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GARRIGUES

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1. Personal income tax exemption allowed for termination of senior managers' employment

Supreme Court (Judicial Review Chamber) concludes that termination by unilateral decision of the employer of a senior management contract is exempt up to seven days' per year with a limit of six monthly payments.

Royal Decree 1382/1985 of August 1, 1985 on the special employment relationship of senior managers allows senior managers to claim an exemption amounting to seven days per year with a limit of six monthly payments when their employment is terminated due to a unilateral decision by the employer. The severance payment goes up to twenty days per year with a limit of twelve monthly payments where it takes place due to unjustified dismissal. An agreement to the contrary is allowed in both cases, however.

The option to reach this agreement had caused the courts and the tax authorities to conclude repeatedly that in labor legislation there is no mandatory lower limit on severance for the termination of senior managers' employment. This had caused them to deny the exemption that the successive personal income tax laws have allowed for dismissals or removals of senior managers, because this exemption only applies to the severance payments laid down as a mandatory obligation in the Workers' Statute, its implementing legislation or the legislation on the enforcement of judgments, whereas those determined under an agreement, covenant or contract do not fall in that category.

The Supreme Court (Labor Chamber) in a judgment rendered on April 22, 2014 (appeal 1197/2013) held that it was not logical for the legislature to allow covenants that exclude any severance payments. On the basis of this principle the National Appellate Court (Judicial Review Chamber), in a judgment rendered on March 8, 2017 (appeal 242/2015), concluded in a case of termination by unilateral decision of the employer, that the severance payment equal to seven days per year with a limit of six monthly payments amounted to a mandatory lower limit exempt from personal income tax. Following the appeal by the government lawyer against this last judgment, the Supreme Court has now confirmed the National Appellate Court's view, which it did in a judgment rendered on November 5, 2019 (cassation appeal 2727/2017). The following reflections by the court are worth noting:

(a) The senior management relationship, according to the Workers' Statute, is a special employment relationship, defined in the Senior Management Royal Decree, and therefore this royal decree is a piece of implementing legislation for the Workers' Statute.

(b) The judgment by the Supreme Court (Labor Chamber) in 2014 recognized the mandatory nature of the examined severance payment. Given that the cassation appeal included by Organic Law 7/2015 "entails a uniform mechanism for interpreting public law", the case law of other supreme court chambers is transferable to the judicial review jurisdiction.

Although it does not refer to unjustified dismissals of senior managers, the view in this judgment may be regarded as transferable to those cases; and as a result as allowing the exemption to be considered applicable in these cases with a limit of twelve monthly payments.

2. Judgments

2.1 Tax on increase in urban land value.- Municipal capital gains tax is unconstitutional where tax liability is higher than capital gain

Constitutional Court. Judgment of October 31, 2019

As explained in our Tax Alert dated November 14, 2019 the Constitutional Court set aside the request for a ruling on unconstitutionality submitted by Madrid Judicial Review Court number 32 and held unconstitutional article 107.4 of the Revised Local Finances Law in cases were the amount of tax payable is higher than the capital gain obtained by the taxpayer.

2.2 Tax on increase in urban land value.- Anyone who has assumed the cost of the tax on increase in urban land value is entitled to appeal

Supreme Court. Judgment of October 30, 2019

The taxable person for the municipal capital gains tax (tax on increase in urban land value) is the transferor, if the transfer is for consideration, and the transferee, if there is no consideration. It is common practice, however, for the parties to agree that the cost of the tax must be assumed by the party that is not the taxable person.

In this judgment, the Supreme Court recognized a legitimate interest in appealing against assessments of local taxes for anyone other than the taxable person who agrees to pay the tax by covenant or contract. The court accepted this option only for local taxes, and expressly rejected it for any other tax.

2.3 Tax on increase in urban land value.- Supreme Court appears to recognize the option to claim damages from the legislating state in relation to the tax on increase in urban land

Supreme Court. Judgment of October 3, 2019

The Supreme Court appears to support in this judgment the option to claim financial liability from the legislating state as a mechanism for recovering amounts incorrectly paid in respect of the tax on increase in urban land value.

In this specific judgment, however, the court set aside the appellant's claim because it did not consider that evidence had been provided of the absence of an increase in land value and therefore held that there was no loss capable of being indemnified through the financial liability of the state.

2.4 Tax on increase in urban land value.- Not taking into account public deeds of acquisition and sale as a means of proving the absence of an increase in value of the land breaches the right to an effective remedy

Constitutional Court. Judgment of September 30, 2019

According to the taxpayer in this proceeding, the tax on increase in urban land value did not have to be paid because the value of the land for the transferred property had not increased between its acquisition and its sale. To evidence this fact it produced the deeds of acquisition and sale. In the proceeding however these documents were not taken into account as proof of variation in the value of the land.

The Constitutional Court upheld the appeal lodged for protection of constitutional rights. It concluded that the failure to consider the deeds of acquisition and transfer of a property as proof evidencing the absence of an increase in value of the land breaches citizens' fundamental rights to an effective remedy.

As a result, it ordered the proceedings to be rolled back for the lower court judge to rule on the produced evidence.

2.5 Tax procedure.- If the deduction of VAT is questioned on the basis of conclusions reached in other related proceedings, the taxpayer should have access to the documents in those proceedings

Court of Justice of the European Union. Judgment of October 16, 2019. Case C-189/18

The Hungarian tax authorities considered that a taxpayer had incorrectly deducted an amount of VAT, because it had been charged on transactions made with its suppliers that were part of VAT fraud.

The taxpayer submitted that the tax authorities had breached the principle of respect for the right of defense, in that only the tax authorities had been able to access the file relating to the audits performed on the suppliers and the decisions in the criminal proceeding conducted against them.

The reference for a ruling by the CJEU concerned whether in a scenario of the type described the right of defense and the right to a fair proceeding were breached. The court concluded that these rights are breached if the tax authorities are relieved of the need to make evidence known to the taxable person including evidence used against that person because this deprives them of the right to effectively call into question the proposed adjustment. Unless objectives based on public interest warrant restricting that access.

Additionally, the court ruling on the appeal lodged by the taxable person must be able to assess the lawfulness of collecting and using the evidence against them and all the findings made in the authorities' decisions adopted in relation to the suppliers which are decisive to the outcome of the action.

2.6 Administrative procedure.- For taxes payable through assessment, late-payment interest owed to the taxpayer must be calculated on the total liability in the voided assessment

Supreme Court. Judgment of October 09, 2019

Some taxes are payable through assessment by the tax authorities, including real estate tax or the tax on economic activities. In relation to these taxes, at issue was the method of calculating the late-payment interest owed to the taxpayer where part of the assessment has been voided.

In the case examined in this judgment the cadastral values of various properties of a company had been voided, and those values had been used as the basis for calculating the tax on economic activities. As a result of this partial voiding of the assessment, the taxpayer applied for a refund of the tax incorrectly paid (the difference between the debt paid and the debt that should have been paid based on the correct cadastral value) with late-payment interest.

The Supreme Court concluded that this late-payment interest owed to the company must be calculated by reference to the aggregate amount of the assessments issued by the tax authorities instead of the amount in those assessments that was incorrectly paid.

2.7 Audit procedure.- Principle of complete adjustment must prevail in audits

Supreme Court. Judgments of September 10 and October 17 2019

In the cases giving rise to these judgments, the auditors had concluded that various invoices issued to the taxable person were not for real transactions. They therefore considered that the input VAT recorded on these invoices was not deductible. The taxable person pleaded that, despite this fact, the VAT had not been paid over to the tax authorities and so the auditors were required to recognize simultaneously the right to a VAT refund. The auditors rejected this option, because they considered that the refund had to be requested by the taxable person in a separate procedure.

The court concluded, against this argument, that, under the principle of complete adjustment and the principles of procedural efficiency and effectiveness in steps by the authorities and proportionality in implementation of the tax system, the auditors should have recognized the right to a VAT refund the deduction of which had been denied, all in the same procedure.

This simultaneous adjustment should have been made even if at the same time it is considered that the taxable person's actions were subject to a penalty.

2.8 Audit procedure.- A dawn raid at the taxpayer's address is only possible if necessary, useful and proportionate in relation to the subject-matter of the audit

Supreme Court. Judgment of October 10, 2019

Observance of the requirements related to the reduction for the depletion factor under the mining tax regime was reviewed in a partial audit. The auditors examined in particular whether the expenses incurred and investments made to create the depletion reserves were directly related to the mining activities specified in the Corporate Income Tax Law. To complete this analysis, the auditors decided to carry out a dawn raid at the company's address.

In this judgment the Supreme Court examined whether that procedure was suitable. The court said that assessing the appropriateness of a measure of this type requires a three-fold judgment:

- On suitability of the measure: it must be useful for the audit work.
- On necessity: there must not be a more moderate measure.
- On proportionality strictly speaking: the benefits to be obtained must be weighed against the sacrifice of the fundamental right to the inviolability of premises.

The court concluded that, in the examined case, there was no need for the auditors to enter the entity's premises and sacrifice that fundamental right to ensure satisfaction of all the requirements laid down by the law in relation to the tax benefit at issue. That same aim could have been achieved by requesting the information from the taxpayer and, if need be, denying the suitability of the reinvestments by making the appropriate assessment.

It therefore voided authorization for the dawn raid and ordered the return to the taxpayer of the documents obtained from the raid.

3. Decisions

3.1 Corporate income tax.- Cost of VAT on gifts in kind that is not assumed by the recipient is added to the base for tax credit in respect of gifts

Central Economic-Administrative Tribunal. Decision of October 8, 2019

Under article 18.1.b) of Law 49/2002, of December 23, 2002, on not-for-profit entities and tax incentives for patronage, in relation to gifts of goods or rights the base for the tax credit is the carrying amount of the given goods or rights when they were transferred.

In the case examined in this decision, the entity had made a gift in kind and had assumed the cost of the VAT charged on that gift. For that reason, it considered that the tax credit in respect of gifts claimable for corporate income tax purposes had to be calculated by reference to the whole cost of the gift, including the VAT charged but not collected from the recipient entity.

TEAC accepted the taxpayer's argument (on the basis of resolution number 1 of the Spanish Accounting and Audit Institute Gazette, issue 115, September 2018) and concluded that the VAT

charged on the gift in kind creates a debt for the recipient which as a result of being forgiven generates an expense for accounting purposes for the giver which therefore is part of the base for calculating the tax credit in respect of gifts.

3.2 Corporate income tax.- Bringing financial assets together at a single entity that does not have financial risks qualifies as a valid economic reason

Central Economic-Administrative Tribunal. Decision of October 8, 2019

The issue focused on determining whether for the purposes of claiming the tax neutrality regime, placing financial assets at a single entity that does not have financial risks for it to serve as a vehicle for future investments qualifies as a valid economic reason, or whether, by contrast, the regime cannot be allowed as a result of endangering the solvency of the entity from which the assets left to the detriment of third parties.

At first instance, Madrid TEAR (Economic-Administrative Tribunal) concluded that the special tax neutrality regime was not allowed to be claimed, because the transaction gives rise to a dissipation of assets unrelated to tax which cannot be considered a "valid economic reason".

TEAC concluded, however, that the tax neutrality regime can only be denied where the main purpose of the transaction is tax evasion or fraud. In other words, any other economic reason (such as, in the specific case raised, safeguarding capital from potential business risks) must be considered included in the vague legal concept of "valid economic reason" in the Corporate Income Tax Law.

3.3 Corporate income tax.- Refund of a tax prepayment is a refund arising from tax law

Central Economic-Administrative Tribunal. Decision of September 10, 2019

The tax authorities issued an assessment for a corporate income tax prepayment. The assessment became final after the annual return for the tax was filed, and for that reason the assessed prepayment could not be deducted. Therefore, to recover the amount of the prepayment assessed earlier, the taxpayer applied for correction of its self-assessment of the tax.

TEAC concluded that the right to apply for a refund arises when the taxpayer paid the amount of the prepayment assessed by the tax authorities, because that is when the excess over the tax liability contained in the self-assessment occurs.

However, because this case involves a refund arising from the mechanism for the tax, late-payment interest must start to be calculated after six months have run from the filed application for correction.

3.4 Personal income tax.- For termination by mutual agreement to benefit from multi-year income treatment there must be a real and actual break in the worker's relationship

Central Economic-Administrative Tribunal. Decision of May 14, 2019

A worker received a severance payment in respect of termination by mutual agreement of an employment contract. Immediately afterwards the worker was hired on a self-employed basis to carry out similar tasks to those he was performing before his dismissal. The issue focused on determining whether the reduction for clearly multi-year income applied. The tax authorities had disallowed that treatment because they considered that no real break had occurred in the relationship between company and worker.

Madrid TEAR upheld the taxpayer's claim because it considered that to be able to reject the reduction the tax authorities should have used a simulation proceeding. Finding against this, TEAC concluded that:

(a) It is not necessary for simulation to be found to exist. It simply needs to be determined and evidenced that there has been no real and actual break in the relationship.

(b) Under article 31 of the Spanish Constitution the reduction has to be rejected in a scenario of the type submitted, even though the personal income tax legislation only requires an actual break in the workers' relationship as a condition for the exemption in respect of severance payments not for the reduction in respect of multi-year income.

TEAC further underlined that the reduction seeks to soften the impact that an item of multi-year income may have on the progressive nature of the tax. The worker, however, had been taxed at the highest marginal rate, so in this case there are no arguments supporting the tax benefit.

3.5 Nonresident income tax.- If interest is paid to a holding company resident in a member state, but the beneficial owner is not resident in the EU, it is subject to withholding tax

Central Economic-Administrative Tribunal. Decision of October 8, 2019

It was examined whether there was an obligation to withhold nonresident income tax on the interest paid by a Spanish entity to a Dutch holding company, whose beneficial owner was resident in Andorra.

The tax authorities argued that the Dutch company did not have power of disposal over the interest paid by the Spanish company because, as a result of its status as intermediary or mandate holder of the Andorran company, it was required to transfer the interest to that Andorran company. The taxpayer argued against this that in the Spanish legislation governing the interest paid to companies resident in the EU (article 14.1 c) in the Revised Nonresident Income Tax Law there is no beneficial owner clause.

According to the interpretation determined by the CJEU in its judgment of February 26, 2019 (C-115/16, C-118/16, C-119/16 and C- 299/16, *N Luxembourg*) in relation to the Interest and Royalties Directive, TEAC concluded that in a scenario of the type submitted the beneficial owner clause may be applied even if this clause has not been implemented in Spanish law and without needing to apply a general anti-abuse clause (conflict in application of the law or simulation).

TEAC added that:

(a) The fact of interest being transferred after being received (and in a very short space of time from when it is received) is an indicator of abuse.

(b) Although an attempt by the taxpayer to claim the most advantageous tax regime cannot in itself give rise to a general presumption of fraud or abuse, a purely artificial transaction in economic terms should not benefit from a right or advantage under EU Law.

(c) It is the tax authority seeking to deny the exemption that is required to prove the existence of an abusive practice. In this type of case, however, it is not necessary to identify the beneficial owners of the interest, but to prove that the alleged beneficial owner is simply a holding company through which an abuse of law has taken place.

3.6 VAT.- Input VAT incurred by a holding company on disproportionate compensation for directors is not deductible

Central Economic-Administrative Tribunal. Decision of September 18, 2019

The single activity of a holding company is management of its one and only subsidiary. It invoices €70,000 a year in respect of that activity. In performing the activity it assumes costs in respect of its directors' compensation amounting to over €2 million. That compensation is recorded on an invoice with VAT.

TEAC disallowed deduction of this input VAT by the holding company. The tribunal argued that:

(a) It is irrelevant whether receipt of the services provided by the directors is mandatory.

(b) There must be a connection between the services provided by the directors and those provided by the holding company to its subsidiaries for the holding company to be entitled to deduct its input VAT. In this case:

- It has not been evidenced that the compensation was paid exclusively in respect of providing the services (subject to VAT) to the subsidiary; and it appears that the holding company incurred in respect of the directors' compensation even when those services had not been provided.

- There is a clear gap between the amount invoiced to the subsidiary for services and the compensation received by the directors.

(c) In short, the holding company cannot be characterized as a trader or professional for the purposes of the tax by reason of the services provided to the subsidiary.

3.7 Collection procedure.- Simple negligence is not a sufficient reason for holding directors jointly and severally liable

Central Economic-Administrative Tribunal. Decisions of September 24, 2019

TEAC examined in two decisions the following scenarios for holding directors jointly and severally liable:

(a) A scenario where inexact corporate income tax and VAT returns had been filed, but the tax authorities did not evidence that the director was at fault.

(b) A second scenario where forged invoices had been issued containing an amount much higher than the value of the work actually performed or reflecting the provision of non-existing services; the director, according to the proof provided by the tax authorities, had participated in issuing the invoices.

TEAC concluded that to hold a director jointly and severally liable, in addition to the tax infringement and director status (elements shared by both types of liability) an intentional element involving major fault is required, comparable to criminal willful misconduct. Specifically, the attribution of joint and several liability requires proof to be provided of willful intent on the part of the director not simply negligence or fault in supervising (which by contrast would be sufficient to attribute secondary liability).

For this reason, in the first scenario, it concluded that joint and several liability could not be attributed to the director, because proof had not been provided of an intentional element comparable to criminal willful misconduct. In the second case, however, it confirmed that the director was jointly and severally liable, by arguing that proof had been provided of the intentional element of willful misconduct when forged invoices were issued.

3.8 Collection procedure.- Once the liquidation phase has begun administrative enforcement action cannot be taken to collect pre-order claims

Central Economic-Administrative Tribunal. Decision of September 24, 2019.

TEAC had already held as an official interpretation that the tax authorities were authorized to render enforced collection interlocutory orders against insolvent debtors, if the claims behind those orders were pre-order claims.

In view of the supreme court judgment of March 20, 2019 (appeal 2020/2017), discussed in our Tax Newsletter for April 2019, TEAC has now changed its interpretation by holding that, after the liquidation phase of the insolvency proceeding has been opened, the tax authorities cannot render enforced collection interlocutory orders against insolvent debtors (not even to require payment of pre-order claims).

3.9 Penalty procedure.- The late filing of Form 720 is not subject to a penalty in itself

Canary Islands TEAR (Decision of February 22, 2019) and Galicia TEAR (Decision of June 27, 2019)

In these decisions two cases were examined in which a penalty had been imposed on the taxpayer for the late filing of the information return on assets and rights abroad (Form 720).

In both decisions, the regional tribunals stressed the particular importance of providing reasons for fault in cases involving a penalty on the taxpayer. The tax authorities must therefore provide specific reasons for the existence of fault in the particular case concerned.

Both Galicia TEAR and Canary Islands TEAR concluded as follows:

(a) A delay in filing a return is not subject to a penalty in itself. Reasons must therefore be provided for finding there was fault on the part of the taxpayer who was late in performing its obligation, at least in the form of simple negligence.

(b) It is insufficient for fault to be based only on the fact that the taxpayer should have known about its obligation to file Form 720, in view of the advertising and information campaign organized by the tax authorities when that form was approved. Especially since this was a new form, approved in the year to which the late return related.

Finding against this, in a judgment rendered on July 11, 2019, Extremadura High Court confirmed the penalty for the late-filing of Form 720, based only on the fact that the taxable person should have known about its obligation, in view of the size of its assets abroad; the court added also that it is likely that, for the same reason, the taxpayer had been advised by experts.

3.10 Review procedure.- The circumstances that followed the challenged act, appeared in the file, and are essential for examining it must be taken into account

Central Economic-Administrative Tribunal. Decision of September 10, 2019

A company applied for correction of a corporate income tax self-assessment on the basis of specific circumstances that originated from an audit. That audit had not ended when the tax authorities and Madrid TEAR dismissed the company's arguments.

TEAC held that the decisions adopted by the tax authorities and Madrid TEAR were correct, in that the application for correction of the self-assessment could not be upheld before the end of the procedure that gave rise to the reason underlying that request.

It also concluded however that it would not be lawful to lay down that the taxpayer, once the audit has ended (and because the circumstance underlying the application for correction arose in that audit), must initiate another procedure for correction of its self-assessment, submitting the same information as in the initial claim.

For all of these reasons, under the principles of expediting proceedings and as a result of the broad powers that the General Taxation Law confers on it, TEAC concluded that, to render a decision on each case, in addition to the prior and existing circumstances for the challenged act (in the examined case, the initial correction of a self-assessment), other circumstances must be considered which, despite coming after that act, appear in the proceeding and are essential for a decision on it.

4. Resolution requests

4.1 Corporate income tax.- DGT revisits the economic reasons considered to be valid in recent resolutions of issues related to the tax neutrality regime for restructuring transactions

Directorate General for Taxes. Resolution V1881-19 of July 18, 2019; resolution V2032-19 of August 6, 2019; resolution V2039-19 of August 7, 2019; resolution V2057-19 of August 7, 2019; and resolution V2061-19 of August 7, 2019

The Directorate General for Taxes (DGT) has recently replied to a raft of resolution requests concerning the tax neutrality regime for reorganization transactions. In many of these resolutions it was examined whether the reasons for performing them qualify as "valid economic reasons" for the purposes of that special regime.

Summarized below are a few of these reasons that the DGT considers economically valid:

(a) In merger by absorption transactions, the following are accepted as valid economic reasons:

- In a case where it is intended to absorb a company under an insolvency proceeding, it is considered valid that this is intended to ensure that the insolvent company continues trading and has access to the bank financing facilities that the absorbing company has available.

- Simplifying the corporate structure, to rationalize the use of tax incentives under the Canary Island Tax and Economic Regime.

Against this, it said that, where a dormant company with unused tax loss carryforwards is absorbed, the existence of valid economic reasons may be questioned.

(b) In a non-monetary contribution by two individuals of shares in an operating company to a newly created company, it is considered valid if it was done with the intention of storing the dividends and capital gains from the contributed companies at the holding company to enable new investments to be undertaken.

(c) In a share exchange by two individuals that benefitted a nonresident (Dutch) company, the following reasons were considered valid:

- To centralize planning and decision-making, and ensure uniform decisions.

- To enhance management of the companies and reduce administrative and management costs.

- To increase the selling and negotiating capacity with third parties, by forming a group of companies.
- To enhance the group's solvency and enable new sources of financing to be obtained.
- To enhance the planning of conducted activities through business synergies, and achieve better coordination and use of resources, by having control over part of the management of affiliates and adopting policies for cooperation among affiliates.
- To give rise to a structure that secures future survival.

4.2 Corporate income tax.- Even though two companies belong to the same business group, the resources used by one of them for its activities cannot be used to determine that an activity is performed at the other, if the two activities are different

Directorate General for Taxes. Resolution V2042-19 of August 7, 2019

Company A is engaged in designing, producing and selling watches and has the necessary material and human resources to carry on this activity. The majority shareholder of A intends to form a second company B engaged in leasing real estate, which will not have the material and human resources needed for this activity. It is intended to transfer the shares of A and B later (under a share exchange) to a third company C.

It was asked whether, in view of the fact that A and B will be part of the same business group, B may be regarded as carrying on an economic activity, because another company in the same group (A) has the material and human resources. The DGT replied that the fact of two companies belonging to the same group does not mean that the material and human resources that company A has are used for B's activity, in view of the difference between the activities of one company and the other.

4.3 Corporate income tax.- The tax neutrality regime may be claimed for an exchange in which only voting shares are issued

Directorate General for Taxes. Resolution V2025-19 of August 6, 2019

An individual directly owned shares in companies A and B. Company A had voting shares and non-voting shares. The issue submitted for resolution concerned a share exchange in which the individual was to contribute all the shares in company B to company A, in exchange for shares in company A's capital stock. To achieve this, company A was going to perform a capital increase by issuing only new voting shares.

The DGT allows the neutrality regime to be claimed for this share exchange transaction, even if the beneficiary company only issues shares in the first class, provided this allows it to obtain the majority of the voting rights at the acquired company (B).

4.4 Corporate income tax.- The benefit of accelerated depreciation may be transferred in a nonmonetary contribution of a line of business

Directorate General for Taxes. Resolution V1810-19, of July 11, 2019

Company A, engaged in leasing business and residential properties, is sole shareholder of company B, engaged in leasing residential properties and subject to the special regime for companies engaged in leasing. The request concerned the transfer of the residential property leasing business of company A to company B in a nonmonetary contribution of a line of business.

The DGT concluded that the benefit of accelerated depreciation, which company A has been electing, is transferable to company B in a contribution of a line of business, on condition that the transferee agrees to satisfy the requirements associated with that incentive and linked to the assets, rights, and liabilities it receives.

4.5 Personal income tax.- Commencement of a professional activity means exclusion from the inbound expatriates regime

Directorate General for Taxes. Resolution V2663-19 of September 30, 2019

The DGT looked at the case of a worker subject to the inbound expatriates regime who terminated his employment and registered as an independent professional. It was asked whether this had an effect on his entitlement to claim that special regime.

One of the requirements for this regime is that the taxpayer must not obtain income that qualifies as having been obtained through a permanent establishment located in Spain. The DGT therefore concluded that the taxable person must be excluded from the special regime. That exclusion takes effect in the tax period when the requirement fails to be satisfied.

4.6 Personal income tax.- For subsistence expenses not to be taxable it is a necessary requirement for the relocation to take place to a municipality other than that of the worker's residence and that of the workplace

Directorate General for Taxes. Resolution V2553-19 of September 19, 2019

The requesting company had several sales and technical workers on its payroll who made frequent trips to customers' premises. The workers were assigned to the company's workplace, but teleworked from their private homes (where ordinarily their business started and ended), and therefore they did not travel to their workplace on a daily basis.

In relation to these circumstances, two questions were asked:

(a) Whether subsistence expenses (per diems) are exempt where employees travel to municipalities other than that of their principal residences for work reasons.

(b) Whether those expenses are eligible for exemption where employees travel from their principal residences to their assigned workplaces, to participate in meetings or for other reasons.

The DGT recalled that, as a general rule, for subsistence expenses to be exempt (similarly to accommodation expenses) employees must travel to a municipality other than the municipality of their permanent residences and the municipality where their workplace is located. For this reason, the second type of per diems are not exempt under any circumstances and the first type are only exempt if the workers travel to a municipality other than that of their workplace.

The DGT also underlined that the payer would have to provide evidence of the date and place of the trip in addition to the reason for making it.

4.7 Personal income tax.- An inbound expatriate does not have to be taxed on the surrender of contributions to a pension system made when he was nonresident

Directorate General for Taxes. Resolution V2358-19 of September 10, 2019

An individual relocated from Switzerland to Spain and applied for the special inbound expatriates regime. While he was living and working in Switzerland, as required under the legislation in that country, worker's and employer's contributions were made for a future pension. When he stopped being resident in Switzerland, the sum of money that had built up was transferred to a special bank account in the form of a single payment without waiting for retirement.

The DGT specified that the single payment arose from contributions made before the relocation to Spain, in other words, while the taxpayer was working and residing in Switzerland. Therefore, this income will not be treated as obtained in Spain and will not be taxed under the special regime for inbound expatriates.

4.8 Wealth tax.- Family business relief claimable even if remuneration payments are not received from the directly owned affiliate

Directorate General for Taxes. Resolution V2067-19 of August 8, 2019

The request was submitted by two individuals who owned a holding company which in turn owned three operating companies. These individuals carried on management activities at the holding company and at one of the operating companies for which they received an amount of remuneration paid first by the holding company, but later charged to the affiliate under a service agreement between both companies. This remuneration accounted for more than 50% of the whole amount of remuneration of the requesting individuals.

Each individual was considering contributing their shares in the holding company to two new holding companies, (each of them) controlled by each of the individuals. The remuneration payments in respect of management activities would continue being received from the first holding company.

The DGT recalled that, as it had concluded in earlier replies, the fact that the new holding companies (in other words, the companies owned directly by the individuals after the planned nonmonetary contribution) are not the ones remunerating the management activities is not an impediment to claiming the family business relief from wealth tax, as long as the appropriate provisions are included in the deed of formation or in the bylaws.

4.9 Wealth tax.- An investment in a private equity fund may restrict the family business exemption

Directorate General for Taxes. Resolution V2582-19 of September 20, 2019

It was asked whether the family business exemption could be claimed for shares in a limited liability company that was considering investing in 5% or a higher percentage of a private equity fund that invested in other private equity entities and was managed by a management company.

One of the requirements for that exemption is that securities must not account for more than half of the entity's assets. For these purposes, securities do not include, among others, any meeting the following requirements:

(a) Those which carry at least 5% of voting rights and are held for the purpose of controlling and managing the investment, provided that there exists for this purpose the appropriate organization of human and material resources.

(b) The primary activity of the target entity cannot be the management of movable or real estate assets.

Accordingly, the DGT explained that:

(a) The shares in a private equity fund in principle qualify as securities.

(b) Since the investment in the limited liability company was going to be higher than 5%, this would mean obtaining voting rights at the meeting of investors in the private equity fund equal to more than 5%. Therefore, the first requirement enabling this investment not to be included in the calculation of securities had been met.

(c) The private equity fund's purpose, however, was to invest in other private equity entities, and therefore its assets consisted primarily of securities. Additionally, it was to be managed by a "manager", so, by nature, it would not have the appropriate organization of material and human resources needed to exclude the securities from the calculation of assets for the purposes of assessing whether a company's primary purpose was the management of movable or real estate assets.

(d) It had to be concluded therefore that the private equity fund's primary purpose was the management of real estate assets and one of the requirements for excluding the investment in the private equity fund from the limited liability company's assets had not been satisfied.

5. Legislation

5.1 The 25th United Nations Climate Change summit is declared an event of exceptional public interest

On November 11, 2019 the Official State Gazette published Royal Decree-law 15/2019, of November 8, 2019, adopting urgent measures for the organization in Spain of the 25th United Nationals Climate Change summit.

Among other measures, it classes the program approved for these purposes as an event of exceptional public interest, and therefore it qualifies under article 27 of Law 49/2002, of December 23, 2002, on the tax regime for not-for-profit entities and on tax incentives for patronage. The tax benefits for this program will be the highest amounts allowed in that article. Any sums paid in respect of sponsorship of the entities in charge of implementing programs and activities for the event will be taken into account to calculate the limit set out in article 27.3, one, paragraph two, of the law.

The support program for this event will start on November 1, 2019 and end on March 31, 2020.

For more information:

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