, the referring court asked the CJEU whether EU law precluded that tax.

The CJEU examined the question from the standpoint of the free movement of capital:

a) It recalled that the measures that are prohibited due to restricting that free movement are those that may dissuade nonresidents from investing in a member state, or the residents of that state from investing in another member state.

b) It also recognized that member states have the power to establish a distinction between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested.

c) In this respect, it underlined that the law at issue applies equally to residents and nonresidents, and also to transactions performed in Italy or in another state, so no difference in treatment may be observed.

Additionally, it held that derivative financial instruments whose underlying assets are governed by Italian law and which are subject to the tax are not comparable to the derivatives whose underlying assets are not governed by that law and to those not subject to the tax.

Lastly, it found that the tax is justified by the fact of ensuring a contribution to public expenditure from any entity carrying out transactions with Italian underlying assets.

On that basis, the CJEU concluded that the law at issue does not constitute a form of prohibited discrimination. It clarified, however, that the administrative and filing obligations accompanying this tax and incumbent on nonresident entities should not go beyond what is necessary for their collection.

2.11 Inheritance and gift tax.- Personal items cannot include income generating assets, assets used in activities, cash, or marketable securities

Supreme Court. Judgment of March 10, 2020

Article 15 of the Inheritance and Gift Tax Law provides that the personal items to be included in the assets available for inheritance must be valued at 3% of the deceased's estate, unless the taxable persons (i) allocate a higher value to them, or (ii) are able to provide verifiable evidence that none exist or that they have a lower value.

Basing its view on the principles of tax equality and economic capacity, the Supreme Court adopted a novel conclusion that personal items only include assets which, as a result of their characteristics, value and function, may be put to private or personal use by the deceased, and all others must be excluded. For that reason, any income generating assets, assets used in professional or economic activities, and in particular, cash, debt instruments and marketable securities, should be excluded.

The taxable person does not have to prove that these excluded assets do not belong to personal items, because by their very nature they cannot be included among those assets.

2.12 Form 720.- Imposing a penalty for every account not reported on Form 720 falls outside the proportionality principle

Extremadura High Court. Judgment of February 27, 2020

A person with tax obligations failed to include in his information return on assets located abroad (Form 720) five checking accounts he owned at a foreign bank. The tax authorities held that the taxpayer had committed five infringements and imposed a penalty for every account not reported.

Extremadura High Court held that where the breach of a procedural (rather than a substantive) tax obligation is involved it must be treated as a single infringement. In the court's view, the penalty imposed by the tax authorities is incompatible with the principle of proportionality, and it held that, from the circumstances of the case, the minimum penalty had to be imposed.

2.13 Collection procedure.- The principles of effectiveness and tax neutrality require the calculation of interest on excess amounts of deductible VAT retained by a state in infringement of EU law to ensure that adequate compensation is received

Court of Justice of the European Union. Judgment of April 23, 2020. Joined cases C-13/18 and C-126/18

In this judgment, the CJEU examined a Hungarian practice of calculating interest on refunds of excess amounts of deductible VAT, which the authorities retained in infringement of EU law. The referring courts submitted, briefly, the following requests for preliminary rulings:

- Whether the principles of effectiveness and equivalence, and those of direct effect and proportionality, preclude the practice of a member state consisting of calculating the interest on those excess amounts of deductible VAT, by applying a rate equal to the basic rate of the national central bank.

  The CJEU held that the rate contained in the Hungarian legislation (lower than the rate a taxable person would have to pay on a loan for the same amount) may deprive the taxable person of adequate compensation for the loss caused by not having access to the sums in question, and therefore, does not observe the principle of effectiveness. Moreover, that practice does not compensate individuals for the economic cost of the amounts unduly retained, which infringes the principle of tax neutrality. For that reason, it answered in the affirmative to the first request for a preliminary ruling.

- Whether the principles of effectiveness and equivalence preclude a practice of a member state which establishes a five-year limitation period to claim interest in these cases.

  The CJEU recalled that it has already confirmed the reasonableness of similar limitation periods (three years) and has no information able to place in doubt that Hungarian law satisfies the principles mentioned. It therefore answered in the negative to this second request for a preliminary ruling.

- Whether it is consistent with the principle of effectiveness that taxable persons have to submit a specific claim for late-payment interest while in other cases the interest is granted automatically, and that the interest is calculated from the end of the thirty or forty-five day refund period and not from when the surplus arose.

  The CJEU answered in the negative, because the member states have autonomy to define in their national laws the procedural requirements for the payment of interest on taxes collected with an infringement of EU law.

2.14 Management procedure.- VAT recapitulative statements and annual summaries of personal income tax withholdings do not interrupt the statute of limitations for the right to assess

Supreme Court. Two judgments dated May 18, 2020

The Supreme Court had been finding that the annual statements for VAT (form 390) and personal income tax withholdings (form 190) interrupted the statute of limitations for the tax authorities' right to assess the tax debt in respect of these items.

In two judgments delivered on May 18, 2020, however, the court amended its interpretation by holding that those statements do not interrupt the statute of limitations. It concluded as follows:

a) Form 190 has to be filed under a procedural tax obligation requiring withholding agents to draw up an annual summary of the withholdings they have deducted from salary income, income from economic activities, prizes and imputed income.

b) This procedural obligation is not to be confused with the substantive obligation to file and pay a self-assessment, which is fulfilled by filing the monthly and quarterly return forms.

c) The annual VAT recapitulative statement (form 390) has to be filed to fulfill an obligation which facilitates management of the tax although its purpose is not to secure payment of the tax debt due in each assessment period.

In relation to this form 390, the court clarified that the case law described above was based on different legislation, which required form 390 to be accompanied by quarterly or monthly self-assessments. For that reason, in those cases the court had held that the annual summary and recapitulative statement were not simply information reports and instead were a "return" confirming the assessments made during the year. Following the publication of the Ministry of Finance Order of December 27, 2000 (Official State Gazette -BOE- of December 29, 2000), form 390 no longer has to be accompanied by the periodical self-assessments.

This interpretation, the court underlined, had already been adopted by TEAC in various decisions.

2.15 Management procedure.- Rectification of a self-assessment return cannot be refused for procedural reasons only

National Appellate Court. Judgment of February 3, 2020

A taxpayer filed an additional corporate income tax self-assessment to report a higher amount in respect of tax loss carryforwards than it had originally reported. The tax authorities refused the application by arguing that the taxpayer should have filed a self-assessment correction form, not an additional self-assessment.

The National Appellate Court concluded in this judgment that the tax authorities acted incorrectly by refusing the application where the citizen’s intentions were clearly inferable from his actions. What the tax authorities should have done, if they considered that the chosen procedure was not the right one, was give the taxpayer the chance to file the proper application.

2.16 Audit procedure.- The examination of self-assessments in which tax loss carryforwards have been reported does not prevent those losses from being examined in a later audit

National Appellate Court. Judgment of October 25, 2019

In its 2004 corporate income tax self-assessment, the taxable person offset tax loss carryforwards (from 1995, 1997, 1998 and 2000). In an audit of that fiscal year 2004, the tax authorities disallowed the offset of tax loss carryforwards from 1997, because the taxable person had not proved from its accounting records that those tax losses were correct.

Against this, the taxable person pleaded that the tax loss from 1997 had already been reviewed by the tax authorities in an earlier audit. The 1997 tax loss carryforwards already appeared in the self-assessment for the year audited at that time and the auditors had not questioned whether they were allowable (estoppel doctrine).

The National Appellate Court concluded, however, as follows:

a) The section of the corporate income tax self-assessment that lists the available tax loss carryforwards is simply for information purposes.

b) Therefore, the fact that the tax loss carryforwards reported in that self-assessment were not questioned in an audit cannot be considered to trigger the estoppel doctrine.

2.17 Tax options.- High courts issue contradictory decisions over whether tax loss carryforwards are a tax option

Madrid High Court Judgment of February 3, 2020; and Castilla y León High Court. Judgment of February 18, 2020

The Central Economic-Administrative Tribunal found in a decision delivered on April 4, 2017 that the offset of tax loss carryforwards is a tax option. Since then, numerous decisions have been issued by the high courts on this issue, with different conclusions (for the time being, neither the National Appellate Court nor the Supreme Court have ruled on this subject).

Examples include the recent judgments by the Madrid and Castilla y León high courts which conclude in one and the opposite direction (the first court found that the offset of tax loss carryforwards cannot be treated as a tax option, whereas the second reached the same conclusion as TEAC).

3. DGT resolutions and TEAC decisions

3.1 Corporate Income Tax.- New resolutions on valid economic reasons in restructuring transactions have been published

Directorate General for Taxes. Resolutions V0222-20 of February 3, 2020; V0316-20 of February 11, 2020 and V0377-20 of February 19, 2020

In these resolutions, various restructuring transactions were analyzed, and the following (among others) were allowed as valid economic reasons:

a) In a merger by absorption, among others, simplifying preparation of the reports on controlled transactions and reducing the tax risk associated with pricing those transactions under the arm's length principle, with elimination of intra-group receivables (V0222-20, of February 3, 2020).

b) In a non-monetary contribution of shares of a company under a voluntary insolvency proceeding, after the arrangement has been approved (V0316-20, February 11, 2020):

- Restructuring the business group, to centralize planning and decision-making, improve management and administrative efficiency, obtain economies of scale and use synergies that will reduce costs.

- Enabling optimum distribution of the funds generated by the group, by supporting the viability of each business.

- Facilitating the external perception of the group, to improve companies' commercial capacitiesas well as their negotiating capacity with third parties, by strengthening the group's financial capacity and solvency.

- Simplifying future succession problems and enabling a family protocol to be put in place to ensure the future continuity of the group, by facilitating satisfaction of the necessary requirements in the wealth tax legislation and in the inheritance and gift tax legislation to claim the benefits for family businesses, while allowing election of the tax regime for groups of companies.

c) In a merger by absorption in which the absorbed company has a building and intended to commence building work on it, but has been refused a loan -or a mortgage not even with the provision of personal guarantees by the shareholders- (Resolution V0377-20, of February 19, 2020):

- Provide the whole business structure with more powerful assets, so that they can be presented to financial institutions to obtain the necessary financing for the building work to be performed.

- Provide the whole business with an optimum organizational structure. Following the merger the property leasing business will be run by a single company, which will rationalize costs.

3.2 Personal income tax.- If, after a pay-out of additional paid-in capital generating income from movable capital, income is distributed, the acquisition value will be reduced to the extent of that income

Directorate General for Taxes. Resolution V0447-20 of February 26, 2020

The issue submitted for resolution concerned a limited liability company that resolved to pay out its additional paid-in capital and wanted to know what treatment that pay-out would receive for personal income tax purposes in the hands of shareholders.

The DGT concluded as follows:

a) Where a limited liability company pays out additional paid-in capital it needs to be analyzed whether there is a positive difference between (i) the company's shareholders' equity in the last year that ended before the pay-out (the portion relating to the shares of each shareholder) and (ii) its acquisition value.

This positive difference has to be treated as income from movable capital.

b) The subsequent pay-out of income or reserves out of income, relating to any shares that had continued to be owned by the shareholder following the distribution of the additional paid-in capital, has to reduce the acquisition value, to the extent of the previously calculated amount of income from movable capital.

3.3 VAT - COVID-19.- Zero rate applies to supplies of medical equipment to all institutions, agencies and entities in the public sector

Directorate General for Taxes. Resolution V1456-20 of May 18, 2020

Article 8 of Royal Decree-Law 15/2020, of April 21, 2020, on urgent additional measures to support the economy and employment, allows zero rated VAT on internal supplies, imports and intra-Community acquisitions of the medical equipment listed in its annex, wherever the customer is an entity governed by public law, a private social welfare entity or a clinic or hospital and they are payable between April 23 and July 31, 2020.

Following the doubts that had arisen over the legal nature of the customers, in particular concerning the definition of “entities governed by public law”, the DGT concluded in this resolution that the term refers to all public authorities and institutions, agencies and entities in the public sector.

3.4 Wealth tax.- The shares of private equity firms acquired within three years after their registration with the CNMV are not held to comply with statutory or regulatory obligations

Directorate General for Taxes. Resolution V0322-20 of February 11, 2020

The “family business” wealth tax exemption is subject to various requirements. The reduction to the taxable amount for the inheritance or gift of a “family business” also depends largely on those requirements. Among others, where shares in companies are involved, the investee cannot have the management of securities or real estate assets as its primary activity. And, for these purposes, it is considered that a company manages securities or real estate assets and therefore is not entitled to the wealth tax relief, where for more than 90 days of the fiscal year, (i) securities account for over half of its assets, or (ii) more than half its assets are not used in economic activities.

To determine the portion of assets that consists of securities or assets not used in economic activities, the following, among others, are not computable: (i) securities held to fulfill statutory and regulatory obligations, or (ii) any that grant at least 5% of the voting rights and are held for the purpose of controlling or managing the investment through an organization of material and human resources.

In relation to private equity firms, Law 22/2014, of November 12, 2014, defines, in article 13, the obligatory investment ratio at these entities. In article 17, however, it states that private equity firms do not have to meet the mandatory investment ratio for the first three years after their registration in the relevant CNMV register.

In the case examined in this resolution, the requesting party gifted to his three children bare ownership of 100% of the shares in a company engaged in the management and administration of securities representing shares in other entities. That company intended to transfer its investment in a second entity and invest the proceeds, among others, in a private equity firm. The issue submitted for resolution concerned the treatment of this investment for the purpose of the relief, and specifically, whether the assets used at a private equity firm for satisfaction of the minimum investment ratio may be considered necessary for conducting its activities, and therefore, used in economic activities for the purpose of determining the scope of the exemption

The DGT concluded that, to determine whether the requirement to be eligible for the wealth tax exemption relating to whether the company has the management of securities or real estate assets as its primary activity is met:

a) The securities included in the mandatory investment ratio of the investee private equity firm are not computable as securities, because they are acquired to fulfill statutory obligations.

b) The other assets invested by a private equity firm in shares that are not part of the mandatory investment ratio are not computable as securities only to the extent that the requirement to invest at least 5% is met and provided the shares are held to control or manage the investment through the relevant organization of material and human resources.

In line with those comments, the DGT took the view that in the first three years of a private equity firm's existence, the shares owned by the firm will not be considered held to fulfill statutory and regulatory obligations (because in that period it is not a statutory obligation to meet the investment ratio); and therefore they have to be computable as securities for the purpose of determining whether the firm manages securities or real estate assets, unless they meet the mentioned requirement for a minimum 5% investment held to control and manage the investment with the appropriate organization of human and material resources.

Aside from the above, this resolution addresses various issues regarding the “family business” regime. The most relevant ones are the following:

a) As per the wealth tax exemption, income from the transfer of shares in entities in which at least 90 percent of their income derives from economic activities will be qualified as business income. Although this criterion must be taken cautiously pursuant to the recent Spanish Supreme Court judgement of October 19, 2017, it is a repeated criterion in the DGT.

   In the same vein, the cash or collection right arising from the sale of the participation in a subsidiary, which carries out a business activity, will not be qualified and computed as an asset, which is not used in economic activities.

b) As regards the donation of shares in family business entities, the DGT clarifies that the requirement linked to the maintenance of the wealth tax exemption during ten years, will be deemed fulfilled when the right to the exemption is maintained during that period, regardless the percentage of ownership which is kept.

Both criteria, undoubtedly, make the transfer of companies that benefited from the family business tax regime more flexible without losing the tax benefits applied in the past.

3.5 Collection procedure.- The persons liable for tax may apply for deferred or split payment of debts in respect of withholdings with shifted liability

Central Economic-Administrative Tribunal Decision of February 27, 2020

The General Taxation Law contains a deferred and split-payment system for tax debts. This system is not available where the debts relate, among others, to personal income tax withholdings. The Central Economic-Administrative Tribunal (TEAC) concluded, however, in a recent decision that the persons liable for tax can indeed apply for deferred or split payment of tax debts that are in the voluntary or enforcement period, even if they relate to withholdings that were not deducted.

In the case examined by TEAC, the tax authorities had shifted the liability for certain tax debts in respect of personal income tax withholdings. The person held liable applied for deferred payment of the aggregate amount claimed in the decision shifting liability, but AEAT disallowed the application on the basis of the mentioned general prohibition of deferred or split payment of debts arising from the obligation to withhold personal income tax.

TEAC concluded in relation to these facts that the requested deferred payment should be granted.

As the Madrid Regional Economic-Administrative Tribunal had already found in the challenged decision to be ruled on by TEAC, the debt of the person held liable does not arise from the liable person's own withholding obligation. The person required by the law to make the withholdings was the main debtor himself; whereas the liable person was only converted into the debtor as a result of the decision shifting liability.

In other words, as TEAC underlined in its decision, the person liable for tax is not a person with a withholding obligation who must pay a debt with the funds of another person (funds of the taxable person from whom the withholding is made), instead that person is a guarantor (third party) who was not originally required to pay the debt that was shifted to him, and who becomes subject to the obligation to pay it out of his own assets as a result of the shift of liability.

4. Legislation

4.1 The voluntary payment period for the 2020 tax on economic activities charges has been determined

The May 20, 2020 edition of the Official State Gazette (BOE) published the Decision of May 18, 2020 by the Revenue Department of AEAT (Spanish tax agency), amending the voluntary payment period for the tax on economic activities (IAE) for fiscal year 2020 (national and provincial amounts) and providing the place for payment of those amounts.

Namely, the voluntary payment period falls between September 16 and November 20 2020, inclusive, for the national and provincial amounts collected through the credit institutions authorized to collect the tax.

More information:

Tax Department

Follow us:

GARRIGUES

Hermosilla, 3
28001 Madrid, Spain.
T +34 91 514 52 00 **F** +34 91 399 24 08

www.garrigues.com