Tax Newsletter

GARRIGUES

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Over recent weeks, several provisions, resolutions and reports have been published on the reference value in property transfers, following the entry into force of Law 11/2021, of July 9, 2021, known as the Anti-Fraud Law (see our comment of July 10).

Under the Anti-Fraud Law, the reference value is used to determine the taxable amount for transfer and stamp tax purposes and inheritance and gift tax purposes, unless the value reported by the interested parties or the price paid (whichever is the case) is higher, then this reported value will be taken. In keeping with this rule, the law also made various amendments to the cadaster legislation to implement the calculation rules for the reference value.

According to these rules, the reference value will be the value determined every year (objectively and with market value serving as limit) by the Directorate General for the Cadaster, using modules based on an analysis of the prices in all real estate purchase transactions performed before an authorized certifying officer in each of the established uniform areas. In relation to how it is determined, the law specifies:

(i) The approval of a reduction factor for values of assets in a same class, to ensure that their "reference value" is not higher than their market value. This factor has been set at 0.9% for all real estate assets (rural or urban) by Order HFP/1104/2021, of October 7, 2021, published in the Official State Gazette on October 14, 2021.

(ii) The publication every year by the Directorate General for the Cadaster of a report on the real estate market with conclusions from an analysis of the data on previous transactions and a map of values, identifying zones with uniform values and assigning average value modules for representative products.

(iii) A set of transitional rules under which the Directorate General for the Cadaster must approve, based on the annual report on the real estate market, a decision defining the scopes of application for the land and construction basic modules, specifying the principles and rules for their calculation, the land values for each zone, construction costs and fields of application for the relevant correction multipliers.

Now that the yearly report has been prepared, the Directorate General for the Cadaster has published two draft decisions on the elements needed to determine the respective reference values for urban and rural properties in 2022.

The draft decision relating to the calculation method for the reference values of urban properties contains an important clarification. In provision two it states that the principles in the draft decision will only apply to properties built primarily for residential use and for storage-parking use for cadastral purposes. In other cases it will have to be taken into account that the transfer and stamp tax and inheritance and gift tax legislation (following the Anti-Fraud Law) stipulates that the taxable amount is the higher of reported and market value (ISD) or the higher of either of those values and the agreed price or consideration, on which an examination may be conducted by the authorities.

Lastly, the Cadaster Website has also published a set of questions and answers on a number of issues relating to the reference value. Among the answers provided, the Cadaster confirms that:

a) the reference value may only be challenged where it has a tax effect and is the taxable amount for transfer and stamp tax or for inheritance and gift tax purposes, in similar terms to the provisions in the transfer and stamp tax and inheritance and gift tax legislation;

b) if the reference value does not affect the cadastral value, it will not have any effect for real estate tax purposes;

c) this value has to be taken into account under the rule on determining the taxable amount for wealth tax with respect to any properties that are acquired on or after January 1, 2022.

2. Judgments

2.1 Mutual agreement procedures. – Declaration of conflict in the application of tax provisions may cause mutual agreement procedure for avoidance of double taxation not to be allowed

Supreme Court. Judgement of September 22, 2021

As a result of a finding of conflict in the application of a tax provision under article 15 of the General Taxation Law (LGT), the tax authorities disallowed the deduction of finance costs which had, however, been treated as revenue in Germany, and this gave rise to double taxation. The appellant therefore initiated a mutual agreement procedure. The application for that procedure was not accepted by the tax authorities due to the case not involving interpretation and application of the Germany-Spain tax treaty or of the EU Arbitration Convention (Convention 90/436/EEC), but instead, strict application of Spanish domestic law.

After briefly examining the history of inclusion of anti-abuse provisions in tax treaties in light of the commentaries on the OECD model tax treaty and the interaction of domestic anti-abuse clauses with those in treaties, the Supreme Court concluded that valid reasons existed in this case for not accepting the application for commencement of a mutual agreement procedure, according to the context and the applicable legislation existing when the facts occurred. It supported this conclusion on the adjustment being based on the declaration of a conflict in the application of tax provisions (under article 15 of the General Taxation Law, formerly known as evasion of tax law or tax law fraud), in other words, in the application of a domestic general anti-abuse provision.

2.2 Free movement of capital. - Placing limit on cash payments is not contrary to EU law, nor are associated penalty rules

Court of Justice of the European Union. Judgment of October 6, 2021. Case C-544/19

A Bulgarian entity distributed dividends to its sole shareholder and paid them in cash. The Bulgarian tax authorities determined that the limit on cash payments stipulated in the domestic legislation had been exceeded and therefore imposed a penalty, calculated by reference to a fixed percentage of the amount paid in cash.

The CJEU concluded that a limit on cash payments does not violate the free movement of capital and confirmed that neither is it contrary to EU law to stipulate penalty rules in which the fine is calculated by reference to a fixed percentage of the aggregate amount of the payment made with a breach of that prohibition (without allowing the fine to be scaled by reference to the specific circumstances of the case), as long as the measure is suitable for achieving the objectives of fighting against tax fraud and evasion and is not above the necessary level.

2.3 Free movement of capital. - Placing limit on double taxation relief according to origin of dividends is contrary to EU law

Court of Justice of the European Union. Judgment of September 9, 2021. Case C-449/20

A Portuguese entity received dividends on shares traded on both the Portuguese and on foreign stock exchanges. In its corporate income tax self-assessment, it reported a 50% deduction on the aggregate amount of those dividends. In an audit, the Portuguese tax authorities reduced the base for calculating the deduction, by excluding (as allowed by the applicable legislation) dividends from foreign shares.

The CJEU held that a legislation that limits double taxation relief on dividends according to their origin restricts the free movement of capital and is not justified.

2.4 Corporate income tax. - To claim neutrality regime for nonmonetary contributions, liabilities do not have to be directly related to acquisition of the assets

Supreme Court. Judgment of October 1, 2021

In the incorporation of a company, a property was contributed together with its mortgage debt. The nonmonetary contribution benefited from the special tax neutrality regime (at that time, article 94 of the revised Corporate Income Tax Law). The tax authorities questioned the ability to claim that regime because the contributed debt was higher than the price paid by the contributor to acquire the property, which was outstanding on the date the loan was signed. In other words, in exchange for contributing the property and a debt, the contributor received shares in the beneficiary of the contribution (equal to the value of the contribution) and also benefited from assumption of the debt by this company.

In the tax authorities' opinion, in nonmonetary contributions for which the neutrality regime has been elected, the liabilities must be related to the contributed assets, something that only occurs where the contributed debt had been expressly entered into to acquire the transferred asset.

The court concluded as follows:

a) It is true that, if the debt is very high, the contribution may actually be a mechanism for the contributing company to obtain immediate cash and release itself from liabilities in the process.

b) However, the law does not require nonmonetary contributions (other than lines of business) to imply the joint transfer of assets and debts, so it cannot be laid down that the contributed debts must have been expressly entered into to finance the acquisition of the transferred assets.

c) Moreover, the risk of artificially "inflating" the liabilities is disabled because paragraph 3 of that article 94 prohibited valuation of the transferred asset above its normal market value, which requires that the net value of the contributed item must be positive.

The court added that the relationship of the debts with the contributed assets may be an element to consider in an examination of the economically valid reasons justifying the transaction.

2.5 Nonresident income tax / Administrative procedure. - Burden of proof of existence of abuse in parent-subsidiary exemption lies with tax authorities

National Appellate Court. **Judgment of May 31, 2021**

A Spanish resident entity distributed dividends to its parent company resident in another EU member state and did not make any nonresident income tax withholdings as allowed if they qualify for the parent-subsidiary exemption. The group's ultimate parent company was resident in Qatar. The tax authorities questioned the ability to claim that exemption because they considered to be applicable the anti-abuse clause set out in the law for cases where “the majority of voting rights at the parent company are held, directly or indirectly, by individuals or legal entities not resident in EU member states”. According to the tax authorities, the “intermediate” parent company resident in the EU did not have human or material resources to carry on an economic activity and its only purpose was to receive dividends so as to distribute them to its parent company resident in Qatar, so it had been created only to claim the exemption.

The National Appellate Court concluded as follows:

a) An abusive purpose cannot be presumed simply because the ultimate parent company is established outside the EU or because it is a holding company.

b) It is the tax authorities who have to support fulfillment of the requirements for applying anti-abuse clauses “and greater proof is required from them, by using the various means of gathering information provided in treaties and making the appropriate requests to obtain precise information supporting that there is no valid economic interest”.

c) It cannot be said that an entity is simply a holding company because it is wholly owned by another entity. A subsidiary can act with autonomy even if a decision-making unit with its parent company or companies in the same group is identified.

2.6 Inheritance and gift tax. - The depreciation of leased properties acquired by inheritance or gift is calculated on value reported for inheritance tax purposes

Supreme Court. Judgment of September 15, 2021

As we saw in our alert on September 29, 2021, the Supreme Court contradicted the tax authorities' method of calculating the depreciation of properties acquired by inheritance or gift, for personal income tax purposes, on the taxes paid on that inheritance or gift plus the costs of later alteration work; and confirmed that depreciation is calculated on the value reported for inheritance tax purposes.

2.7 Inheritance and gift tax. – Reduction for principal residence is calculated on whole value of residence, without deducting mortgage

Supreme Court. Judgment of September 15, 2021

The taxable amount for inheritance and gift tax purposes is determined by subtracting from the value of the assets in the estate any charges and encumbrances placed directly on the assets that reduce their value (such as land taxes or annuities, for example), which does not include charges that create a personal obligation for the acquirer, such as mortgages and pledges. However, any debts entered into by the deceased person which have been left unpaid may be deducted from the estate. In other words, a mortgage does not reduce the value of the inherited property specifically, although it does reduce the final estate.

In view of this, it was asked whether the reduction for the principal residence is calculated on the gross value of the property or on its net value, after subtracting the amount of the mortgage which is also inherited.

The chamber of the lower court held that the reduction should be made on the actual value of the property, in other words, without taking the mortgage into account, because article 12 of the law expressly states that "mortgages shall not be deducted from the actual value of the assets", which has been confirmed by the Supreme Court.

2.8 Inheritance and gift tax / Collection procedure. - Late-payment interest cannot be sought as a result of mere differences of interpretation between taxpayers and tax authorities

Castilla y León High Court. Judgment of June 21, 2021

The tax authorities adjusted the position of two taxpayers in relation to inheritance and gift tax because, among other reasons, the reduction for transfer of a family business claimed by them in their self-assessment was not allowed. The tax authorities therefore sought the amount of unpaid tax plus late-payment interest from them. The decisions on the subsequent economic-administrative claims partially upheld the taxpayers' claims.

Castilla y León High Court held that in this case it was not allowed to seek late-payment interest. The court recalled the principle set by the Supreme Court (judgment of November 16, 2015, in appeal 848/2014), under which, in relation to inheritance and gift tax, late-payment interest that has fallen due cannot be sought if (i) the taxpayer reports the facts correctly, and (ii) the discrepancies between tax authorities and taxpayer boil down to a mere difference of interpretation. In the examined case, this circumstance existed, which is proved by the economic-administrative tribunals having partially upheld the interested parties' claims, added to which no concealment of the facts is observable.

2.9 Transfer and stamp tax. – Extensions of administrative concessions allowed in the original concession document and not involving an extension of their scope are not subject to transfer and stamp tax

Supreme Court. Judgment of September 28, 2021

Junta de Galicia (Galician regional government) granted the appellant a mining concession for a 30-year term, able to be extended up to 90 years. The extension was contemplated in the concession document. The concession was extended twice with the same conditions as were originally granted. In relation to those extensions, the tax authorities sought payment of transfer and stamp tax under the transfers for a consideration heading, because, under the law on the tax, both the creation of administrative concessions and subsequent extensions of their terms are taxable transfers where they imply an increase in the holder's net worth.

The Supreme Court concluded that extensions of administrative concessions are not subject to transfer tax under the transfers for a consideration heading where the following conditions are fulfilled cumulatively:

a) The extension must be expressly contemplated in the original concession document.

b) The extension must be subject to non-discretionary terms and conditions of a public authority.

c) The extension cannot involve an increase to the substantive terms of the concession, in other words, to its scope.

Therefore, in the examined case, because the extension of the original concession did not involve a creation of new rights, or an increase to its scope; nor did it increase the value of the concession holder's net worth, the challenged assessment had to be set aside.

2.10 Charge for covering the fire prevention and extinguishing and rescue service. – Quantification method for the charge observes economic capacity, equality and equivalence principles

Supreme Court. Judgments of September 15, 2021 (appeals 3949/2019, 4773/2019, 683/2018 and 4763/2019)

The Supreme Court has ruled as to whether the local authority charge for maintaining the fire prevention and extinguishing and rescue service of the local councils for Rivas - Vaciamadrid and Torrejón de Ardoz is legal.

The court concluded that, under the Local Finances Law, a local authority is allowed to levy a charge for maintaining the fire prevention and extinguishing and rescue service, even if the public service is actually provided by the autonomous community government, although this does not imply the local authority forfeiting its power over that service; nor does a contract need to be drawn up between the autonomous community government and the local authority where no human or material resources are to be transferred.

Additionally, it stated that the local authority ordinance sufficiently determines who is liable for the charge, and therefore the provisions in the law are fulfilled. Namely, the charge payers are the owners of properties who benefit from or are affected by keeping the service; and the persons responsible for paying on behalf of the charge payers (due to taking the place of the owners of the insured properties) are the entities or companies insuring the risk in the local authority area.

The court added that the persons responsible for paying on behalf of charge payers (the insurance companies) may seek from the charge payer (the owner of the insured property) the charge paid on their behalf, because the law does not prohibit that recharging of amounts paid.

Lastly, the court concluded that the method used to determine the charge observes the economic capacity, equality and equivalence principles, because it is based on the cost of the public service, represented by the amount paid by the local authority to the autonomous community government providing the service.

In any event, although the court confirmed the correctness of the quantification of the charge sought from the insurers (appellants), it also stated that the quantification is correct insofar as it serves to determine a payment on account, and therefore, if the amount paid over by the companies exceeds the amount that the charge payer has to pay, the excess must be refunded.

The judgment had a dissenting opinion from two senior judges, who disagreed and accepted the appellants' arguments.

2.11 Tax management procedure. – It must be declared that the time period for a limited review has expired to be able to commence an audit on the same subject-matter

National Appellate Court. Judgment of July 7, 2021

The tax authorities initiated a limited review of personal income tax in fiscal year 2010 and audit work in relation to personal income tax in fiscal years 2008 and 2009. After they had not delivered a decision within more than six months from the start of the limited review of fiscal year 2010, the auditors extended the scope of their work to fiscal year 2010, although they had not declared that the time period for the review had expired.

The National Appellate Court concluded, based on Supreme Court case law, that when article 140.1 of the General Taxation Law prohibits the making of new adjustments with the same subject-matter as an earlier review, it does not discriminate between the management and the audit bodies. That prohibition is therefore applicable to all tax authority bodies as a whole.

Focusing on the case, the court concluded as follows:

a) The scope of the audit work (following its extension) included the subject-matter of the earlier limited review.

b) Therefore, because they had not expressly declared that the limited review period had expired after the period allowed for its completion had ended, an audit could not be initiated with the same subject-matter.

2.12 Management procedure. - Request for correction of self-assessment stops time limit running for right to request refund in relation to all elements of tax obligation not just the element that gave rise to the request

National Appellate Court. Judgment of June 23, 2021

A taxpayer filed in 2011 a request for correction of its corporate income tax self-assessment of 2006 tax year to correct the claiming of certain tax credits. In 2014, it filed a new request for correction of the same self-assessment to include an adjustment to decrease the tax base in respect of revenues obtained from refunds of a tax held to be unconstitutional by arguing that those revenues had to be recognized in the year the related expense had been reported.

The tax authorities denied this second request due to the taxpayer's right to request a new refund for 2006 having become statute-barred, because the first request filed in 2011 only stopped the statute of limitations for fiscal year 2006 running in relation to the tax credits that were requested to be corrected, but not in relation to the other elements of the tax obligation.

The National Appellate Court rejected the view adopted by the tax authorities and TEAC and held that a request for correction with a refund of incorrect payments stops the statute of limitations running for the taxpayer's right to request the refunds to which they are entitled in relation to all elements of the tax obligation not just the specific element to which the request relates.

In the court's view, finding otherwise would be tantamount to supporting an unacceptable difference in treatment benefiting the tax authorities, because the first request for correction stopped the statute of limitations clock running for the tax authorities' right to determine the whole tax debt by making an appropriate assessment of the debt in aggregate.

In relation to the merits of the case, relating to the timing of recognition of the revenues obtained from refunds of a tax held unconstitutional, the National Appellate Court concluded that, when the Constitutional Court's judgment includes a clause restricting the timing effects of the declaration of unconstitutionality, the revenues must be recognized in the period when the refunds are received, not in the period when the tax expense was reported.

2.13 Audit procedure. - Entry and search is only allowed after the audit has commenced and, if the search warrant is voided, AEAT has to return seized documents

Supreme Court. Judgments of September 23 and September 27, 2021

The Supreme Court has again ruled on the tax authorities' power to enter and search a taxpayer's home.

In a judgment delivered on September 23, 2021, relying on its judgments on October 10, 2019 (November 2019 Tax Newsletter) and on October 1, 2020 (October 2020 Tax Newsletter), the Supreme Court concluded as follows:

a) The court warrant for entering and searching a constitutionally protected home must be connected with the existence of an audit that has already commenced; the audited party must have been notified of commencement of the audit, and in the audit, data and indicators must have been obtained that make it absolutely necessary to enter the home.

   It is not allowed, therefore, to enter the home of a third party other than the audited person, even if there is a connection between them.

b) The warrant for entry may be adopted without first notifying the audited person. These, however, are absolutely exceptional circumstances, and therefore, both the tax authorities' application and the court decision must expressly specify the reasons making the measure necessary, and the tax authorities do not have an unconditional or natural right to enter a home.

c) To file an appeal against the decision authorizing entry to a home, the appellant must have access to any documents that the judge may have seen and considered for the warrant, so that the appellant can submit any pleadings and produce any proof that they consider relevant.

The judgment delivered on September 27, 2021 examines a case in which the court decision that authorized the entry and search of the taxpayer's home was appealed and set aside due to not being substantiated. In relation to this measure, the following questions were raised:

a) Whether that absence of substantiation can be remedied. The court replied that it could not, underlining that it is only allowed to enter a constitutionally protected home with the consent of the owner or with a perfectly valid court warrant.

b) What effects the voiding of a decision authorizing entry has. The court concluded that this voiding removes legal protection of the seizure of documents and other material during home searches. Therefore, AEAT does not have the right to retain the seized documents and computer materials where entry to the home was carried out with a breach of the fundamental right to inviolability of the home and as a result of this the court decision that authorized entry has been set aside.

2.14 Penalty procedure. - For the penalty scale the denominator for calculating the financial loss percentage must be net tax payable, not final tax payable

National Appellate Court. Judgment of July 1, 2021

Under article 187 of the General Taxation Law, penalties may be increased if the aggravating factor relating to financial loss exists, which is calculated as the percentage obtained from the ratio between the penalty base and the "aggregate amount that should have been paid with the self-assessment".

In the case examined in this judgment, the origin of the penalty was a corporate income tax adjustment. To calculate the aggravating factor relating to financial loss, the auditors started out from the final tax payable, which the figure is obtained after subtracting withholdings and prepayments from net tax payable. The appellant argued against this that the true debt is net tax payable, which is the figure obtained by subtracting the relevant deductions and reductions from gross tax payable (after multiplying the tax base by the tax rate), since withholdings and prepayments are only an advance payment of the tax. Therefore, the denominator in the formula was greater than that supported by the auditors.

The National Appellate Court confirmed the appellant's method. In its opinion, it is contrary to the spirit of the law for the penalty to be different for two taxpayers who have the same net tax payable figure, due to the fact that one has had withholding tax deducted and made prepayments and the other has not had to meet these obligations. According to the court, the interpretation of financial loss must be made from the standpoint of the principle of proportionality and therefore the elements that have to be compared are the tax cost that the taxable person is required to bear and the tax deficiency identified by the auditors.

2.15 VAT / Review procedure. – It is not contrary to EU law for the tax authorities to reject in a review the production of proof not produced in the examination process

Court of Justice of the European Union. Judgment of September 9, 2021. Case C-294/20

A nonresident entity repeatedly failed to comply with requests for documents made by the tax authorities in an examination process, for which reason, in the assessment that brought the process to an end, the taxable person's right to a VAT refund was denied. Later, in relation to the economic-administrative claim brought with TEAC, the taxpayer produced the documents supporting their entitlement to the VAT refund. TEAC dismissed the claim because in its opinion the documents should have been produced in the examination process.

The CJEU concluded that the VAT Directive does not preclude a national legislation allowing entitlement to a VAT refund to be denied where a taxable person does not provide (without reasonable grounds and despite requests for information) the documents proving that the substantive requirements for obtaining that refund are met before the tax authorities adopt their decision. It clarified however that those provisions do not preclude either member states allowing that proof to be provided after the authorities' decision is adopted, provided that the principles of equivalence and effectiveness are observed, something that must be determined by the referring court.

This judgment and its relationship with the principle determined by the Supreme Court (among others, in its judgments on September 10, 2018 and July 27, 2021 – discussed in our July - September 2021 Tax Newsletter-) are discussed in greater detail in our Blog.

3. Decisions

3.1 Corporate income tax. - Limit for claiming international double taxation tax credit does not run counter to Portugal-Spain tax treaty

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

A taxpayer included in its tax base a number of dividends received from its Portuguese subsidiary and claimed the relevant international double taxation credit under additional provision 15 of the Corporate Income Tax Law. According to this provision, the combined amount of international double taxation tax credits cannot exceed 50% of the taxpayer's gross tax payable, where their net revenues figure is at least €20 million in the 12 month period before the beginning of the tax period.

Later, the taxpayer applied for correction of its self-assessment to remove the effect of applying that limit, because it considered that the limit was contrary to the tax treaty with Portugal. According to the taxpayer, the tax treaty contains autonomous and specific rules on the subject, which make it necessary to eliminate double taxation without any option to delay that elimination; and they must be applied as priority rules.

TEAC concluded as follows:

a) The hierarchy of the sources of law does indeed require the tax treaty to be examined first and after it has been determined that it allows the income to be taxed in the state of residence, then domestic law must be applied.

b) However, the limit set out in additional provision 15 does not prevent the elimination of double taxation as established in the tax treaty, because that instrument only leads to deferral of the tax credit, since any part of the credit not claimed in one year may be claimed in the following years.

3.2 Personal income tax. - Exemption for work performed abroad is not conditional on nonresident entity benefiting on exclusive basis from services provided by worker

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

A taxpayer claimed in their personal income tax self-assessment an exemption for work actually performed abroad. The tax authorities denied this exemption based on the view that the work performed did not benefit the nonresident entity only.

Under the principle determined by the Supreme Court in its judgment on March 28, 2019 (April 2019 Tax Newsletter), TEAC upheld the claim and set the assessment aside, acknowledging that, to benefit from that exemption, it is not a problem for there to be more than one beneficiary of the services, as long as one of them is the nonresident entity.

3.3 Personal income tax. – In transfers of properties acquired by prescription, property's acquisition cost is market value on acquisition date

Balearic Islands Regional Economic-Administrative Tribunal. **Decision of June 29, 2021**

The taxpayer acquired a property by prescription in 2002. The acquisition was declared in a judgment dated 2010, in which the acquisition was acknowledged. Therefore, in 2002 the taxpayer should have reported the relevant capital gain, by reference to the property's market value. The taxpayer did not report the relevant capital gain, however, either in 2002 or when its acquisition by prescription was declared in the 2010 judgment. Nor did the tax authorities assess the tax after the judgment, and after more than four years had run from that point, the tax authorities' right to assess personal income tax on the acquisition became statute-barred.

In 2013 the taxpayer transferred the property. In an examination process of 2013 personal income tax, the tax authorities concluded that, because no acquisition cost existed for the property (due to no tax having been levied on the acquisition), that value had to be set at zero euros to determine the capital gain.

The Balearic Islands TEAR concluded against this that the absence of a capital gain reported on the acquisition by prescription does not in itself determine that the acquisition cost of the property should be zero, but rather that value must, under the personal income tax law, be the property's market value when it was acquired.

3.4 Personal income tax. – Under community property system, no capital gain on transfer between spouses of community property shares

Castilla-La Mancha Regional Economic-Administrative Tribunal. Decision of April 16, 2021

A married couple owned shares in a company, which were treated as community property shares. One of the spouses sold their half to the other. The tax authorities took the view that the transfer gave rise to a capital gain for the transferor, which was subject to personal income tax.

Castilla-La Mancha TEAR concluded, however, that the transfer does not give rise to any capital gain whatsoever, because the shares were community property and the money paid for them also. According to the tribunal, the transfer was actually just a sale of non-economic rights held by shareholders, which are owned individually.

The tribunal added that this transaction should not be confused with a transfer of community property assets to one of the spouses on an individual basis or vice versa, on which there is a capital gain.

3.5 VAT. - Pension funds and investment funds do not meet the requirements to be entered on the Large Companies Register

Central Economic-Administrative Tribunal. Decisions of June 21 and September 22, 2021

The cases examined in these decisions originate from the inclusion by the tax authorities of pension funds (decision on June 21) and investment funds (decision on September 22) on the Large Companies Register. In the tax management bodies' judgment, where the transaction volume of these entities exceeds €6,010,121.04 in a year, they must be included on that register the following year.

TEAC held, however, that since neither pension nor investment funds organize their own resources to make supplies of goods or services, but instead they are a separate and independent set of assets from the entities sponsoring and managing them, they do not carry on a business activity as required by the VAT Law. In other words, VAT is not levied on these entities' revenues, because they come from interest, dividends or increases in value of their own assets.

In view of this, the tribunal departed from the principle expressed in earlier decisions and concluded that the inclusion of pension funds or investment funds on the Large Companies Register is not allowed because, by nature, they do not have a "transaction volume".

3.6 Inheritance and gift tax. – An act contrary to a mandatory provision is null and void and therefore cannot give rise to inheritance and gift tax

Madrid Regional Economic-Administrative Tribunal. Decision of September 30, 2021

A married couple gifted their contractual positions (as policyholders and beneficiaries) in insurance policies to their daughter, and as a result filed the relevant inheritance and gift tax self-assessments. When the gift was notified to the insurance company, this company stated that the gift was not legally possible because a beneficiary had been irrevocably named in the policies, and therefore, under article 99 of Law 50/1980, the Insurance Contract Law, the policyholder could not transfer the policy by any means.

Since the gift was null and void due to being contrary to that mandatory provision, the couple applied for a refund of tax incorrectly paid in respect of the amounts paid over with their inheritance and gift tax self-assessments. Madrid TEAR concluded that the gift was null and void ab initio and therefore acknowledged their right to the requested refund.

3.7 Transfer and stamp tax. – Valuation of a property by reference to transfers of the same property in the year following the year the tax becomes due requires substantiation from tax authorities that the physical, legal and economic circumstances have not changed

Murcia Regional Economic-Administrative Tribunal. Decision of May 31, 2021

In a limited review, the tax authorities altered the value reported by a taxable person for transfer and stamp tax purposes. The valuation method used was that set out in article 57.1.h) of the General Taxation Law, in other words, the price relating to other transfers of the same asset that have occurred within a year from when the tax became due.

Article 158.4 of the General Regulations on tax management and audits provides that this method is valid only if the physical, legal and economic circumstances determining the value are the same. Murcia TEAR had been interpreting this provision as conferring validity on audits of reported values for which that valuation method had been used, if the taxpayer did not substantiate that a material change in those circumstances had occurred.

However, that tribunal refined its theory following a Murcia high court judgment on February 17, 2021, by clarifying that it is the tax authorities who, to support the validity of their audit of reported values, have to substantiate that these circumstances have not changed materially. Because in the examined case that substantiation by the authorities did not exist, the tribunal set aside the challenged assessment and ordered the proceedings to be reverted to allow the tax authorities to provide that substantiation.

3.8 Extension of liability procedure. – Individual representing legal entity director of company that has ceased operations may be held secondarily liable

Central Economic-Administrative Tribunal. Decision of October 18, 2021

The General Taxation Law states that de facto or de iure directors are secondarily liable for the tax debts of legal entities that have ceased operations, in respect of the tax obligations that are outstanding when they cease operating, if those directors had not done everything necessary to secure their payment or had adopted resolutions or taken measures which caused the nonpayment.

TEAC determined that from the way in which corporate law gives the same treatment to the legal entity director and the individual it has designated as representative, it may be concluded that this liability may be sought from the individual representing the legal entity director, in respect of the outstanding tax obligations of the main debtor company.

3.9 Extension of liability procedure. – Recipient may be held jointly and severally liable where giver has not set aside sufficient assets to pay tax debts existing before the gift

Central Economic-Administrative Tribunal. Decision of September 16, 2021 (Principle 1 of 2 and Principle 2 of 2)

TEAC has again examined a case of extension of joint and several liability to the recipient, in a case where the giver had been left (following the gift) without sufficient assets to pay the tax debt (a case provided for in article 643.2 of the Civil Code), and clarified the conclusions in its Decision of October 19, 2020 (see our November 2020 Tax Newsletter).

In these cases, according to TEAC, two of the requirements for declaring liability must be held to be fulfilled:

a) One is concealment of assets or rights by the debtor (the giver) to prevent a lien being placed against them by the tax authorities.

b) And the other, the role played by the recipient of the assets in "causing or aiding" the concealment of assets.

However, the tax authorities will have to provide proof of the third requirement, in other words, bad faith or knowledge on the part of the person held liable (the recipient) that a loss to public finance may be caused.

Lastly, TEAC examined whether the fact that the tax debts became due several years before the gift affects the declaration of liability and concluded that the existence of concealment cannot be denied because the act or legal transaction giving rise to the declaration of liability (the gift, in this case) might have been carried out at an earlier time.

3.10 Tax management and audit procedures. – To report on personal income tax return of transferor of a property the audited value reported for transfer and stamp tax by transferee, the first value must be verified in an audit of reported values

Balearic Islands Regional Economic-Administrative Tribunal. Decision of June 30, 2021

A taxpayer transferred a parking space and reported the relevant capital gain in their personal income tax self-assessment by taking the value recorded in the deed as the transfer value. Following a limited review procedure on the transferor, the tax authorities found that the property had a higher value. According to the central government tax authorities (the competent authorities for personal income tax matters), the autonomous community authorities had also audited the value of the property when they verified the transfer and stamp tax paid by the transferee and had found that the value of the property to be taken as the taxable amount for the purposes of that tax was higher than the reported value (which was the value that appeared in the deed).

The Balearic Islands TEAR recalled that, according to the Supreme Court, the valuation of an asset made by a tax authority must be binding for all purposes in relation to other taxes, especially if central government taxes are involved (devolved or otherwise). It nevertheless set aside the personal income tax assessment because the central government tax authorities, when using an audit of reported values conducted by an autonomous community government which they intended to apply to a taxpayer other than the taxpayer on which the autonomous community tax authorities had conducted their audit work, should have verified the following elements:

a) Firstly, that the file for the autonomous community authorities' audit of reported values on the transferor had been made available for inspection.

b) Secondly, that the transferee's reported value audited by the autonomous community authorities was final.

c) Thirdly and lastly, that it had been expressly and verifiably communicated to the transferor that they could request an expert appraisal as a defense against the value audited by the autonomous community authorities; although this requirement would not be necessary, according to the TEAR, if there is proof on file that the autonomous community authorities have sent the case file for the audit of reported values to the seller.

3.11 Audit procedure. - Failure to fulfill obligation for actual examination to stay within specified scope of work cannot be remedied by reverting the process

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

Before this decision, TEAC had held that an examination process that went beyond the scope of work defined in the notice of commencement, determined a non-invalidating defect in the final assessment made, which could be remedied by reverting the process.

However, in view of the principle set by the Supreme Court in its judgment on March 4, 2021, TEAC has changed its method and concluded that the specification of the scope of the examination process at the start of the work is a substantive element, meaning that failure to comply with the subject-matter of the process, amounts to a defect going beyond a simply procedural or formal matter, which cannot be remedied by reverting the process.

4. Resolution requests

4.1 Corporate income tax. - Implications of converting partnership firm into company and of contribution of properties to the company by its members

Directorate General for Taxes. Resolution V2404-21 of August 23, 2021

A partnership firm's partners were considering converting the firm into a limited liability company. Since 2016, the partnership firm had been a corporate income taxpayer and filed its financial statements with the commercial registry. Its activities are carried on at two sets of premises owned by the partners in indeterminate shares.

The reasons for making this change, in view of the expansion of its activities, were: (i) the change of legal regime for the entity, (ii) the separation of their personal assets from the assets of the business and (iii) opening up the option for new partners and investors to take up stakes in the future.

Simultaneously with the conversion of the partnership firm, it was being considered whether to contribute the premises to the new company.

The DGT concluded as follows:

a) Conversion: the conversion does not determine the obtaining of income for tax purposes, for either the company (because it does not imply any alteration to the tax regime applicable to the company for corporate income tax purposes) or for the partners (because it does not alter their ownership interests in the entity).

b) Contributions: the tax neutrality regime may be claimed, as determined for the special nonmonetary contributions made by each member. For these purposes, the economic grounds submitted for making the contributions are valid.

4.2 Corporate income tax. - Capitalization reserve calculated by reference to accounting figures, regardless of tax method for timing of recognition of revenues and expenses

Directorate General for Taxes. Resolution V2402-21 of August 23, 2021

An entity was intending to make a sale in which the price was going to be received in the same fiscal year as the transfer and over the following 5 years. The income would be recognized on an accrual basis for accounting purposes, in other words, in the year of the sale, although it would be recognized for corporate income tax purposes as and when the payments became due, in other words, under the rules on installment transactions. In relation to the impact this timing of recognition method might have on the capitalization reserve, the DGT made the following comments:

a) The capitalization reserve is a tax benefit that allows the corporate income tax base to be reduced by 10% of the increase in shareholders' equity in the taxable period.

b) The increase in shareholders' equity is determined by reference to the positive difference between the shareholders' equity figure at year-end, not including income for the year, and the shareholders' equity figure at the beginning of that year, not including income for the previous year.

c) For these purposes, regard needs to be had to the accounting legislation on the captions under shareholders' equity on the entity's balance sheet. Therefore, the increase in shareholders' equity must be calculated without regard to the tax timing of recognition method for revenues and expenses used on the tax return (without including income for the year in which the sale was made).

4.3 Corporate income tax. – Discounts on future purchases collected in advance are earned over the valid term of the contract

Directorate General for Taxes. Resolution V2387-21 of August 23, 2021

The requester's corporate purpose is to conduct hospitality activities. It planned to sign an exclusivity agreement with a beverage distribution company for a three-year term, under which it undertook that only the beverages and brands of the distribution company would be purchased and consumed on its premises. In respect of this exclusivity undertaking, the distribution company would pay to it, at the signing of the agreement, a sum determined by reference to the term of the agreement, the planned purchases and the discount percentage that would be applied to the prices.

In relation to the tax on the amount received in respect of the exclusivity undertaking, a report was requested from the Spanish Accounting and Audit Institute (ICAC), from which it may be inferred that the amount received as a result of a future exclusivity undertaking is an advanced volume discount, which is earned over the term of the agreement.

Because the corporate income tax legislation does not provide specific treatment for the timing of recognition of revenues of this type, the tax base must be determined by reference to the accounting treatment, which means that the revenue must be recognized over the term of the agreement.

4.4 Corporate income tax. - Photovoltaic energy companies are holding companies until development of solar plants starts

Directorate General for Taxes. Resolution V2265-21 of August 12, 2021

A Spanish company's primary activity is the generation, transmission and distribution of energy. To conduct that activity it was applying for all the necessary permits to build a solar plant. The project was split into two phases: the first involved applying for and obtaining all the necessary permits to build the plant; and the second consisted of obtaining the necessary funding, and developing and building the plant.

The entity had no hired employees. All its services were invoiced by the parent company (also Spanish resident) or, where applicable, by third parties.

Regarding the option of the parent company transferring its interest in that entity, the DGT concluded as follows:

a) If the investee qualifies as a holding company, the portion of the income obtained on the transfer which does not relate to an increase in unallocated earnings generated by the investee in the period when the interest was held will not give entitlement to the exemption under article 21 of the Corporate Income Tax Law.

b) If on the sale of the shares, the first phase of the project has ended, but the actual development work on the solar plant has not started, the investee will be seen as not having carried on an economic activity and its assets will be seen as not being used for any activity, so the investee company will be treated as a holding company.

4.5 Corporate income tax. - Income obtained from leasing residential and commercial properties is exempt from withholding tax only if cadastral values of the residential and commercial properties, measured separately, are above €601,012.10.

Directorate General for Taxes. Resolution V2112-21 of July 15, 2021

An entity owning a residential property and factory premises wanted to lease both properties. To do this, it would register under captions 861.1 "Residential rentals" and 861.2 "Factory premises rentals and other rentals" for the tax on economic activities. The cadastral value for both rental properties combined (the residential property and the factory premises), calculated together not separately, was above €601,012.10.

The Corporate Income Tax Regulations provide that no withholding tax has to be deducted from income obtained from leasing or subleasing urban properties where the lessor's activity is classified in any of the captions in group 861 in section one of the tax on economic activities classifications, or in any other caption for the activity of leasing or subleasing urban properties; provided that the rules on determining the tax liability in the captions in group 861 to the cadastral value of the properties used for leasing or subleasing do not produce a tax liability equal to zero.

According to note 2 on captions 861.1 and 861.2, if the cadastral values of the rented properties included in each of those captions are below €601,012.10, their tax liability will be zero.

Therefore, the DGT concluded that withholding taxes have to be deducted from the rent under the lease in the examined case, because the separate values for each type of property (residential or premises) are below the threshold determined in the legislation on the tax on economic activities.

4.6 Corporate income tax and VAT. - Regime applicable to transfer of business with variable price

Directorate General for Taxes. Resolution V2190-21 of July 30, 2021

An entity intended to transfer one of its lines of business to another entity. The price was to be calculated by reference to the gross profit margin obtained by the purchaser in the following seven years, subject to a limit. If that limit was paid before the end of the 7 year period, it would be treated as paid in full and no new payments would be required. If at the end of that period, the limit had not been attained, the aggregate amount paid until that point would be treated as the last and final price.

After examining the treatment of this transaction, the DGT concluded as follows:

a) Corporate income tax:

(i) In transactions with deferred prices, the price is known at the time of the transfer. Therefore, the income is considered to be earned and is recognized for accounting purposes at that time. Its inclusion in the tax base is deferred however until the point when the deferred price is received.

(ii) The issue submitted for resolution, therefore, does not involve a transaction with a deferred price, because the amounts to be received depend on unknown future contingent events. The rent will be earned in this case in each taxable period following the transfer in which, after the specified requirements have been fulfilled, each portion of the contingent price is earned.

b) VAT and invoicing:

(i) If the transferred business unit qualifies as an independent economic unit for VAT purposes, the transaction will not be subject to VAT.

(ii) An invoice will have to be issued and delivered on supplying the elements that are going to be transferred, regardless of whether or not the supply is subject to VAT. The taxable amount to be included on the invoice, if applicable, is a provisional amount that must be determined using founded principles, which may have to be corrected when the final price is determined.

4.7 Digital services tax. - Services provided by travel agencies are subject to the tax if they act on another's behalf

Directorate General for Taxes. Resolution V2214-21 of August 2, 2021

In line with its findings in resolution V2153-21 of July 28 (see July - September 2021 Tax Newsletter) for certain hotel management agreements, the DGT concluded that services provided by travel agencies acting on their own behalf do not trigger the digital services tax in respect of online intermediation, because in these cases the agencies sell their own service to travelers and do not act as intermediaries.

By contrast, where travel agencies act for and on behalf of others the taxable event involving online intermediation may occur:

a) If the customer goes to a physical travel agency, the taxable event involving online intermediation does not occur because in this case the only digital interface functions as a connection tool between the travel agency (the intermediary) and the service provider (the tour operator). In other words, the interface does not connect users who are part of the underlying service (the traveler and the tour operator).

b) If, by contrast, the customer uses the travel agency online to purchase the tour operator's service, then the taxable event involving online intermediation will occur, because the service is putting two users in touch with each other (the traveler and the tour operator) through an interface. It is not an obstacle to this conclusion if the purchase requires the agency's interface to connect with the tour operator's interface.

After the taxable event has occurred:

(i) All revenues or commission received in respect of the services must be included in the taxable amount for the digital services tax, including management costs, even if they do not relate to a commission for putting travelers in touch with tour operators. In other words, how the agency is paid is irrelevant, and the distinction between management costs and commission is artificial.

(ii) Where one or more of the users establishing contact are not in Spain whereas others are, the rules under article 10.2 of the Digital Services Tax Law must be applied to the aggregate revenues (in other words, it must be calculated which part of the revenues are considered to be obtained in Spain according to the users' location).

4.8 Personal income tax. - Any dividends paid to a shareholder who has exercised their right of withdrawal must be recognized in the year they were payable, even if they were paid in a later year

Directorate General for Taxes. Resolution V2231-21 of August 4, 2021

The requester, owning shares in a corporation, exercised their right of withdrawal from the company in 2017. In December 2019, in compliance with the judgment that acknowledged the right of withdrawal, the company paid out part of the value of the shares. In 2021, however, various judgments were published concluding that individuals or entities retain shareholder status until the value of their shares is paid to them. For that reason, the requester claimed the 2017, 2018 and 2019 dividends from the company. The company paid those dividends in 2021.

In relation to the timing of recognition of those dividends, the DGT explained as follows:

a) The dividends must be recognized in the taxable period in which they become payable to their recipient, in other words, on the date specified in the distribution resolution or on the day after the date of its adoption, if no payment date was specified.

b) The Supreme Court has concluded repeatedly that, in the event of withdrawal of shareholders, shareholder status is not forfeited until the company pays out the value of the shareholder's ownership interest. Under that case law, a shareholder who exercises their right of withdrawal is entitled to the dividends declared by the company until that shareholder receives payment in respect of the value of their ownership interest.

c) Although article 14.2.a) of the Personal Income Tax Law stipulates that where all or part of an amount of income has not been paid, due to the right to receive it or its amount having to be determined by a court decision, the unpaid amounts must be recognized in the taxable period in which the decision becomes final; in this case, the judgment delivered in favor of the requester did not rule on the right to receive dividends, instead on the right of withdrawal itself. Therefore, no matter what view was taken in the judgment, it did not affect the right to receive the dividends distributed until the shareholder's withdrawal became effective, instead the point when the shareholder would not be entitled to receive new (future) dividends.

   Consequently, in the examined case the special timing of recognition rule in article 14.2.a) of the Personal Income Tax is not applicable and the dividends have to be recognized in the years they were payable, irrespective of when they were paid.

4.9 Personal income tax. - Employment contract of joint owner is not sufficient for property leasing by joint property entity to be an economic activity

Directorate General for Taxes. Resolution V2227-21 of August 4, 2021

The requester was member of a joint property entity that owned leased properties. The leased property was a set of premises used as offices. Additionally, one of the joint owners was hired under a full-time employment contract to manage the leasing business.

The personal income tax legislation states that for property leasing to be conducted as an economic activity, there must be one individual employed under a full-time employment contract (until 2014, it was also necessary to have premises used for lease management activities).

According to the DGT:

a) The aim of this provision is to set out minimum requirements for the property leasing activity to qualify as a business activity.

b) These requirements relate to the need for a minimum amount of infrastructure, in other words, an organization of business resources for the activity to have that nature.

c) The requirement for the lessor to have, at least, one individual employed full time under an employment contract implies that the lessor (or the lessors and co-owners of the properties, in the case of a joint property entity) must use, at least, one individual employed as described, and that requirement cannot be fulfilled based on the management tasks carried out by them. Therefore, that requirement is not fulfilled in the case submitted for resolution, because there is no third party hired for management of leasing activities, instead one of the joint owners.

4.10 Personal income tax. - Incentives must be recognized in the year they become payable, even if they are calculated by reference to targets in earlier years

Directorate General for Taxes. Resolution V2029-21 of July 7, 2021

An individual who was resident in Chile in 2020 returned to Spain at the end of that year, and acquired tax residence in Spain starting in 2021. Also 2021, they received an incentive based on the attainment of targets in 2020. Under the terms and conditions for the incentive, it became payable in 2021, even though it was calculated by reference to targets in 2020. In relation to the tax on this bonus, the following principles were determined:

a) The bonus is an amount of salary income and, as such, although it is quantified on the basis of targets in 2020, it must be recognized in 2021, because this is when it becomes payable and is ultimately paid.

b) Withholding tax must be deducted on payment of the bonus. Because it becomes payable in 2021 and its payment also takes place in 2021, withholding tax must be calculated under the general procedure rather than as if it were a delayed payment.

4.11 Personal income tax. - Employee's sale of shares in employer due to tender offer implies non-fulfillment of three-year holding period

Directorate General for Taxes. Resolution V2028-21 of July 7, 2021

Article 42.3.f) of the Personal Income Tax Law allows an exemption for salary income obtained from the award of shares to workers. Among other requirements, the worker has to hold the shares for at least three years. The issue submitted for resolution concerned whether the holding period is not fulfilled where the worker transfers their shares (within the three-year period) as part of a tender offer in which the minority shareholders (like the worker) are forced to sell their shares.

The DGT recalled the following points:

a) The aim of the tax benefit is to encourage workers' participation in the company, by conferring shareholders' economic and non-economic rights on them.

b) The Personal Income Tax Legislation does not contain any exceptions to that period nor does it make the existence of non-fulfillment of the period conditional on the reasons that caused it.

c) In cases involving exchanges (such as that examined in resolution V1222-16), in which the worker replaces their shares with those of the new parent company, non-fulfillment of the holding requirement is not deemed to take place because:

   (i) The decision to exchange shares is outside the workers' control.

   (ii) The received shares have the same market value as those delivered.

   (iii) In both cases, the shares are in the group's parent company, regardless of whether it changes as a result of the exchange.

d) In the case of an IPO, however, (such as that examined in resolution V2480-20 and now in resolution V2028-21) which makes it necessary to sell the shares within the three-year period, the holding requirement is seen not to be fulfilled, because in these cases the aim sought by the tax benefit is not met, due to the shares being delivered in exchange for cash not in exchange for new shares.

4.12 Wealth tax. - Treatment of shares in family business by Swiss resident

Directorate General for Taxes. Resolution V2304-21 of August 16, 2021

The requester is tax resident in Spain and was considering changing its residence to Switzerland in 2022. The requester, together with their siblings and their mother, owns shares in an entity having its registered office in Madrid.

In relation to the implications that the change of residence could have for wealth tax purposes, the DGT noted the following:

a) After becoming tax resident in Switzerland, the requester would be subject to wealth tax as nonresident taxpayer, in other words, on the assets or rights owned by them which are located, may be exercised, or have to be fulfilled, in Spain.

b) Being a nonresident taxpayer is not an obstacle to eligibility for the family business exemption, if all the requirements laid down in the wealth tax legislation for that exemption are fulfilled:

   (i) In relation to the requirement relating to "management functions at the entity, and receiving in that respect compensation accounting for more than 50 percent of the aggregate amount of amount of income from business or professional activities and salary income", all income from business or professional activities and salary income must be computed, both in Spain and abroad.

(ii) Where the interest in the entity is owned jointly with family members, the management functions must be carried out by, at least, one of the individuals in the family group, even though all of them may be entitled to the exemption.

c) Even if the requester becomes resident in a third country which is not a member of the EU or the EEA, the applicable legislation will be the legislation for the autonomous community of Madrid, because this is where the entity is established; even though the competent body for levying the tax will be the Spanish Tax Agency.

4.13 Wealth tax. - Nonresidents are not taxed in Spain on their interests in foreign companies, even if they have assets located in Spain

Directorate General for Taxes. Resolution V2070-21 of July 9, 2021

The request was submitted by UK tax resident shareholders in a British entity. That entity owned a property in Mallorca, which accounted for more than 50% of its assets. In relation to whether the nonresident shareholders were liable for Spanish wealth tax, the DGT concluded as follows:

a) Under the Spain-United Kingdom tax treaty, Spain has the power to tax, under its domestic legislation, the portion of the wealth of nonresident persons that consists of shares in a British company, where not more than 50% of that company's assets are composed, directly or indirectly, of real estate assets located in Spain.

b) However, for the ownership of shares in the companies mentioned above to be taxed in Spain, there must be a domestic law that effectively taxes the ownership of those shares.

The Wealth Tax Law provides that nonresident individuals are taxed in Spain as nonresident taxpayers only on their assets and rights located in Spain, or which may be exercised, or have to be fulfilled, in Spain.

Therefore, that tax is not levied on the ownership of shares in non-Spanish resident companies which are owned by non-Spanish resident individuals.

4.14 Tax on increase in urban land value. - Exemption for upkeep, improvement or renovation work requires the work to be performed by the owner of the property

Directorate General for Taxes. Resolution V2206-21 of July 31, 2021

Article 105.1.b) of the Revised Local Finances Law allows an exemption from the tax on increase in urban land value for transfers of real estate assets which are located in a delineated conservation area (*Conjunto Histórico Artístico*) or which have been declared individually as cultural heritage, where their owners (or holders of a property right in them) provide proof that they have completed upkeep, improvement or renovation work on those properties at their cost.

Moreover, the legislation governing the tax determines that in transfers of land or in the creation or transfer of property rights of enjoyment limiting ownership for no consideration, the transferees are taxable persons for the tax; unlike transactions for consideration, in which the taxable person is the transferor.

In relation to the discussed exemption, the DGT clarified the following points:

a) Under the letter of the law, where the work had been performed under the ownership of a deceased person, the exemption is only claimable on the transfer of the real estate asset to that person's heirs, not on its subsequent sale by those heirs.

b) The exemption is not conditional on whether the work has been completed within a certain amount of time before the tax becomes due.

5. Legislation

5.1 Personal Income Tax Regulations adapted to provisions in General State Budget Law for 2021

On October 20, 2021, the Official State Gazette published Royal Decree 899/2021, of October 19, 2021, adapting the Personal Income Tax Regulations to various changes introduced by the General State Budget Law for 2021 (see our **alert**). Among other elements:

a) It explains how to claim the reduction to net taxable income for contributions to benefits and pensions systems in prior years.

   Namely, where contributions from prior years coexist with contributions in the year being reported, the reductions will relate first to contributions from prior years.

   In relation to excess contributions in periods between 2016 and 2020 (in which no distinction was made between contributions by the taxpayer and employer contributions made by the sponsor), the amounts remaining to be reduced relate to contributions recognized by the sponsor to the extent of the contributions recognized in those taxable periods and the excess over that amount will be deemed to relate to the taxpayer's contributions.

b) The scale of withholding taxes applicable to recipients of salary income has been amended to include the new €300,000 bracket at 47%. And, along the same lines, the maximum rate under the inbound expatriates' regime is determined at 47% for the portion of compensation in excess of €600,000.

   Additionally, the maximum withholding rate in the event of a tax adjustment has been determined at 47% (as opposed to the previously required 45%); 19% (previously 18%) where all salary income was obtained in Ceuta and Melilla and benefits from the tax credit for income obtained in those territories.

5.2 Amendments to tax measures introduced in Royal Decree-Law 17/2020, of May 5, 2020

On October 12, 2021, the Official State Gazette published Law 14/2021, of October 11, 2021, amending Royal Decree-Law 17/2020, of May 5, 2020 (see our alert on May 6), and, among others, a few of the tax measures introduced by that royal decree-law. The main tax measures are:

a) Starting on January 1, 2021, Law 49/2002, of December 23, 2002 on the tax regime for not-for-profit entities and on tax incentives for patronage has been amended to broaden the definition of "beneficiaries of patronage" to include:

- Non-Spanish resident entities operating through a permanent establishment and which are comparable to the entities set out in article 2 of Law 49/2002.

- Entities resident in a EU member state or of other member states in the European Economic Area with which there is legislation on mutual assistance regarding the exchange of tax information, without a permanent establishment in Spain, but comparable to the patronage beneficiaries set out in that article 2.

In both cases, entities resident in a non-cooperative jurisdiction will not be included, unless that jurisdiction is an EU member state and proof is provided that the entity's formation and transactions are for valid economic reasons.

Additionally, (starting in January 1, 2021) it has retained the increased tax credit rate for gifts made by individuals and nonresident income taxpayers operating in Spain without a permanent establishment, which were introduced in Royal Decree-Law 17/2020, of May 5, 2020 (80% for the first €150, 35% for the excess or 40% in cases involving loyalty).

b) A new event of exceptional public interest has been introduced: *El tiempo de la Libertad*. *Comuneros V Centenario*, which will take place between January 1, 2021 and December 31, 2022.

c) The lengths of certain events declared to be of exceptional public interest have been extended. Namely:

- *Centenario Delibes*: Extended until December 31, 2021 (previously, until June 30, 2021).

- *Automobile Barcelona* 2019: Extended until December 31, 2021 (previously, until September 1, 2021).

- *Expo Dubai 2020*: Extended until September 30, 2022 (previously, until October 31, 2021).

d) Starting in taxable periods beginning on or after January 1, 2021, an amendment has been made to additional provision fourteen of Law 19/1994, of July 6, 1994, amending the Canary Islands Tax and Economic Regime, to increase the upper limits on the tax credit for investments in productions of films, audiovisual series and live performing arts and musical shows made in the Canary Islands, by 80% of the limits set out in article 36 of the Corporate Income Tax Law (Law 27/2014).

5.3 Tax incentives approved to mitigate effects of volcano eruption in La Palma

On October 6, 2021, the Official State Gazette published Royal Decree-Law 20/2021, of October 5, 2021, adopting urgent support measures to repair damage caused by volcano eruptions and for economic and social reconstruction on the island of La Palma.

Additionally, in its October 1, 2021 edition, the Official Canary Islands Gazette published Decree Law 12/2021, of September 30, 2021, adopting tax, organizational and management measures as a result of eruption of the volcano on the island of La Palma.

In our alert on October 6 we discussed the main tax measures introduced by both instruments.

5.4 Tax measures approved to boost energy efficiency in homes

Royal Decree-Law 19/2021, of October 5, 2021, on urgent measures to boost the renovation of buildings was published on October 6, 2021 in the context of the Recovery, Transformation and Resilience Plan.

In our alert on October 6 we discussed the main tax measures introduced by this royal decree-law.

6. Miscellaneous

6.1 Procedural obligations and applicable penalties in relation to computer or electronic systems and programs used for accounting, invoicing or management processes will not come into effect until implementing regulations are passed

On the Spanish Tax Agency's website, a Notice has been published in relation to the implementation of articles 29.2.j) and 201.bis of the General Taxation Law, introduced by Law 11/2021, of July 9, 2021, on measures to prevent and fight against tax fraud (see our commentary).

Although these articles were scheduled to come into force on October 11, 2021, implementing regulations are needed which have not yet been approved, so AEAT has clarified they will become applicable when those implementing regulations are adopted.

The specific provisions concerned are as follows:

a) Article 29.2.j) sets out a new procedural obligation consisting of computer or electronic systems used for accounting or business management processes having to meet certain requirements that ensure the integrity, preservation, accessibility, readability, traceability and inalterability of the records. The technical specifications for these requirements may be further defined in implementing regulations, which may include having to obtain a certificate for them.

b) Article 201.bis established specific penalty rules in keeping with that new obligation, which define a new infringement involving the manufacturing, production, marketing and holding of computer systems and programs that do not meet the specifications laid down in the applicable legislation.

Paragraph 1 of that article sets out a number of tests determining that the infringement has been committed: (a) where the computer systems allow different accounting records to be kept, (b) where they allow all or part of noted transactions not to be reflected fully or partially; (c) where they allow transactions other than the noted transactions to be recorded; (d) where they allow transactions that have already been recorded to be altered with a breach of the applicable legislation; (e) where they do not meet the technical specifications required in the law; and (f) where the manufactured, produced or marketed systems are not certified (if this is mandatory).

Letters a), b), c) and d) above relating to the penalty rules started to apply on October 11, 2021. Whereas letters e) and f), which explicitly require implementing regulations, will not be applicable until those regulations are approved and come into force.

c) Lastly, article 201.bis.(2) refers to users holding computer or electronic systems and programs that do not comply with the provisions in article 29.2.j), where they have not been duly certified and this is required under the regulations. AEAT has clarified that until the implementing regulations on the certificate have been adopted, users cannot be penalized for any breach in this respect.

6.2 EU updates tax haven blacklist

In a meeting on October 5, 2021, the Council of the European Union adopted a set of Conclusions on a revised EU list of non-cooperative jurisdictions for tax purposes (November 2021 AML Newsletter).

Anguilla, Dominica and Seychelles have been removed from the list of non-cooperative jurisdictions (Annex I to the Conclusions). While waiting for a later review by the Global Forum on transparency and exchange of information for tax purposes, these jurisdictions have been placed on the grey list (jurisdictions that do not yet meet all the international tax rules, but have made sufficient commitments to reform their tax polices -Annex II to the Conclusions-).

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