Tax Newsletter

Spain

GARRIGUES

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1. Judgments

1.1 Freedom of establishment. - Legislation which establishes a different tax treatment for dividends received by parent companies depending on whether or not they have opted to apply the tax consolidation regime is in breach of EU law

Court of Justice of the European Union. Judgment of May 11, 2023. Joined cases C-407/22 and C-408/22

French law provides that dividends distributed to a resident parent company by subsidiaries belonging to the same consolidated tax group as the parent company can be deducted in full from the net profit of the latter (meaning they are fully exempt), whereas dividends from subsidiaries not belonging to the tax group are only partially exempt from the tax. Moreover, under the legislation in question, only companies resident in France may opt to apply the consolidated tax regime and form part of a tax group in that member state.

In its judgment of September 2, 2015 (case C-386/14) (newsletter of August-September 2015), the CJEU had already found that national legislation such as that described creates a difference in treatment which is contrary to the freedom of establishment. In this new judgment, the CJEU analyses the issue once again, insisting that this legislation contravenes the freedom of establishment because it makes enjoyment of the tax advantage dependent on whether or not the consolidated tax regime is opted for.

1.2 Monetization of tax assets. - Deferred tax assets associated with internal provisions covering commitments in respect of retirees or workers in pre-retirement can be monetized

Supreme Court. Judgment of May 3, 2023

A taxpayer requested the monetization of deferred tax assets (DTAs) deriving from commitments in respect of its employees, consisting of (i) cash supplements to be received after pre-retirement, and (ii) in-kind commitments in relation to retiring employees. The auditors acknowledged that DTAs in respect of outsourced commitments were eligible for conversion where the conditions had been met for the expense to be deductible (i.e. for the part corresponding to amounts already paid). However, they ruled out the possibility of conversion in the case of (a) internal funds and (b) external funds, for the part corresponding to the expense not yet deductible because the corresponding payments had not been made. TEAC recognized the right to monetization in the case of the latter, but not in the case of DTAs corresponding to internal funds.

In an appeal led by Garrigues, the National Appellate Court recognized the right to conversion of all DTAs corresponding to internal provisions. Finally, the Supreme Court upheld the decision of the National Appellate Court.

Specifically, the court affirmed as follows:

(i) In-kind pension commitments in respect of retired workers: Since the corporate income tax legislation provides no definition of "employee welfare systems", this category must be understood to be made up of commitments designed and intended to improve upon the benefits corresponding to workers under the social security system.

(ii) Commitments in respect of workers in pre-retirement: Additional provision 22 of the revised Corporate Income Tax Law envisages the possibility of monetizing assets relating to workers in pre-retirement, which are treated as a separate concept, distinct from "employee welfare systems".

Moreover, the court concludes in both cases that, according to the rules, the outsourcing of such provisions is not mandatory.

1.3 Personal income tax – A spouse who has left the domicile owing to a separation, divorce or annulment of their marriage can apply the exemption for reinvestment in a principal residence

Supreme Court. Judgment of May 5, 2023

Article 38 of the Personal Income Tax Law stipulates that capital gains obtained upon the transfer of a principal residence are exempt if the amount obtained is reinvested in the acquisition of a new principal residence. This is dependent, among other requirements, on the transferred dwelling having been the taxpayer's principal residence at the time of the transfer or on its having been their main residence up to any date in the two years prior to the transfer.

The Supreme Court concluded that, in situations of separation, divorce or annulment of the marriage which have led to the property no longer being effectively occupied as a principal residence by one of the spouses, the effective occupancy requirement will be deemed met for both spouses even if it is only fulfilled by one of them.

1.4 Personal income tax – Retirement or disability benefits must be included at 75% if they come from contributions that did not reduce the tax base

Supreme Court. Judgment of April 25, 2023

The second transitional provision of the Personal Income Tax Law stipulates that retirement and disability benefits deriving from insurance contracts entered into with welfare mutual insurance companies for which contributions dating from before January 1, 1999 have been subtracted from the tax base, must be included in the personal income tax base as earned income. The amount to be included, however, is only the amount by which the benefit exceeds the contributions made to the mutual company which have not reduced the tax base, pursuant to the legislation in force at any given time; and, if it cannot be proven which contributions have not reduced the tax base, they must be included at 75%.

The Supreme Court concluded as follows:

- If the entire retirement benefit derives from contributions which it was possible to subtract or deduct from the tax base, it must be included as earned income for personal income tax purposes in its entirety.
- If the benefit derives from different types of contributions, it must be included to the extent that it exceeds the contributions by which the tax base was not reduced.
- If the entire benefit corresponds to contributions that were neither subtracted nor deducted from the personal income tax base, the benefit must not be included as earned income in the personal income tax base.

1.5 Personal income tax. - Earned income in kind deriving from the exercise of a stock option plan by an inbound expatriate is taxable in Spain

National Appellate Court. Judgment of February 15, 2023

A worker arrived in Spain in 2014 and took advantage of the special tax regime for posted workers (the "inbound expatriates regime") provided for in the Personal Income Tax Law, with effect from 2015. In March and April 2015, the worker received free shares (on the maturity restricted stock units (RSUs)) and other securities as a result of the exercise of stock options. The compensation programs through which these benefits were offered were signed before the worker moved to Spain.

The National Appellate Court concluded that income in kind derived from stock plans is understood to have been obtained when the employee acquired the shares (which is the point at which their rights vested). Because this took place after the move to Spain, the income must be taxed in this country (even if it was partly generated during periods in which the worker was working outside Spain).

This earned income in kind is therefore taxable in Spain, although the special regime for inbound expatriates may be applied to it.

1.6 Tax on economic activities/Covid-19. – The tax on economic activities charge for the period in which businesses were required to shut down due to the state of emergency has to be reduced

Supreme Court. Judgment of May 30, 2023 (appeals 1602/2022 and 2323/2022)

At issue was whether no taxable event may be considered to have occurred for the purposes of the tax on economic activities (“IAE”) while the state of emergency was in effect during the Covid-19 pandemic. The Supreme Court concluded that:

(i) The shutdown and closure of establishments ordered by Royal Decree 463/2020 of March 14, 2020 did not determine non-existence of the taxable event for the purposes of the tax on economic activities, because it had already become chargeable on January 1, 2020.

(ii) However, businesses that had to shut down are entitled to a reduction equal to the proportional part of the tax on economic activities charge relative to the time in which the industry, trade or business stopped running, in accordance with the regime on the shutdown of businesses established in rule 14.4 of Legislative Royal Decree 1175/1990.

(iii) For these purposes, it is not necessary to provide any special proof of the shutdown or closure of the business, because both circumstances derive directly from the law. For hospitality establishments it will only be necessary to prove that there has been a total shutdown of operations (if there were any operations, such as home delivery, the reduction does not apply).

The judgment also contains interesting pronouncements on the type of appeal that taxpayers may file to obtain that reduction; and affirms also that the tax authorities could have made refunds of their own initiative, bearing in mind, among other factors, the co-active denial of the right to carry on operations, due to an act of authority.

1.7 Levies. – The levy for the private use of public domain consisting of vehicles crossing pavements is not compatible with the charge paid for a municipal parking lot concession

Supreme Court. Judgment of March 30, 2023

The Supreme Court concluded in this judgment that the levy for special use of local public domain (in the vehicles crossing pavements category) is not compatible with the charge originally paid for a municipal concession for the construction and operation of a mixed underground parking lot.

According to the court, entry to the underground parking lot is an integral part of the concession, since without it, the parking lot itself could not exist. In other words, the underground car park can in no case be accessed without crossing pavements.

1.8 Tax procedure. - If an assessment is annulled on substantive grounds, the tax authorities cannot revert the steps performed or initiate a new procedure

National Appellate Court. Judgment of April 19, 2023

Following a limited review procedure, the tax authorities issued a VAT assessment. TEAC voided the assessment on the grounds that it should have been calculated by quarterly rather than yearly periods. A new limited review procedure was subsequently initiated with the same subject-matter, as a result of which a new assessment was issued in which TEAC's principle was adopted. In response to this assessment, the taxpayer filed a new economic-administrative claim; this was partially upheld by TEAC, in relation to the calculation of late-payment interest, but the calculation of tax payable was confirmed.

The National Appellate Court voided the second assessment based on the following arguments:

(i) Firstly, it pointed out that it is the settled view of the Supreme Court that the tax authorities may issue a new assessment in implementation of a decision or judgment voiding an earlier assessment provided that the right to adjust the taxpayer's position through the necessary assessment has not become statute-barred (the "two shots" principle). Moreover, according to Supreme Court case law, voidable acts (such as the voided assessment in the examined case) have the effect of tolling the statute-of-limitations period.

(ii) This does not mean, however, that the second assessment was lawful. The Supreme Court has established that, when the defect which resulted in the assessment being voided is of a substantive nature, the tax authorities, in implementing the ruling, can correct that defect, but without carrying out any new steps.

(iii) Therefore, because, in the examined case, the tax authorities initiated a new procedure, they put the taxpayer "back to square one", thereby acting without legal authority and contrary to the established position of the Supreme Court, in a manner which infringed the principle of good administration.

1.9 Audit procedure. - Territorial powers in relation to tax audits based on the domicile of the taxable person can be modified by a decision extending powers

Supreme Court. Judgment of April 17, 2023

According to article 84 of the General Tax Law (LGT), territorial powers for the application of taxes is attributed to the body determined by the tax authorities, by means of the relevant provision (published in the corresponding official gazette). In the absence of an express provision, powers are attributed to the lowest-ranking functional body in whose territorial area the taxpayer is domiciled for tax purposes. This judgment analyses whether, based on the principle of efficiency, it may be allowed not to apply the rule whereby powers are based on tax domicile.

The Supreme Court concluded that, for reasons of efficiency, it is possible to alter the principle whereby powers are attributed by means of a decision extending powers, which must take into consideration the specific organizational rules on the attribution of powers of the tax authority concerned. For this, the following are required: (i) those rules must have been published; (ii) the alteration of powers must be justified by specific circumstances that prevent or hinder the normal course of audit work; and (iii) it must not be possible to overcome those obstacles or difficulties through the mechanisms for collaboration between tax administration bodies. It must be explained in the resolution, individually and in specific terms, how each of these requirements is met.

In this case, the Supreme Court agreed with the judgment of the lower court, finding that the justification for the alteration of rules relating to powers had not been established. Unlike the lower court, however, it concluded that the inadmissibility of the decision extending territorial powers renders the assessment and the associated penalty voidable but does not imply the nullity of the steps performed.

1.10 Extension of liability/collaboration in the commission of offenses. – The tax authorities may issue a second decision extending liability where the first one has been annulled due to formal defects

Supreme Court. Judgments of April 28, 2023 (appeals 72/2021 and 546/2021)

The tax authorities notified the taxpayer of a decision to extend joint and several liability pursuant to article 42.2.a) of the General Taxation Law. This article provides that persons who cause or actively collaborate in the commission of a tax offense shall be held jointly and severally liable. Following the setting aside of the decision by the Canary Islands TEAR (due to a lack of documentary evidence supporting the objective and subjective elements on which the declaration of liability was based), a new procedure was initiated, and this concluded with a second decision extending liability.

The Supreme Court concluded that the decision of the Canary Islands TEAR did not rule on the merits of the case, because it set aside the first decision on the basis of documentary defects, which prevented it from issuing a substantive ruling on fulfillment of the requirements for joint and several liability; therefore, a second decision could be issued, unless the tax authorities' right to assess or collect taxes was found to have become statute-barred. It added that a declaration of joint and several liability on the grounds referred to in the aforementioned article of the General Taxation Law is not of a sanctioning nature and, therefore, that the *ne bis in idem* principle which prevails in the law on penalties does not apply.

These judgments included a dissenting opinion expressed by one of the judges, who concluded that the appeals should have been upheld, in light of the sanctioning nature of article 42.2.a) of the General Taxation Law.

1.11 Penalty procedure. - The calculation of financial loss in the scaling of penalties should be based on net tax payable rather than final tax payable

Supreme Court. **Judgment of April 11, 2023**

Article 187.1.b) of the General Taxation Law establishes a principle for the scaling of tax penalties which is based on the financial loss caused to the Treasury. The financial loss has to be calculated as a percentage based on the ratio between (i) the penalty base (ii) the total amount that should have been paid over with the self-assessment, or had the tax been correctly declared, or the amount of the refund initially obtained.

The understanding of the Supreme Court is that the figure considered for these purposes should be net tax payable, which takes into consideration, as part of the debt paid, the amount of prepayments, withholdings or installment payments; because the real and actual damage caused to the Treasury should take into account all obligations paid, even if they were not paid in through the self-assessment of the tax.

2. Decisions

2.1 Corporate income tax. - A double taxation credit can be applied if it is proved that the transferor was taxed for nonresident income tax purposes

Valencian Regional Economic-Administrative Tribunal. **Decision of September 27, 2022**

Transitional provision 23 of the Corporate Income Tax Law envisages the right to apply a deduction equal to 100% of the gross tax which would have been payable on dividends corresponding to shares in entities resident in Spanish territory that meet the requirements established in article 21 of the law, provided that the taxpayer can demonstrate that an amount equivalent to the dividend has been included in the tax base for corporate income tax or personal income tax purposes as income obtained by the successive entities or individuals who have owned the shares by reason of their transfer.

The Valencian TEAR examined a case in which the entity transferring the shares was nonresident and the income obtained was therefore not taxable for corporate income tax and personal income tax purposes but instead for nonresident income tax purposes. Based on a teleological interpretation of the rule, the court concluded that the deduction is applicable in

this case because its purpose is the avoidance of double taxation. In this case, the deduction must be calculated by applying the nonresident income tax rate for capital gains to the dividend included in the corporate income tax base.

2.2 Corporate income tax. - A consolidation formality cannot be challenged through an economic-administrative claim by one of the group companies

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

When a tax audit is carried out in respect of a group of entities taxed under the consolidated tax regime, so-called consolidation formalities must be initiated, i.e. procedures for documentation of the results of the review procedures in respect of each of the subsidiaries forming part of the group.

TEAC concluded that these consolidation formalities cannot be appealed against by the subsidiaries separately, it being the parent company, as representative of the group, which has the authority to challenge through the administrative channel the decision that finally results from the adjustment carried out; although they are able to raise questions relating to the review of each of the companies on an individual level within the framework of appeals against the decision that brings the procedure to an end.

2.3 Personal income tax. - The elected option to file an individual return can be changed if the taxpayer was not informed of the possibility of filing a joint return when filing their self-assessment by telephone

Central Economic-Administrative Tribunal. Decision of January 31, 2023

As a general rule, it is not possible, once the statutory period for filing a personal income tax self-assessment has ended, to change the elected option to file joint and individual returns. The settled position of the Spanish courts, however, is that for this rule to apply, the taxpayer's decision must not have been influenced, at the time of electing the option, by circumstances for which they are not responsible.

In the case analyzed in this ruling, the taxpayer filed their self-assessment by telephone through a member of the tax authorities' technical staff, who did not inform them of the possibility of electing to file a joint return, this being the only reason why they filed an individual return.

TEAC's view is that the taxpayer's declaration of intent was invalidated by the fact of their having been given incomplete, deficient and unclear information by the tax authorities' technical staff, and therefore that their right to modify the elected option should be recognized, once the spouse has been asked to ratify the option for a joint return.

This principle had been applied, among others, by the Regional Economic-Administrative Tribunal of Extremadura in its decision of July 27, 2022 (February 2023 newsletter).

2.4 Personal income tax. – The tax authorities must prove the degree of autonomy and responsibility and the exercising of powers to support the affirmation that a special senior management employment relationship exists

Catalan Regional Economic-Administrative Tribunal. Decision of November 28, 2022

The tax auditors took the view that a dismissed worker had been a senior manager and concluded as a result that the amount of the worker's severance pay which was exempt from tax was lower than had been considered by the company and the employee. The auditors reached this conclusion on the basis of the employee's position (financial director), the fact that he was highly paid, his status as a member of the board of directors, and the existence of powers of attorney in his favor.

The Catalan TEAR rejected the conclusion reached by the auditors. It pointed out in this respect that (i) a senior management employment contract did not exist, (ii) the position as member of the board of directors was merely administrative since it did not involve the exercising of powers inherent in the legal ownership of the company, and (iii) the powers were limited to those inherent to the role of financial director and did not include broad powers of representation. Moreover, the company belonged to a multinational group and the auditors made no effort to demonstrate that it had a considerable degree of autonomy and responsibility within the group.

2.5 Personal income tax/Nonresident income tax - The payment of earned income by a Spanish entity to an employee in respect of work performed in another country does not make the recipient a personal income tax taxpayer

Central Economic-Administrative Tribunal. Decisions of December 19, 2022 and March 28, 2023

Spanish tax resident status is acquired, among other cases, where the main center or base of the taxpayer's economic activities or interests is located in Spain, either directly or indirectly. Spanish tax resident status also determines personal income taxpayer status.

TEAC took into account its previous decisions of February 22, 2021 (00/02008/2019) and May 24, 2022 (00/01527/2019) (analyzed in our October 2022 newsletter), as well as the doctrine established by the Supreme Court in its judgment of July 4, 2006 (appeal 3400/2001) and stated that, to determine the location of the main center or base of a person's economic activities or interests, all the objective factors present in the specific case in question must be considered.

In the examined cases, the only income received by the claimants in the year under review derived from their employment activity which, despite the work being performed for a Spanish company, was carried out abroad in its entirety. For this reason, TEAC concluded that the center of interests was not located in Spain and, consequently, that the interested parties were not Spanish tax residents for personal income tax purposes. In the court's opinion, the fact that the parties have a permanent home in Spanish territory or that they hold shares in a Spanish company is irrelevant for these purposes, as they receive no income from these assets.

2.6 Nonresident income tax. - Amounts received by a nonresident from their Spanish employer under a pre-retirement agreement constitute earned income taxable in Spain

Central Economic-Administrative Tribunal. Decision of March 28, 2023

The examined issue was the classification of income paid to a taxpayer resident in Portugal by a Spanish company as the result of a pre-retirement agreement. The income included severance payments and contributions made by the paying entity to pension plans.

The tax authorities view was that this is earned income (which comes under the heading "dependent personal services" in the Portugal-Spain tax treaty) derived from an employment in Spain, and that it is therefore considered to have been obtained in Spain, and, consequently, should be subject to nonresident income tax. The claimant argued that pre-retirement entails the termination of employment by the Spanish entity, meaning that the payments received can only be classed as pensions or other income for the purposes of the treaty, which are taxable in the recipient's state of residence.

TEAC pointed out that pre-retirement (consisting merely of a suspension of the contract until the termination of employment takes place) should not be confused with early retirement. It concluded that the amounts received within the context of that special employment situation constitute earned income which, according to the treaty, are taxable the source state, and that they are therefore subject to nonresident income tax in Spain.

2.7 Administrative procedure. - Self-assessments based on a principle established by a TEAR are not covered by the principle of legitimate expectation

Central Economic-Administrative Tribunal. Decision of April 25, 2023

A taxpayer declared amounts received as an MEP (under the European Parliament's voluntary supplementary pension scheme) as income from movable capital on their income tax returns for 2015 through 2018, based on the principle established by the Galician Regional Economic-Administrative Tribunal in a previous decision in respect of the taxpayer's own self-assessments for previous years. This principle adopted by the Galician TEAR contradicted that reflected in several binding resolutions by the DGT, in which it had concluded that such income should be classed as earned income. TEAC subsequently concluded, in its decision of July 10, 2019 (ruling on a point of law), that this type of income should be taxed partly as earned income (two thirds), and partly as income from movable capital. This TEAC decision has been confirmed by the Supreme Court in its judgment of February 2, 2023 (appeal 1895/2021).

In light of this, the tax authorities adjusted the taxpayer's personal income tax position in 2015 through 2018. The Galician TEAR, however, voided the issued assessments because it considered that the taxpayer was covered by the principle of protection of legitimate expectation, given that they were in possession of a previous ruling by the TEAR itself.

TEAC rejected this interpretation by the Galician TEAR and clarified that the doctrine established in its decisions in relation to points of law are binding upon the bodies responsible for the application of taxes not only for the future, but also with regard to past positions which have not become statute-barred where, in this latter case, the principle of legitimate expectation does not apply. In the examined case, the TEAC concluded that the taxpayer's

actions are not covered by this principle because the method applied by the taxpayer departed from that adopted by the DGT and the tax authorities are not bound by the decisions of TEARs.

2.8 Tax collection procedures. - The enforced collection surcharge may be levied where the party jointly and severally liable fails to pay over the debt for which it has been assigned liability within the voluntary payment period

Central Economic-Administrative Tribunal. Decision of March 21, 2023

In this decision, TEAC applied the principle established by the Supreme Court in its judgment of December 10, 2020 (appeal 2189/2018). It concluded that, in the context of a case involving joint and several liability pursuant to article 42.2 a) of the LGT (applicable to persons who cause or collaborate in the concealment or transfer of assets or rights of the party under the obligation to pay in order to prevent the work of the tax authorities), the person liable may be charged an enforced collection surcharge on the debt for which liability is extended if it is not paid in within the voluntary period.

This applies regardless of whether the amount for which liability is extended already includes the enforced collection surcharge originally charged to the main debtor, given that, in the words of the tribunal, this surcharge, together with the outstanding tax payable, penalties and interest, fall within the overall scope of the liability referred to in article 42.2 of the LGT.

2.9 Administrative procedure. - TEAC establishes new principles in relation to the suspension of procedural time periods as a result of COVID-19

Central Economic-Administrative Tribunal. Decisions of February 23, 2023 (9196/2021) and March 28, 2023 (9299/2021)

As a result of the health crisis caused by COVID-19, numerous measures were adopted to alleviate the situation of citizens and companies. The most notable of these included the suspension and interruption of the time periods established in procedural laws at all jurisdictional levels. This was regulated in Royal Decree 463/2020 of March 14, 2020 declaring the state of emergency (alert dated March 15, 2020), which was subsequently amended by other provisions.

In these rulings, TEAC analyzed the effects of this suspension in the tax field and established the following principles:

(i) The period between March 14, 2020 (date of entry into force of the rule) and May 30, 2020 is not to be included to calculate the maximum period for completion of tax enforcement, penalty and review procedures handled by the tax authorities, including the procedure for expert appraisals carried out at the behest of the taxpayer.

(ii) In this case, the time periods were suspended for an objective reason, i.e. the existence of a state of emergency that made it difficult or impossible to fulfill essential formalities. Therefore, it is not necessary for administrative bodies to justify the extent to which the interruption of the proceedings was essential for the procedure in question to be correctly conducted.

(iii) While the suspension remained in force, the bodies responsible for the application of taxes were unable to continue with the formalities involved in procedures in progress (i.e. the formal steps by which the procedure is moved forward from start to finish), but this was compatible with the tax authorities' civil servants carrying out the internal work required of them, aimed at organizing information and facilitating its analysis within the framework of the review.

3. Resolutions

3.1 Corporate income tax. - Analysis of the accounting and tax treatment of work carried out by the lessee on leased premises

Directorate General of Taxes. Resolutions V0764-23 and V0765-23 of March 29, 2023

An entity is going to carry out fitting-out work on leased premises where it is to carry on its economic activity. Some of the work cannot be separately identified and accounted for and will therefore be permanently incorporated into the leased premises. The lease agreement is classed for accounting purposes as an operating lease.

The DGT analyzed two scenarios:

(i) Scenario 1: Fitting-out work that does not meet the accounting definition of an asset. In this case, the investment must be recorded as an expense for the year, to be included in the tax base for the tax period of accrual.

(ii) Scenario 2: Investments that cannot be separated from the leased asset and meet the definition of an asset. These investments must be capitalized as "property, plant and equipment" and depreciated for accounting purposes over the term of the lease agreement (unless the useful life of the asset is shorter, in which case it will be depreciated over its useful life). The depreciation expense so calculated will qualify for deduction when it relates to the actual depreciation of the asset, which may be determined by any of the procedures set out in article 12 of the Corporate Income Tax Law. In the case of buildings, furniture and fixtures, however, the declining balance and sum-of-the-digits methods are not applicable.

3.2 Transfer and stamp tax. - A capital reduction entailing the assumption of a mortgage debt of the shareholder may be subject to stamp tax if the debtor is discharged

Directorate General of Taxes. Resolution V0588-23 of March 10, 2023

An entity intends to reduce its share capital by repaying contributions. The repayment of contributions will be carried out through an assumption of the payment obligations in respect of a mortgage loan of the shareholders. The transaction will be documented in a single act, through the formalization in a public deed of the necessary resolution adopted by the shareholders' meeting.

The DGT concluded as follows:

(i) The capital reduction constitutes a taxable event for transfer and stamp tax purposes under the corporate transactions heading. The taxable amount is the value of the assets and rights delivered to the shareholders. In the examined case, however, there is no delivery of assets to the shareholders, given that the capital reduction is carried out through the assumption by the company of a debt owed by the shareholders, and there is therefore no tax liability under this heading.

(ii) The assumption of debts does not constitute a taxable event, given its non-registrable nature, unless the co-debtors are discharged, in which case it is subject to the ad valorem stamp tax charge for notarial documents, as has been established by the supreme court (judgment of June 20, 2020).

3.3 Tax on increase in urban land value. - Analysis of the taxation of usufructs under the new tax rules

Directorate General of Taxes. Resolution V0597-23 of March 13, 2023

The current legislation regulating the tax on increase in urban land value (municipal capital gains tax) stipulates (as did the previous legislation) that the tax is to be calculated using an objective method based on the cadastral value of the land and the years of ownership of the property. The taxpayer, however, is allowed to provide proof that the capital gain obtained is lower than the amount so calculated, or that there has been no increase in value, in which case the tax will be reduced or voided, as appropriate.

The DGT pointed out that the wording of the new rule does not restrict the ability to provide proof of the true increase in value to cases in which full ownership is transferred. So when, for example, a usufruct right in rem over a property is transferred, the taxpayer also has the opportunity to prove the true increase in value, based on the data reflected in the deeds of acquisition and transfer.

3.4 Tax on increase in urban land value. - The constitutional court judgment declaring the previous tax legislation on this tax to be unconstitutional came into effect when it was handed down and not when it was published in the Official State Gazette

Directorate General for Taxes. Resolution 0001-23 of February 8, 2023

In its judgment of October 26, 2021, the Constitutional Court declared to be unconstitutional, and null and void, certain provisions in the legislation on the tax on increase in urban land value. The court affirmed, however, that tax assessments or self-assessments which had not been challenged by the date of the judgment, among others, could not be reviewed (alert dated November 3, 2021).

In the case to which this resolution relates, a taxpayer received, on September 28, 2021, a notice demanding payment of the tax on increase in urban land value. This taxpayer subsequently applied for it to be voided based on the aforementioned judgment of the Constitutional Court on October 28 of the same year (i.e. two days after the judgment was handed down) and before it was published in the Official State Gazette (November 25, 2021).

The DGT concluded, in relation to the limitation on the effects of the Constitutional Court's judgment, that in a case such as that analyzed, the tax self-assessment or assessment notified to the taxpayer cannot be reviewed on the basis of this decision since the taxpayer had not challenged it before the date on which the judgment in question was handed down (with no consideration being given for these purposes to its date of publication in the Official State Gazette, which was November 25, 2021).

The Supreme Court will finally settle this point (order of January 25, 2023).

3.5 Administrative procedure. - Clarification of how time periods are to be computed in relation to the calculation of late-payment surcharges

Directorate General of Taxes. Resolution V0532-23 of March 7, 2023

The LGT contains a surcharge system for cases in which a tax return or self-assessment is filed after the corresponding deadline. The surcharge amounts to 1% of the debt, plus an additional 1% for each full month of delay in filing the self-assessment or return. If it is filed after 12 months have run from the end of the voluntary period, the surcharge is 15% plus late-payment interest (for the time elapsed since the day after the end of the 12-month period counted as from the end of the voluntary period for filing returns).

The DGT has provided the following clarification:

a) When the delay is less than one month as from the end of the voluntary period for the filing of returns, the surcharge is 1%. Once that first month has elapsed, an additional 1% will accrue for each additional month of delay.

b) The period of that first month must be computed in accordance with the provisions of article 5.1 of the Civil Code, i.e. from date to date. For example, if the period for the filing of the return ends on June 30 of a particular year, this is the date from which the one-month period will be computed, meaning that it will end on the following July 30. Once this date has passed, i.e. from July 31, the first full month of delay will have been completed, leading to the application of an additional 1% surcharge.

4. Legislation

4.1 Changes are made to the information return form 345

The May 30, 2023 edition of the Official State Gazette published Order HFP/528/2023 of May 22, 2023, which changes “Information Return form 345. Pension plans, pension funds and alternative systems. Welfare mutual insurance societies, insured welfare plans, individual systematic savings plans, company welfare plans and dependent care insurance policies. Annual return for members, payments and contributions”.

The purpose of the amendments to Form 345 is to adapt and adjust the wording in the current designs for registration of the form owing to the amendments introduced, with effect for 2023, by: Law 12/2022 of June 30, 2022 (alert dated July 1, 2022); the General State Budget Law for 2023 (commentary dated December 24, 2022); and Royal Decree 1039/2022 of December 27, 2022 (December 2022 Tax Newsletter).

The order came into force on May 31, 2023 and will be applicable for the first time to information returns in respect of 2023, to be filed as from 2024.

4.2 The corporate income tax and nonresident income tax (permanent establishment) return forms for 2022 have been published

The May 29, 2023 edition of the Official State Gazette (BOE) published Order HFP/523/2023, of May 22, 2023 approving the corporate income tax and nonresident income tax (permanent establishments and pass-through entities incorporated in other countries with a presence in Spain) return forms for tax periods commencing between January 1 and December 31, 2022.

The filing period ends on July 25, 2023 where the taxpayer's fiscal year is the same as the calendar year (July 20 if payment by direct debit is elected).

The form has been adapted to reflect, inter alia, the legislative changes effective for 2022 introduced by: the Anti-Fraud Law (commentary dated July 10, 2021); the 2022 General State Budget Law (commentary dated December 2021); Royal Decree Law 31/2021 of December 28, 2021 (alert dated December 29, 2021); Law 12/2022 of June 30, 2022 (alert dated July 1, 2022); Royal Decree Law 18/2022 of October 18, 2022 (alert dated October 20, 2022); and Law 22/2022 of October 19, 2022 (alert dated November 3, 2022).

Another important change is the inclusion of tables for the following breakdowns, the purpose of which is to provide AEAT with more information to improve taxpayer control: (i) breakdown tables (on form 200) for shareholders of SICAVs under the dissolution and liquidation regime or for communicating net revenues in the case of agricultural and/or livestock farming activities, (ii) breakdown tables (on forms 200 and 220) relating to the special regime for shipping companies in the Canary Islands and credits for investment and expenditure by port authorities, foreign film productions (including a specific one for the Canary Islands), unused credits for investment in West African territories and publicity and advertising expenses.

Also published, as in prior years, are the forms to be used to supply information on certain adjustments to and reductions from the income statement amounting to €50,000 or more (exhibit III), the annual report on activities and projects carried out and researchers affected by Social Security allowances (exhibit IV), and the reserve for investment in the Canary Islands (exhibit V).

4.3 Changes to the personal income tax treatment of leases

Law 12/2023 of May 24, 2023 on the right to housing was published in the Official State Gazette on May 25, 2023.

A summary of the main tax changes introduced by this law is provided in our alert published on the same date.

4.4 The general rule on the deduction of finance costs for corporate income tax purposes is modified and other new tax legislation is introduced

On May 25, 2023, the Official State Gazette published Law 13/2023, of May 24, 2023 amending General Taxation Law 58/2003, of December 17, 2003, to transpose Council Directive (EU) 2021/514 of 22 March 2021, amending Directive 2011/16/EU on administrative cooperation in the field of taxation and other tax rules.

Our alert of that same date summarized the changes introduced by this law to the tax legislation.

4.5 Tax incentives introduced for agricultural and livestock farming activities

On May 12, 2023, the Official State Gazette published Royal Decree Law 4/2023 of May 11, 2023 adopting urgent measures in relation to farming and water resources in response to the drought and the worsening of conditions in the primary sector as a result of the war in Ukraine and the weather conditions, and promoting the use of collective road public transport by young people and preventing occupational hazards in high temperature conditions.

Our commentary dated May 17, 2023 provided a summary of the main tax measures introduced by this royal decree-law.

4.6 Changes introduced in relation to VAT and excise and other special taxes through the transposition of various directives

The May 9, 2023 edition of the Official State Gazette published Law 11/2023 of May 8, 2023, transposing European Union Directives in relation to the accessibility of certain products and services, the migration of highly qualified persons, taxation and the digitalization of notarial and registry procedures; and amending Law 12/2011 of May 27, 2011 on civil liability for nuclear damage or damage caused by radioactive materials.

The following directives affecting the tax field have been transposed:

(i) In the field of VAT, a partial transposition has been made of Council Directive (EU) 2020/284 of 18 February 2020 amending Directive 2006/112/EC as regards introducing certain requirements for payment service providers.

(ii) In the field of excise and other special taxes, changes have been made to both the law and the regulations on excise and other special taxes in order to transpose Council Directive (EU) 2020/262 of 19 December 2019 laying down the general arrangements for excise duty and Council Directive (EU) 2020/1151 of 29 July 2020 amending Directive 92/83/EEC on the harmonization of the structures of excise duties on alcohol and alcoholic beverages.

Lastly, this law also amends article 71 of Law 14/2013 to regulate the authorization of residence for qualified professionals.

Our alert dated May 10, 2023 summarized how this change affects the current regime for inbound expatriates.

5. Miscellaneous

5.1 AEAT analyses how tax losses and credits from years prior to consolidation are applied under the regime for tax groups

An information notice dated May 5, 2023 has been published on AEAT's website regarding the application by tax groups of unused tax losses and credits dating from before their consolidation.

The following conclusions can be drawn from this note:

(i) Exit of companies or termination of the group: Article 74 of the law stipulates that when a company exits the group or the group is terminated, the tax credits generated by the group must be distributed among the group entities in proportion to the contribution made by each one of them to the generation of those credits. According to AEAT, this distribution rule places groups under the obligation to know the origin of each such tax credit.

In this regard, it needs to be borne in mind that, although the group is free to decide which credit to use or not to use to reduce its tax burden, subject only to the limits imposed by law, once the tax credit to be used has been decided, it must be treated as a single tax credit of all the entities that have contributed to its generation, and the proportions initially determined in relation to its generation must be respected in its application. In other words, a group is not at liberty to decide, for example, to offset only the portion of the tax losses of the group for year "n" which is attributable to entity A if, in proportional terms, there were more entities that contributed to the generation of such losses.

The proportions to be considered must be determined based on the contribution made to the tax credit by the different entities in the year in which it was generated.

(ii) Application of "pre-group" tax credits: The law allows a tax group to apply tax credits generated by subsidiaries prior to their inclusion in the group. For this to be possible, however, the entity that generated the credit must contribute to the group a tax base or tax payable which would be sufficient for the credit to be applied under the individual taxation regime.

In this regard, AEAT has clarified the following points:

- In relation to "pre-group" tax losses, there are two limits to be considered (depending on the group or individual net revenues):

  - The "group limit", i.e. the percentage limit on the offsetting of tax losses of the tax group itself (as a whole) for the period, which must be determined based on the consolidated net revenues for the previous year.

  - The "individual limit", i.e. the individual percentage limit applicable to the actual entity which generated the loss, which must be determined on the basis of the individual net revenues of that entity for the previous year. When determining this limit, moreover, the appropriate eliminations and inclusions required for consolidation purposes must be applied.

    AEAT adds (applying a principle which is questionable and appears not to be inferable from the rule) that, when determining this individual limit, the amount of any tax loss generated by the group to which the entity itself has contributed and which is being applied in the year must be taken into account. In other words, group tax losses offset in the same period would reduce, in the part attributable to the entity in question, the amount of that entity's pre-group losses, and thus the leeway it has to make use of its "pre-group" losses.

In both cases, the minimum amount is €1 million.

- According to the law, "pre-group" credits and reductions can also be applied in accordance with the relevant individual and group limits. According to AEAT, when determining the "individual limit," the same principle must be applied as in the case of tax losses. In other words, credits and reductions generated and applied by the group in the period must be taken into account, to the extent that the entity in question contributed to their generation; and any group tax losses which may be being offset must also be taken into account, in the proportional part by which the entity contributed to their generation.

Tax Department

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