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TAX NEWSLETTER

Latest developments and legal trends - Legislation of interest

News Roundup - Judgments

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1. Tax ruling: The burden of proof for state aid lies with the European Commission

The General Court of the European Union has concluded in two recent judgments that the burden of proof for the existence of state aid in the tax rulings issued by the tax authorities to companies lies with the European Commission (EC).

As has become common knowledge, the European Commission (EC) concluded in its decisions on the Fiat Finance and Starbucks cases that certain tax rulings issued by the tax authorities in Luxembourg and the Netherlands, respectively, to certain multinationals granted them more favorable tax treatment than that conferred in the general legislation applicable in those states:

(a) In Fiat's case, the EC considered that the margin on its intra-group financial activity which was regarded as taxable in Luxembourg was below a rational level in view of the funds and capital available at the company.

(b) In the Starbucks case, the EC concluded that the remuneration of the Netherlands company (which produced and distributed coffee grains) was not rational, from the standpoint of the characteristics of this activity; this remuneration was affected, to a large extent, by the payment of an excessive and unjustified royalty to another group company resident in the UK.

The General Court accepted in its judgments that the EC has the power to check correct application of the arm's length principle, requiring transactions between related parties to be priced according to market conditions. However, the court concluded as follows:

(a) Transfer pricing is a complex field and allows a margin of appreciation.

(b) Not every discrepancy over the method used to price transactions between related parties may give rise to state aid.

(c) To conclude correctly as to whether state aid exists the EC (which has the burden of proof) needs to provide sufficient arguments that the pricing method used by the company is not appropriate and that it grants an advantage. In the Starbucks case, because these elements had not been demonstrated, the EC's decision was set aside (which did not happen in the Fiat case).

(d) Tax rulings are individual measures which allow a presumption of selectivity.

2. Judgments

2.1 Corporate income tax.- The gain obtained from an exchange and subject to deferred taxation must benefit from the tax regime existing when the shares are subsequently transferred

Court of Justice of the European Union (CJEU). Judgment of September 18, 2019. Joined cases C-662/18 and C-72/18

A French taxpayer elected the tax neutrality regime for an exchange of shares, so taxation on the gain was deferred. After the exchange, a reduction was approved in French law for gains arising on the transfer of shares, linked to the holding period. The French courts took the view that, because the reduction was not in force when the exchange took place, it was only applicable to the gain arising between the exchange and the subsequent transfer of shares.

The request submitted to the CJEU concerned whether this interpretation is consistent with the EU Directive on the tax rules for restructuring transactions.

The CJEU concluded that it was not. It based this conclusion on the view that the shares received in the exchange are substituted for the securities existing before the exchange but retain their cost and holding period. In such cases, the transfer of the new securities must be taxed as if the exchange had not taken place, in other words, the same tax treatment must be given to the whole of the gain that arises on the transfer.

2.2 Corporate income tax.- The auditors cannot adjust deduction of allowance for impairment of investments in equity securities in respect of dividends received in statute-barred years

National Appellate Court Judgment of July 25, 2019

Before 2015, allowances for impairment of investments in equity securities could be deductible if certain requirements were satisfied. In an audit, the tax authorities proposed a reduction to the amount deducted by a company by the amount the company received in dividends over the holding period for the shares, including those received in periods that were already statute-barred when the audit was performed.

The National Appellate Court concluded in this judgment that the dividends received in a statute-barred year cannot be included to calculate the tax deductible allowance, because this implies ignoring the statute of limitations when reviewing this year.

On another note, the court recalled that the tax authorities have a duty to adjust the taxpayer's position as a whole so if the adjustment made in relation to one year has effects in another year, an adjustment must be made to that year also.

2.3 Cadastral values.- The cadastral value of a property cannot be higher than the value appraised by the tax authorities for transfer and stamp tax purposes

National Appellate Court Judgment of February 7, 2019

The cadastral value of a property was challenged because it was believed to be higher than its market value. That property had been appraised by the tax authorities in a transfer and stamp tax audit, which resulted in a value for transfer and stamp tax purposes below the cadastral value.

The National Appellate Court ruled to set aside the cadastral value, and held that the cadastral value of the property must be, in this case, the value audited for transfer and stamp tax purposes, because it was lower than the cadastral value.

2.4 Administrative procedure.- Appointment of a representative not correctly made by the taxpayer is valid if the taxpayer does not dispute it in the proceeding

Supreme Court. Judgment of October 3, 2019

In the case underlying this judgment, the steps required during the audit work had been dealt with by a person authorized in a standard appointment form delivered by the auditors at the start of the work. The scope of the appointment appearing in that form was to act in dealings with AEAT's auditors.

The Supreme Court was asked whether it must be considered that this type of appointment implicitly includes acting in the penalty proceeding.

According to the court, although it is true that the audit and the penalty procedure are separate and independent, the law does not require a specific power of attorney to be granted for the penalty proceeding. As a general rule, therefore, a combined power of attorney may be granted for both procedures. It is necessary, however, for the power of attorney to state appropriately all the steps that the representative is authorized to carry out. Therefore, if the power of attorney does not expressly state that the representative's appointment by the taxable person includes the steps authorized in that power of attorney that are carried out in the penalty proceeding they are not valid.

The court clarified however that the representative's appointment will be deemed confirmed where the administrative act has been challenged and no pleadings were made against the potential non-existence or insufficiency of the appointment of the person acting as representative in the procedure concerned.

2.5 Administrative procedure.- Determining different periods for appealing against decisions according to whether or not they are in breach of the Constitution or EU law may not be consistent with the principles of equivalence and effectiveness

Court of Justice of the European Union. Judgment of September 11, 2019. Case C-676/17

Romanian law sets out a one-month limitation period for submitting a request for revision of a final judicial decision handed down in breach of EU law. The limitation period is three months, however, if the appeal for revision is based on an infringement of national law.

The one-month limitation period was determined in a judgment published in 2017. In the case underlying the CJEU's judgment, however, the appeal later held to be out of time was filed in August 2016.

The CJEU concluded as follows:

(a) The described provisions could initially appear to be in breach of the principles of equivalence and effectiveness, although this will depend on the circumstances of the case.

(b) In relation to the principle of equivalence, it needs to be analyzed whether both types of appeals are similar to conclude as to whether this principle is breached or not. According to the CJEU, this analysis has to be done by the referring court, which retains the right to file a new request for a preliminary ruling when it is able to provide the CJEU with all the elements enabling it to hand down a decision on compliance with the principle of equivalence.

(c) On the principle of effectiveness:

- A one-month time limit for filing an appeal for revision of a final judicial decision is not censurable in itself because it is not an obstacle to assessing whether grounds exist for requesting the revision and, if necessary, to preparing the appeal.

- In the examined case, however, it so happens that this one-month time limit was determined in a judgment that was binding on the Romanian courts but was not published until 2017. The appeal was filed in August 2016, however. The court therefore concluded that it is not rational to hold that the appeal is out of time.

2.6 Management procedure.- If the expert appraisal procedure lasts longer than six months late-payment interest stops accruing

National Appellate Court Judgment of July 10, 2019

The Supreme Court concluded in a judgment rendered on January 17, 2019, that the maximum period for deciding a procedure for an expert appraisal requested by the taxpayer is six months, and failure to render a decision in that period cannot be deemed approval by silence.

The National Appellate Court concluded that a breach of that period stops late-payment interest accruing to the authorities.

2.7 Audit procedure.- The tax authorities cannot hold that transactions in statute-barred periods before July 1, 2004 were performed with evasion of the law

Supreme Court. Judgment of September 30, 2019

Following a corporate income tax audit for the years between 2005 and 2008, the authorities held that evasion of the law had occurred in relation to a number of transactions carried out in 2002 and 2003, which did not fall within the scope of the audit and moreover had become statute-barred. The aim of this decision was to adjust the effects of those transactions in the years being audited (specifically, in relation to amortization of the goodwill that arose in transactions held to be performed with evasion of the law).

The Supreme Court invoked its earlier judgments rendered on May 26, 2016 (appeal 569/2015) and October 17, 2016 (appeal 2875/2015) and found in favor of the taxable person. Namely:

(a) It affirmed that the date determining the legal regime applicable to the tax authorities' right to audit the statute-barred years is not that of the audit work, instead the date when the audited acts, transactions and circumstances took place.

(b) Because the audited transactions were subject to the 1963 General Taxation Law, the tax authorities were not allowed to audit the acts, transactions and circumstances that took place in statute-barred tax periods not even for the purpose of extending their effects to non-statute barred years, because this right was introduced in the 2003 General Taxation Law.

(c) The court denied, however, that the tax authorities are allowed to audit transactions commenced in 2002 (before the 20003 General Taxation Law came into force) that had effects in statute-barred years (2002, 2003 and 2004).

The same judgment examines other issues related to the procedure carried out by the auditors. Specifically, following the decision confirming evasion of the law the company was granted ten days to submit pleadings (the law allowed this period to be extended for between ten and fifteen days). The appellant asked for the period to be extended for a further five days, but this request was not answered by the authorities. Nevertheless, the tax authorities treated the extension for the requested number of days as a delay, which allowed them to stop a few of the reviewed years becoming statute-barred. In relation to transfer and stamp tax the Supreme Court concluded that:

(a) Where the law determines a minimum period and another maximum period for the submission of pleadings, the authorities have a discretionary right to specify that period.

(b) However, granting the minimum period without providing reasons for doing so and without a specific answer by the tax authorities means, in this specific case, that the extension cannot be treated as a delay attributable to the taxpayer.

2.8 Management and audit procedure.- Tax obligations audited by the tax authorities cannot be reviewed again

National Appellate Court Judgment of July 11, 2019

A taxpayer claimed on its corporate income tax return a tax credit for reinvestment of extraordinary income.

After it filed its return, a limited audit was initiated to confirm satisfaction of the requirements for the tax credit. The management procedure ended with no adjustment.

Later a general audit was initiated on corporate income tax for the same year, which disallowed the tax credit.

The National Appellate Court refused to allow the same tax credit to be examined twice and reiterated its case law on the preclusive effect of the limited audit procedure in relation to the right to review anything already audited in that procedure.

2.9 Penalty procedure.- Penalty procedures over failure to comply with requests from the authorities expire in three months

National Appellate Court Judgment of July 8, 2019

Under the legislation on penalties, a penalty procedure has to be started within three months after notification of the decision bringing the audit or management procedure to an end. If that period is not observed, the authorities' right to impose a penalty expires.

The law does not, however, expressly mention an expiry period for the imposition of penalties for failure to comply with requests from the authorities.

The National Appellate Court concluded that the three month period also applies in these cases and must run from the end of the period granted in the request to the person with tax obligations.

2.10 Criminal proceedings.- Article 197 bis.2 of the regulations on the application of taxes, under which the tax authorities could initiate a criminal proceeding even after issuing an assessment and imposing a penalty

Supreme Court. Judgment of September 25, 2019

The Supreme Court has upheld an appeal lodged by the Spanish Association of Tax Advisers (AEDAF) and set aside paragraph 2 of article 197 bis of Royal Decree 1065/2007, which allowed the tax authorities to identify indications of a criminal offense and initiate the relevant criminal proceeding "at any time", regardless of whether it has already issued an official assessment or even imposed a penalty for the same facts.

The court held that the absence of a time limit for initiating a criminal proceeding besides not being authorized in the law comes into direct conflict with the legal rules which, in the event indications of a criminal offense are identified, prohibit the authorities from initiating a penalty proceeding or from ending a penalty proceeding that has already started on those facts. It held moreover that the provision in the voided provision is contrary to the principle of legitimate expectations and the ne bis in idem principle preventing examination of the same facts twice.

3. Decisions

3.1 Personal income tax.- Traveling time is included in calculation of exemption for work performed abroad

Madrid Regional Economic-Administrative Tribunal. Decision of February 25, 2019

Article 7 p) of the Personal Income Tax Law allows an exemption for income obtained for work actually performed abroad subject to certain requirements. In this case it was asked whether the calculation of that exemption had to include the days the worker traveled abroad or returned to Spain.

Madrid Regional Economic-Administrative Tribunal took the view that any time spent on international travel and traveling to and from the airport is part of the worker’s working hours. Therefore, the days spent traveling abroad or returning to Spain must be included in the number of days worked abroad for the purpose of calculating the exemption.

On another note, the tribunal concluded that the base for calculating the exemption cannot include amounts received in respect of health insurance, childcare, meals, transport, etc., because these amounts are already tax exempt in their own right.

3.2 Personal income tax.- Tax returns may be filed jointly with descendants by one of the parents where a court order has already been issued with pre-divorce injunctive remedies

Madrid Regional Economic-Administrative Tribunal. Decision of February 25, 2019

The Personal Income Tax Law sets out more than one different type of family unit. Where a marriage has been dissolved, the family unit consists of the father or mother and any offspring that live with either of them who are minors, or are of legal age and are incapacitated persons entitled to extended or reinstated parental guardianship. The members of a family unit are allowed to file joint tax returns.

In the case examined by the Madrid regional tribunal, the tax authorities had not allowed the joint filing option for one of the parents with their offspring because on the due date for the tax there was no record that they were separated or divorced. On that date there was only a court order for pre-divorce injunctive remedies assigning guardianship and custody of the offspring to the taxpayer.

The court concluded against this that although the court order for pre-divorce injunctive remedies does not dissolve the marriage it does confirm legal separation of the spouses. Therefore from that time the family unit no longer consists of both spouses and any offspring, instead it is only one of the spouses and the descendants living with that spouse.

3.3 VAT.- Clarification of how to calculate the time limits for decreasing charged amounts of VAT

Central Economic-Administrative Tribunal Decision of June 25, 2019

In this decision TEAC examined the timeframe for altering the VAT taxable amount in the cases in article 80 of the VAT Law. To do this it referred to the time limit set out in article 89 for the correction of charged amounts of VAT.

Namely by applying the supreme court's theory adopted in a judgment rendered on February 5, 2018 (appeal 646/2017), TEAC concluded that:

(a) The length of time available to the taxable person for altering the taxable amount is the standard four-year period running from when the tax became chargeable on the transaction or from when the circumstances under article 80 giving rise to the alteration occur.

(b) If the alteration implies a decrease in the VAT amounts, then the taxpayer has one year, after it has altered the taxable amount within that four-year period, in which to correct its tax liability on the relevant return. In other words, in these cases, the total period is 4 plus 1 (four years to alter the taxable amount and an additional year to correct the return).

(c) This does not prevent the option to apply alternatively for a refund procedure for incorrect payments (within the statute of limitations). In this case the total period is four years.

3.4 Transfer and stamp tax.- The partition needed to terminate undivided ownership is not subject to stamp tax

Central Economic-Administrative Tribunal Decision of July 11, 2019

The Supreme Court concluded in a judgment rendered on November 12, 1998 that where the horizontal division of a property and termination of the condominium arrangement are both completed at the same time in a single document, the right to charge stamp tax does not arise twice, if the horizontal division is unavoidable to terminate the condominium arrangement.

TEAC adopted this view in a decision dated July 11, 2019. It specified, however, that where the partition is not unavoidable for termination of the condominium arrangement and is desirable or necessary for other purposes, that double right to charge stamp tax does arise.

3.5 Transfer and stamp tax.-Autonomous community authorities cannot question requirements for tax neutrality regime

Central Economic-Administrative Tribunal Decision of July 11, 2019

Until December 26, 2008, the Transfer and Stamp Tax Law allowed an exemption for restructuring transactions if the tax neutrality regime was elected. Election of this regime had to be notified to the (central government) authority responsible for corporate income tax or personal income tax. The exemption has since been broadened to apply to all restructuring transactions, even if the neutrality regime has not been elected.

The case examined by TEAC in this decision related to a period when the exemption was conditional on the neutrality regime being claimed. On this occasion, the autonomous community authorities had disallowed the transfer and stamp tax exemption because, in their opinion, the neutrality regime had not been validly elected because there were no economic reasons for performing the transaction.

TEAC concluded against this that the autonomous community authorities did not have the authority to examine the neutrality regime other than to check that election of this regime was notified to the central government authorities. If that notification was made and the central government authorities did not dispute election of the neutrality regime, the transfer and stamp tax exemption cannot be denied.

3.6 Inheritance tax.- TEAC allows transfers upon death to residents of third states to benefit from inheritance tax relief and reductions under autonomous community legislation

Central Economic-Administrative Tribunal Decision of September 16, 2019

A Swiss tax resident filed an inheritance tax return in which it applied the central government legislation. Later they requested a correction of the return because they considered that the CJEU's conclusion in its judgment on September 3, 2014 allowed them to apply the more favorable legislation of an autonomous community. That request was denied because the taxpayer was not resident in an EU country or in the European Economic Area.

Against this the TEAC upheld the interested party’s petition because in its opinion the CJEU’s case law also applies to residents of third countries.

This view has already been accepted by the Directorate General for Taxes in various binding resolutions (among others, number V2113-19, of August 12, 2019) and earlier by the Supreme Court in several judgments.

3.7 Inheritance and gift tax.- Satisfaction of the “family business” requirements must occur at the time of the gift

Central Economic-Administrative Tribunal Decision of June 18, 2019

Gifts of family businesses benefit from a reduction to the taxable amount if a number of requirements are satisfied. Among others, the company transferred as a gift must carry on an economic activity.

In the case examined by TEAC, the tax authorities had rejected the reduction because they considered this requirement had not been satisfied. Namely, they considered it had not been evidenced that for the property leasing business carried on by the company the requirements of having “premises and an employee” were satisfied on December 31 in the year the gift was made. Proof had been provided, however, that those requirements were satisfied on the date of the gift.

The tribunal concluded in the taxpayer’s favor because it considered that the relevant time for satisfaction of the requirements to claim the reduction is when the gift itself was made.

TEAC has accordingly extended the theory determined by the Supreme Court in a judgment rendered on December 16, 2013 for scenarios involving transfers of family businesses upon death. In that judgment, the Supreme Court concluded that satisfaction of the requirement related to remuneration for management activities in a scenario where they are carried on by a person other than the deceased, must take place on the date the tax falls due.

3.8 Cadastral values.- Comparative methods for appraising values in Barcelona partially set aside due to determining higher land value for 3-star or higher hotels

Central Economic-Administrative Tribunal Decision of July 11, 2019

The comparative methods for appraising values in Barcelona approved to take effect in 2018 determine a specific use category called “others” for appraising the cadastral value of land for 3 star or higher hotels. As a result, the taxable value for these hotels is considerably higher than the value that would have been obtained if that specific use had not been envisaged and, as a result, their cadastral value also.

TEAC explained that the creation of this separate use for hotels of this type is completely unrelated to the urban development characteristics of the area or the cadastral building types. It moreover explained that the comparative methods themselves already contain a “tourism” use, which applies to the other hotel establishments within the Barcelona municipal area. For this reason, it partially set aside the comparative methods for appraising values.

3.9 Administrative procedure.- Tax notifications to capital companies managed by boards of directors must be sent to the board chairperson

Madrid Regional Economic-Administrative Tribunal. Decision of January 28, 2019

At capital companies managed by boards of directors their legal representative is the board acting as a collective body. Accordingly it was asked whether any notifications intended for the board of directors may be deemed validly served where they are sent to any of its members.

The Madrid regional tribunal concluded that under article 235 of the Capital Companies Law, notifications of tax acts addressed to capital companies managed by boards of directors must be sent specifically to the board chairperson. Otherwise they are not valid.

3.10 Collection procedure.- The government cannot correct an absence of reasoning for the decision to deny deferral in the judgment on an appeal for reconsideration

Central Economic-Administrative Tribunal Decision of July 18, 2019

The authorities denied deferral of a tax debt because they considered that the claimant was experiencing structural economic and financial difficulties. The decision dismissing the subsequent appeal for reconsideration reinforced that conclusion for reasons not included in the original denial decision. Among others, it was argued that the fact that the taxpayer had initiated the process for a refinancing agreement was sufficient proof of cash-flow difficulties.

TEAC upheld the appeal because it considered that AEAT cannot, in an appeal for reconsideration proceeding, try to correct the absence of reasoning in the denial decision.

The tribunal added that in any event the fact alone of initiating the process for a refinancing agreement, an advance proposal for an arrangement, or an insolvency proceeding cannot in itself give rise to denial of the deferral on the ground of “structural cash flow difficulties”.

As a result, TEAC ordered the proceedings to be rolled back for the authorities to issue a new correctly reasoned decision.

3.11 Collection procedure.- Enforced collection order is void if the assessment giving rise to it has not been notified

Murcia Regional Economic-Administrative Tribunal. Decision of March 29, 2019

A taxpayer filed a personal income tax return requesting the offset of a tax payment against a refund due on his spouse's return. The tax authorities considered that the requirements for this offset had not been satisfied and rendered an enforced collection order for the outstanding amount.

The Murcia regional tribunal rendered this enforced collection order void because it considered that the authorities' procedure should have been as follows:

(a) Issue a provisional assessment determining why the requirements for the offset had not been satisfied (or not been evidenced).

(b) Notify the assessment.

(c) Initiate an enforced collection procedure, if necessary.

There is accordingly no justification for considering that the fact of filing a personal income tax return alone means acknowledgement of the debt without issuing a provisional assessment; and therefore an enforcement procedure cannot be initiated without that assessment.

4. Resolution requests

4.1 Corporate income tax.- The offset of tax losses at companies acquired before 2015 is subject to the limits in the legislation applicable at that time

Directorate General for Taxes. Resolution V2178-19 of August 14, 2019

The Corporate Income Tax Law in force until the years that began on or after January 1, 2015 (the Revised Corporate Income Tax Law, approved by Legislative Royal Decree 4/2004, of March 5 –TRLIS-) placed various restrictions on the offset of tax losses of companies where a change of control had occurred. The current rules (Law 27/2014, of November 27, 2014 –LIS-), applicable for years that began on or after January 1, 2015, also place a number of restrictions but with amendments to the previous wording. Among others, in the more recent Corporate Income Tax Law (LIS) these restrictions apply where the acquired company carried on in the two years after the acquisition a different or additional activity to that carried on before the acquisition, which brings net revenues 50% above the average revenues for the previous two years. This requirement was not laid down in the earlier TRLIS.

This resolution concerned the case of a company that acquired in 2014 (namely, when the TRLIS was in force) control of another company with tax loss carryforwards, generated between 1997 and 2013. Following the acquisition, the new shareholders changed the company's activity.

The DGT concluded that because the majority interest in the capital of the company with losses was acquired before entry into force of the LIS, the restriction on the offset of tax losses is that applicable when the acquisition took place, which is the restriction contained in article 25.2 of the earlier TRLIS law. Therefore the new rule regarding the change of activity does not apply.

4.2 Corporate income tax.- A loss obtained on the sale of a debt is not affected by the restriction on deduction of finance costs

Directorate General for Taxes. Resolution V2133-19 of August 13, 2019

A company transferred a debt to an unrelated company at a discounted value. A financial loss for accounting purposes was recorded in respect of the difference between the price received and the carrying amount of the assigned debt. The company asked the DGT whether this financial loss is affected by the general limit in the Corporate Income Tax Law on the deduction of finance costs.

According to the DGT, this loss is not affected by that limit because it was not obtained on the company's own debts.

4.3 Corporate income tax.- The capitalization reserve is included to calculate increase in equity

Directorate General for Taxes. Resolution V1854-19 of July 16, 2019

Corporate income taxable persons benefit from a reduction to their tax base amounting to 10% of the increase in their equity if, among other requirements, they record a reserve for the amount of the reduction. Legal or bylaw reserves are not included for determining the increase in equity, according to the Corporate Income Tax Law.

On the basis of this exception, the DGT has interpreted in the past that the term “legal reserve” must include any reserve required to be recorded by a statutory provision in corporate law.

The DGT concluded in reply to this resolution request, however, that under a reasonable interpretation of the law the capitalization reserve itself should not be classed as a legal reserve, and therefore it could be considered part of equity at the beginning or end of the year.

4.4 Corporate income tax and nonresident income tax -Treaty with Malaysia.- Payments for technical services are taxed as royalties if they are physically provided in Spain

Directorate General for Taxes. Resolution V2223-19 of August 19, 2019

A multinational group has centralized in a company located in Malaysia the provision of specific accounting and financial services, for which one of the clients is a Spanish subsidiary of the group. The service is physically provided at premises in Malaysia.

According to article 12 of the Malaysia-Spain tax treaty, payments in respect of technical services (including management or consulting services) may be taxed as royalties in the state in which they arise. For these purposes, it is considered that technical services arise in a state where the services are provided in that state.

Based on these rules, the DGT concluded as follows:

(a) The accounting or financial services may be deemed to fall within the definition of "technical services".

(b) In the examined case, since the services are not physically provided in Spain they cannot be taxed in Spain.

4.5 Personal income tax.- Interest remaining to be deducted on the financing for a leased property cannot be used to determine the income obtained from leasing other properties

Directorate General for Taxes. Resolution V1698-19 of July 09, 2019

The requesting party had a property that it had obtained using borrowed funds. Since it leased the property, in determining its income from immovable capital it included the interest paid on that finance as deductible costs. In some years, however, it obtained a loss that it could not use in full, and left amounts to be deducted over the following four years. At the time of a later sale of the property a part of those finance costs not actually deducted had yet to be used. It was asked whether that unused interest could be treated as deductible expenses from the income obtained from leasing other properties.

The DGT replied that this was not allowed because it considers that income from immovable capital has to be calculated "for each property individually".

4.6 Personal income tax.- The cost of contributions for self-employed workers is deductible even if the director's services are not remunerated

Directorate General for Taxes. Resolution V1783-19 of July 11, 2019

The requesting party was chief executive officer and shareholder owning more than 25% of a dormant company's shares and received no income from the company. Despite this, under the social security legislation contributions had to be paid under the regime for self-employed workers for that person's services as director.

According to the DGT, these contributions are treated as a deductible expense for determining net salary income, even though they generate a negative net salary income figure if no other income of this type is obtained from other employers that is higher than the paid contributions.

4.7 Personal income tax.- The one-year period for deducting a past-due debt starts to run from when the enforcement claim is filed

Directorate General for Taxes. Resolution V2211-19 of August 19, 2019

The personal income tax legislation allows the capital loss obtained from past-due debts to be calculated where, among other circumstances, a period of one year has run from the start of a court proceeding other than insolvency proceedings for enforcement of the debt and the debt has not been paid.

According to the DGT, the one-year period starts to run from when the enforcement claim is filed, where it is accepted.

Additionally, because the loss does not arise from a transfer of assets it must be included in the general component of taxable income.

4.8 Personal income tax.- Administration and custody costs for shares in collective investment vehicles are deductible

Directorate General for Taxes. Resolution V2117-19 of August 12, 2019

A question was submitted concerning the deduction of administration and custody costs for shares in Spanish and foreign collective investment vehicles.

The DGT concluded that, if the shares in these types of vehicles qualify as marketable securities, the administration and custody costs for these shares, charged to the client by the institution selling them, are deductible from income from movable capital, where they meet the criteria for their chargeability determined by the Spanish National Securities Market Commission.

4.9 Personal income tax.- The contribution or conversion into equity of a debt to a company with the intention of liquidating the company immediately could be regarded as a gift

Directorate General for Taxes. Resolution V1824-19 of July 15, 2019

The DGT looked at the case of an individual owed a debt by a dormant company where they were shareholder, and considering whether to forgive that debt or convert it into equity. The request concerned the treatment of these transactions for personal income tax purposes. The DGT made the following analysis:

(a) It first recalled that, under article 14.2.k) of the Personal Income Tax Law (applicable since January 1, 2015), losses arising from past-due debts may be reported in the period when (i) a write-off allowed in a refinancing agreement approvable by a court becomes enforceable, (ii) an arrangement allowing a write-off of the debt when the debtor is in an insolvency proceeding becomes enforceable, or lastly, (iii) the debt is not paid within a year from the commencement of a court proceeding other than an insolvency proceeding, brought to enforce the debt. This last circumstance will only be taken into account if the one-year period ends on or after January 1, 2015.

    Therefore, if one of these requirements is satisfied, a loss may be reported (as was concluded in the resolution discussed above) in the general component of taxable income.

(b) Otherwise, if instead of reporting that loss, the debt is forgiven or converted into equity, no income is obtained, instead an increase occurs in the acquisition value of the investment for the purposes of future transfers of the shares.

    If after forgiveness of the debt or its conversion into equity the company is liquidated, in theory a loss arises to be included in the savings component of taxable income. In other words, a loss in the general component of taxable income (because the debt is uncollectible) is being converted into a loss in the special component of taxable income (due to liquidation of the company to which the debt had been contributed or that had been forgiven the debt).

Both types of losses (in the general component of taxable income and in the savings component of taxable income) have different rules for their inclusion and offset.

(c) Because this may cause a tax advantage, the DGT recalled that, if it is identified that forgiveness of the debt or its conversion into equity are very close to the liquidation of the company it could be held that they were done to create a tax advantage and the transaction could be adjusted under the rules in the General Taxation Law on unusual transactions (conflict in the application of tax provisions or simulation).

For these purposes, the DGT recalled that the treatment of shareholder contributions to strengthen equity, consisting in treating them as an investment not as a gift, is based on their characteristics as an investment not as a non-refundable sum of money, which is incompatible with a contribution that is essentially not recoverable if the intention is to liquidate the company immediately.

4.10 Personal income tax.- The incoming expatriates regime may be applied for again if tax residence is not obtained in the first relocation to Spain

Directorate General for Taxes. Resolution V2201-19 of August 16, 2019

The requesting party moved to Spain in November 2017. They notified election of the inbound expatriates regime. In June 2018, however, they were sent to another country, and therefore never became resident in Spain (in 2017 and in 2018 they spent fewer than 183 days a year in Spain and did not satisfy the other requirements to be treated resident in Spain).

Therefore, the DGT concluded as follows:

(a) In both 2017 and in 2018 the taxable person should have been taxed in Spain as a nonresident, and the special inbound expatriates regime was not applicable to them.

(b) If they later became tax resident in Spain as a result of a new relocation to Spain, they are allowed to re-elect the special inbound expatriates regime, because it was never applied and the requirement not to have been resident in Spain in the previous ten years was satisfied.

4.11 Tax on construction, installation projects and works.- The transferee of assets does not become a taxable person for the tax on construction, installation projects and works if they are not substituted for the transferor in respect of all rights and obligations

Directorate General for Taxes. Resolution V1841-19, of July 15, 2019

The tax on construction, installation projects and works is reported on (i) a provisional return that has to be based on the initial quote for the work, and (ii) a final return, based on the final cost of the work.

The examined case concerned a company that was going to acquire assets from a company in liquidation, including a permit for major work relating to the unfinished construction of houses for which a provisional return had already been filed. The transferee asked whether an application could be made for any refund resulting from the final return for the tax on construction, installation projects and works.

The DGT clarified that the transferee only becomes taxable person for the tax on construction, installation projects and works where the transferee is substituted for the transferor in respect of all rights and obligations, as happens, for example, in a merger between two companies. In the case submitted for resolution, any refund arising from the final tax return cannot be applied for therefore by the transferee of the assets, because the acquisition does not legally involve this type of substitution.

5. Legislation

5.1 New protocol amending Spain-U.S. Tax treaty published

On October 23, 2019 the Official State Gazette published the Protocol and its Memorandum of Understanding, amending the Spain-U.S. Treaty.

In our Commentary dated October 28, 2019 we summarized the main contents of this instrument.

5.2 Legislation adopted on how to report the residence of pension funds and collective investment vehicles for the purposes of certain exemptions

On October 19 the Official Gazette published Royal Decree 595/2019, of October 18, 2019, amending the Nonresident Income Tax Regulations (Royal Decree 1776/2004, of July 30, 2004), to regulate how pension funds and collective investment vehicles should report their tax residence to claim certain exemptions allowed in that regulation.

You are asked to see our Commentary of October 25, 2019, with a summary of this royal decree.

5.3 Canary Islands determines exceptional measures to defer the Canary Islands general indirect tax charges affected by the Thomas Cook case

On October 21 2019 the Official State Gazette published the ORDER of October 17, 2019, establishing exceptional measures to grant a deferral for certain Canary Islands general indirect tax charges not paid by companies in the Thomas Cook group, in certain assessment periods in 2019.

See our Alert for further details (http://www.garrigues.com/es_ES/noticia/el-supremo-determina-que-si-hay-incremento-de-valor-de-los-terrenos-urbanos-procede-el-pago).

5.4 Mandatory rules implemented on keeping accounting records for products subject to manufacturing excise taxes

On October 5, 2015 the Official State Gazette published Order HAC/998/2019, of September 23, implementing the provisions on keeping accounting records for products subject to manufacturing excise taxes and, where applicable, for the raw materials needed to obtain them.

In particular, it determines the conditions, time periods and procedures relating to keeping those accounting records and supplying them to AEAT.

In the cases of factories, tax warehouses, receipt warehouses, excise warehouses and factories for vinegar, this obligation is to be met on a computerized accounting system at AEAT. In all other cases it may be elected to keep these accounting records on the website, either on numbered paper books, or lastly, on an electronic accounting system.

This Order will take effect on January 1, 2020.

5.5 Publication of the annual equivalent rate for the fourth quarter of 2019, for the purpose of characterizing certain financial assets

On September 27, 2019 the Official State Gazette (BOE) published the decision of September 26, 2019, by the Office of the General Secretary for the Treasury and Financial Policy, which, as is now the custom, sets out the reference rates that will apply for the calculation of the annual effective interest rate for the purposes of characterizing certain financial assets for tax purposes, this time for the fourth calendar quarter of 2019. The rates are as follows:

- Financial assets with terms of four years or less: -0.382 percent.
- Assets with terms between four and seven years: -0.265 percent.
- Assets with ten-year terms: 0.169 percent.
- Assets with fifteen-year terms: 0.519 percent.
- Assets with thirty-year terms: 1.023 percent.

In all other cases, the reference rate for the period closest to the period when the issuance is made will be applicable.

6. Miscellaneous

6.1 New Brexit information leaflets for operators published by AEAT

On October 4 AEAT published new information leaflets to help operators with their obligations in relation to Brexit, as we reported in our Tax Alert dated October 4, 2019.

6.2 Legislation on intra-Community VAT amendments moves forward

A draft bill and preliminary bill for a royal decree have been published to implement in Spain various EU provisions in relation to VAT and intra-Community trade in goods as we mentioned in our Tax Alert dated October 2, 2019.

The main amendments, set to come into force on January 1, 2020, were analyzed in our Commentary dated December 10, 2018, when the EU law amendments were published.

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