Tax Newsletter

Spain

GARRIGUES

October 2023

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1. Judgments

1.1 Free movement of capital. - It is prohibited by EU law to restrict a tax advantage in relation to inheritance tax based on the place where the inherited properties are located

Court of Justice of the European Union. Judgment of October 12, 2023. Case C-670/21

The German inheritance tax legislation states that properties which do not form part of business assets and are leased for residential use must be assessed, for the purpose of calculating the tax, at 90% of their market value, if they are located in Germany, in another member state of the European Union or a state in the European Economic Area. Other properties must be assessed at their full market value.

The CJEU held that this legislation restricts the free movement of capital, because it makes the ability to benefit from the tax advantage dependent on the location of the assets contained in the inheritance. In the court's view, that difference in treatment is not justified by either the German public housing policy, or by the need to guarantee the effectiveness of fiscal supervision.

1.2 State aid. – Compound interest for the recovery of state aid must be calculated on the principal of the aid and unpaid accrued simple interest as of May 19, 2004

Supreme Court. Judgment of September 28, 2023

In its Decision 2002/820/EC dated July 11, 2001, the European Commission declared that a tax credit for companies resident in Álava equal to 45% of their investments was incompatible with the common market, due to considering that it was state aid, and ordered recovery of that aid together with interest reckoned from the date the tax credit was granted. According to the European Commission, in these cases compound interest had be applied from May 20, 2004, under article 11 of Commission Regulation (EC) No 794/2004 dated April 21, 2004, which came into force on that date. For earlier periods, simple interest had to be applied.

The Supreme Court concluded that the compound interest must be calculated by reference to the amount of aid to be recovered plus the unpaid simple interest accrued before May 19, 2004. If compound interest were not applied to the whole amount due in 2004, the interest generated until that point would not have been discounted to present value from that point, thereby making the aid more advantageous financing than it would have obtained in normal conditions. This would fail to fulfill the purpose sought in the recovery procedure, namely, to return to the situation before the aid.

1.3 Corporate income tax. – If no proof is provided of the business use of vehicles, that use is presumed to be 50%, under the rule in the VAT law

Castilla y León High Court. Judgment of July 11, 2023

Tax auditors disallowed the deduction of expenses relating to the acquisition of vehicles to be provided for use by a company's executives, due to considering that because full business use for the company had not been proven, the provision of that vehicle was a gratuity. The appellant alleged that full business use of the vehicles was being made and proved this by showing that it did not recognize any income in kind to the executives.

The court confirmed that this explanation by the company was not sufficient to conclude that full business use was made of the vehicles, but underlined that the tax authorities had not evidenced either that the vehicles were not used to any degree. They therefore considered it reasonable to apply the presumption contemplated in the VAT Law whereby vehicles are presumed to be used in the business or professional activity in a 50% proportion, and accepted deduction of 50% of the incurred expense. In their opinion, this is the most congruous solution with the law, even though the two taxes are different.

1.4 Corporate income tax. – Entitlement to the neutrality rules is not forfeited where the relevant notification is not made, regardless of any potential penalties

Madrid High Court. Judgment of June 28, 2023

Madrid High Court recalled that the tax neutrality rules apply by default to the reorganization transactions defined in them (mergers, spin-offs, asset contributions, and so on) unless it is chosen not to apply them.

For that reason, although the law requires the election to apply the rules to be notified to the tax authorities, failure to make that notification cannot be a ground for denying entitlement to apply them, and, among others, entitlement for (as occurred in the examined case) the absorbing entity in a merger to be able to offset the losses of the absorbed company. This is regardless of whether this failure to notify may warrant the relevant penalty for a serious tax infringement.

1.5 Corporate income tax. – A non-proportional spin-off must benefit from the tax neutrality rules even if the spun-off assets do not constitute lines of business

Castilla y León High Court. Judgment of June 13, 2023

The examined case involved a total spinoff carried out with the aim to separate the shares in two family groups and allocate the shares in each beneficiary company to one family group (non-proportional spinoff). The spun-off assets and liabilities did not previously constitute independent lines of business. According to the Corporate Income Tax Law, non-proportional spinoffs cannot benefit from the tax neutrality rules, unless the spun-off assets and liabilities constitute lines of business at the company performing the spin-off. On that basis the tax authorities rejected application of the neutrality rules.

Castilla y León High Court however, accepted their application. According to that court, the prior existence of separate lines of business at the company performing the spinoff is not a requirement laid down in Council Directive 2009/133/EC of 19 October 2009. In fact, the European Commission has commenced penalty proceedings against Spain due to considering that seeking that requirement infringes the aim of the directive. For that reason, even though those penalty proceedings have not finished, it may be concluded that the requirement contained in the Spanish legislation goes against the aim of the directive.

1.6 Personal income tax. – The provision of services as an independent contractor on a one-off basis does not affect the exemption applied to severance pay

Valencia High Court. Judgment of June 13, 2023

The personal income tax legislation states that the exemption for severance pay is conditional on actual termination of the worker's relationship. It is presumed for these purposes (unless there is proof to the contrary) that this termination does not occur if the worker provides services again for the same employer (or a related entity) in a three-year period following dismissal. In the case examined in this judgment, the dismissed worker provided services again for the employer in the year following the worker's departure, although as an independent contractor and on a one-off basis.

The court accepted the worker's entitlement to retain the exemption. Even though, according to the court, the taxpayer has to provide proof of actual termination of their relationship with the employer, it cannot be concluded automatically that termination had not taken place as a result of any relationship after the dismissal, between the employer and the taxpayer, provided it is not an equivalent relationship, from a functional standpoint, to that held before dismissal.

1.7 VAT. - Providing a gift to new subscribers to a journal is not an ancillary obligation to the main reading service

Court of Justice of the European Union. Judgment of October 5, 2023. Case C-505/22

A company established in Portugal publishes and sells journals which it sells through subscription. In a promotional initiative, it offered new subscribers a gift which could be either a tablet or smart phone following payment of the first month's subscription, which was identical to the following monthly payments.

The CJEU concluded that the provision of a gift must not be regarded as a disposal free of charge for the purposes of article 16 of VAT Directive 2006/112 (in which case there would be a self-supply). It must be considered, by contrast, that it is part of a single transaction for a consideration, in which the grant of a gift is ancillary to the main transaction.

1.8 VAT. - The right to amend the taxable amount for VAT purposes is not forfeited due to insolvency proceedings on the debtor, even if it is exercised outside the time limit, whereas it is forfeited in debt remissions

National Appellate Court. Judgments of May 10 and September 14, 2023

In these judgments the National Appellate Court examined two scenarios for amendment of the VAT taxable amount:

(i) Pre-insolvency order claims: the VAT Law (article 80.3) lays down a time period for amending the taxable amount where the customer in the transactions has not paid the tax charge, and after VAT became chargeable on the transaction, an insolvency order was issued. This time period is two months after the end of the maximum one-month period provided in article 21.1.5 of the Insolvency Law. At issue was whether the right to make the amendment is forfeited after that time period has run.

In the examined case, the circumstances were as follows: (i) A verification of reported values procedure was carried out on the entity in relation to its VAT self-assessment for January 2016, which ended with a provisional assessment (in which amendment of the taxable amount was disallowed, due to having been made outside the time limit - more than two years after the maximum statutory period -), which subsequently became final; (ii) later, new verification of reported values procedures were commenced to apply the effects of the previous adjustment in self-assessments for later periods. The new provisional assessments gave rise to the proceeding examined by the National Appellate Court.

The court concluded that the time period granted by the law is simply a procedural rather than a substantive requirement, therefore a breach cannot cause forfeiture by the creditor of its right to recover amounts of tax that it neither received nor will receive. Finding otherwise would contradict the neutrality principle. Additionally, although in the examined case the assessment relating to the initial period became final, that circumstance cannot not prevent the right to recover VAT from being exercised, because otherwise that neutrality principle would be breached.

(ii) Out-of-court agreements: the case of a sports facility was examined which brought a claim against a developer in respect of indemnification for delay in completion of building work and for damages in respect of poor performance of that work. The developer brought a counterclaim against the sports facility in respect of the outstanding cost of performing the work. Following a number of appeals, the proceedings were dismissed because the parties reached a settlement agreement, in which they agreed to reduce the price to be received by the developer. Under the terms of that agreement, the developer issued a correcting invoice reducing the amount originally invoiced to the sports facility, and applied for the corresponding refund of the VAT originally charged.

The tax authorities found that the correcting invoice was not necessary because, in their view, the parties had covenanted a debt remission, a scenario that does not appear among those allowing amendment of the taxable amount under article 80 of the law on the tax. The National Appellate Court dismissed the appeal for judicial review brought by the developer, and confirmed the tax authorities' position.

1.9 Transfer and stamp tax. – Where the same notarized document formalizes a horizontal division and termination of the existence of a condominium only the second transaction has to be assessed

Supreme Court. Judgment of October 18, 2023

The Supreme Court confirmed that where the same notarized document formalizes a division under the horizontal division rules and termination of the existence of the pre-existing condominium with allocation of their portion to the joint owners, stamp tax only has to be assessed on the termination of the condominium, because the horizontal division is a prior and necessary transaction for the material division of the property owned under a tenancy in common.

According to the court, stamp tax cannot be charged twice where both transactions are included in the same notarized deed and formalized simultaneously with the associated allocations to each co-owner. In these cases the aim of the horizontal division is clearly and precisely to bring an end to the common tenancy with the resulting allocation of the properties to each owner.

1.10 Inheritance and gift tax. – To apply the reduction for the gift of a sole trader, the age requirement has to apply to each giving spouse

Supreme Court. Judgments of September 19, 2023 (appeals 7855/2021, 8196/2021 and September 20, 2023 (appeal 7852/2021)

Article 20.6 of the Inheritance and Gift Tax Law contains a reduction for gifts of family businesses to a spouse, descendants or adopted offspring, where, among other requirements, the giver is aged 65 years or over or has permanent incapacity status, to a degree determining absolute or severe disability.

In these judgments the court examined various gifts made by spouses with a community property matrimonial arrangement to their offspring, in which they applied the reduction because one of the parents in each case was aged over 65. The Supreme Court concluded that, in these cases, there are two gifts (one by each spouse) and therefore the reduction can only be applied to that made by the spouse meeting the age requirement.

1.11 Entry and search. – Tax auditors cannot copy the data from a personal electronic device without court authorization

Supreme Court. Judgment of September 29, 2023

At an audit meeting held at AEAT's offices, tax auditors asked to make a copy of the taxpayer's personal computer. When the taxpayer refused to allow this, the tax auditors adopted preservation measures, by copying the information on the laptop and sealing the copy. A few months later, in reply to a request by the auditors, a decision was delivered authorizing access to the tax-relevant information that had been copied earlier. The Supreme Court concluded as follows:

(i) The examined facts do not constitute entry at a constitutionally protected home. The fundamental right concerned is not, therefore, the right to inviolability of the home, but rather the rights to personal and family privacy, secrecy of communications and data protection.

(ii) The jurisdiction and procedural rules for court authorization to enter a home are not suitable for authorizing the copying, sealing, capture, possession or use of data held on a computer, where that step takes place outside the home of the audited person and may affect the content of fundamental rights.

However, the Supreme Court's theory in relation to the requirements for authorization for access and entry at a constitutionally protected home also applies to steps by the authorities to find, control or process information stored on electronic devices, which may be protected by fundamental rights to personal and family privacy, to secrecy of communications and to data protection.

(iii) Those requirements, which the judge required to grant the authorization, must be assessed by balancing fundamental rights, cannot be based only on the account submitted by the tax authorities on the application they file with the court, without contrasting and verifying that information to a minimum extent.

(iv) The proportionality requirement imposes the obligation to make a selection, before copying data, of the information with tax relevance for the audit.

The Supreme Court therefore held that the constitutional rights to personal and family privacy, secrecy of communications and data protection had been breached in the examined case, because complete and indiscriminate access had been gained to data with personal content on a computer and that access had been decided before having court authorization.

1.12 Administrative procedure. – The filing of a self-assessment with an exemption or right not to be taxed tolls the statute of limitations

Supreme Court. Judgment of September 22, 2023

A taxpayer was allocated a property in a court auction through an allocation decree rendered on October 1, 2012. On November 7, 2012 a certificate of the allocation decree was issued. On May 30, 2016 the taxpayer filed a transfer and stamp tax self-assessment without payment, due to considering that the transaction was not subject to stamp tax. The Andalusian tax agency commenced a limited review procedure, at the end of which, in September 2017, it issued an assessment for transfer tax under the transfers for a consideration heading.

The taxpayer considered that the tax authorities' right to make the assessment in respect of transfer tax under the transfers for a consideration heading had become statute-barred because the self-assessment filed on May 30, 2016 could not have tolling effects on the statute of limitations for transfer tax under the transfers for a consideration heading and on the date of notification of the assessment of this tax a period more than 4 years had run following the allocation.

The Supreme Court concluded, however, that the filing of a self-assessment accompanied by a document containing the fact with tax relevance is an act conducive to the assessment or self-assessment of the tax, regardless of the result of that self-assessment. This is a step that allows the tax authorities to be informed of the fact with tax relevance and exercise their powers to review it and, if necessary, to assess and collect tax, therefore it does have tolling effects on the statute of limitations.

1.13 Management procedure. – The tax authorities have an obligation to expressly declare the statute-barring of a tax management procedure

Supreme Court. Judgments of September 21, 2023 (appeals 8101/2021, 8105/2021 and 8213/2021) and September 29, 2023 (appeals 8103/2021 and 8100/2021)

In these judgments the consequences were examined of failure to report the statute-barring of a management procedure on an audit procedure that commenced later. The Supreme Court concluded as follows:

(i) After the maximum statutory period has run for notifying the relevant assessment in the tax management procedure commenced through a return, the statute-barring will be considered to have occurred by operation of the law, but will have to be declared expressly.

(ii) Without that express declaration it is not possible to commence an audit on the same tax item and taxable period nor can any documents and items of proof obtained in the statute-barred procedure be considered.

1.14 Audit procedure. – An assessment made without considering the taxpayer's submissions is void

Supreme Court. Judgment of September 12, 2023

A taxpayer filed submissions on the last day of the period granted in the right-to-be-heard procedure before the notice of assessment. The auditors had already issued the contested notice of assessment a day earlier, however, and therefore had not taken the taxpayer's submissions into account. The submissions against the notice of assessment were filed on the last day of the time period, which was also the date of the assessment decision (confirming the proposal contained in the notice of assessment). The decision stated that no submissions against the notice of assessment had been submitted, although the submissions made in the right-to-be-heard period had been considered. The maximum time period for notifying the assessment expired a few days after the date on which it was notified.

The Supreme Court set aside the assessment for the following reasons:

(i) The interested party's right to be heard in procedures is a constitutional right which, in the tax field, is recognized in article 157 of the General Taxation Law, on the right-to-be-heard period before the notice of assessment and the submissions period on the notice of assessment before the assessment. A breach of these procedures renders the procedure void where their absence causes an actual and real decrease in the protections granted to the interested party, in other words, a material denial of the right to a defense.

(ii) In the examined case, the assessment had to be set aside, because it had been made without considering the submissions on the notice of assessment (given that it was the submissions made in the right-to-be-heard period that had been considered in the assessment).

1.15 Liability for tax. – The directors' secondary liability has a sanctioning nature

Supreme Court. Judgment of October 2, 2023

At issue was whether the amount included in a decision to enforce secondary liability under article 43.1 a) of the General Taxation Law could be suspended without security, where that decision includes the tax debt (liability and late-payment interest) and penalties. That article relates to the secondary liability of de facto or de jure directors of legal entities for the tax infringements committed by those entities, where they did not take the necessary steps within their powers to ensure that those entities complied with their tax obligations.

The Supreme Court stated that secondary liability under article 43.1.a) of the General Taxation Law has a sanctioning nature.

However, according to the court, this does not give entitlement to automatic suspension of the amount relating to the tax debt. The legislature, within constitutional limits, can modulate the rules on the unenforceable nature of sanctioning steps. Therefore, the provision in paragraph two of article 212.3.b) of the General Taxation Law, which prevents automatic suspension of the tax debt being enforced is compatible with the Constitution, and in particular, with the principle of equality.

The same view was upheld by the Supreme Court in a judgment dated February 7, 2023 on secondary liability under article 42.1.a) of the General Taxation Law, relating to anyone who has caused or actively collaborated in the performance of a tax infringement.

1.16 Penalty procedure. - The CJEU examines the *non bis in idem* principle in relation to more than one criminal penalty

Court of Justice of the European Union. Judgments of September 14, 2023. Cases C-820/21 and C-55/22

The CJEU recalled that the imposition of two criminal penalties for the same facts does not infringe the *non bis in idem* principle if: (i) the possibility of duplicating those two penalties is provided for by law, (ii) the duplicated penalties relate to different aspects of the same unlawful conduct at issue, (iii) there are clear and precise rules setting out which acts or omissions may be subject to a duplication of proceedings and penalties, and (iv) the first penalty is taken into account in the assessment of the second, meaning that the overall penalties imposed correspond to the seriousness of the offenses committed (proportionality principle). On that basis, it concluded:

(i) That that principle does not preclude national legislation such as the Bulgarian legislation which allows a person who has committed a serious infringement of the legislation on products subject to excise taxes to be punished by imposing a financial penalty on them and also with withdrawal of the authorization to operate a tax warehouse for those products, if that withdrawal (and, especially, its final nature) is not disproportionate relative to the seriousness of the infringement.

(ii) That, by contrast, the principle is breached by the Austrian legislation on games of chance, which allows a penalty of a criminal nature to be imposed on a person for infringing a provision of that legislation even if that same person has already been the subject of a judicial decision which has become final, given at the end of a hearing with the taking of evidence, and which resulted in that person being acquitted of an infringement of a different provision of that legislation in respect of the same acts.

1.17 Tax offenses. – A legal dispute between tax auditors and a taxpayer cannot become the origin of criminal proceedings

Supreme Court. Judgment by the Criminal Chamber, dated October 24, 2023

A taxpayer signed a contract by which it assigned the right to exploit its publicity rights to a company located abroad. The tax authorities considered that this assignment was a sham transaction, designed as a strategy to defraud the Spanish Public Treasury, preventing them from taxing correctly the income associated with publicity rights (even though they had been reported, but with a different classification to that considered by the Treasury). As a result, both the footballer and his tax advisors were accused of offenses against the Public Treasury (article 305 of the Criminal Code). The lower chamber acquitted the accused parties.

The Supreme Court underlined that the lower court's judgment dismissed the offense on the basis of the existence of various items of proof, which enabled the court, among other findings, to deny the existence of willful misconduct, which removes any possibility of the Supreme Court amending the acquittal ruling. The Supreme Court's own theory, in line with the constitutional case law and the case law of the European Court of Human Rights, states that (i) an acquittal ruling cannot be replaced with another conviction ruling without having seen the evidence provided at a lower instance, (ii) nor can the assessment of evidence made at a lower instance or on appeal regarding the existence or absence of willful misconduct be undermined.

Moreover, the court recalled that article 305 of the Criminal Code requires defrauding conduct. For that reason, any actions falling outside any attempt to conceal income cannot be considered a defined offense, where it is not the evidence of an intent to defraud that is at issue, but rather a legal dispute between tax auditors and the taxpayer. Where the assessment filed by the taxable person discloses gains obtained in any economic activity and provides the Public Treasury with a way of charging tax that the auditors consider incorrect, that disagreement over interpretation not as to 'what', but to 'how much' cannot become the origin of a criminal proceeding.

1.18 Review procedure. – A supreme court judgment confirming the rendering void of urban planning provisions is a document of material value for the purposes of the special appeal against the official schedule of values

National Appellate Court. Judgment of June 16, 2023

The final acts of tax authorities and the final decisions of economic-administrative tribunals may be revised where a "document of material value" appears after the appealed act or decision or could not be produced when the act or decision took place, if that document also provides evidence of the error made. The interpretation of "document of material value" has given rise to a range of court rulings, a few of which have been contradictory.

In this case, the National Appellate Court concluded that a supreme court judgment, confirming the rendering void of a municipality's urban planning provisions used to support alteration of the cadastral value of a piece of land, constitutes a "document of material value" for the purposes of a special appeal against the cadaster's decision approving the municipality's official schedule of values.

According to the court, the supreme court judgment is particularly relevant (i) because it set aside the planning instrument taken as the basis for the classification that provided the ground for the new cadastral value of the piece of land, and (ii) because of the effects that the case law has attributed to these supervening circumstances which evidence the unenforceable nature, or directly the absence, of correct implementation of the planning provisions.

2. Decisions

2.1 Personal income tax and transfer and stamp tax. – If the tax authorities consider that the audited acquisition value for transfer and stamp tax purposes is not valid to calculate the capital gain for personal income tax purposes they have to give sufficient reasons

Canary Islands Regional Economic-Administrative Tribunal. Decision of August 31, 2022

A taxpayer calculated the capital gain obtained from the sale of a property by reference to the acquisition value validated by the Galician autonomous community government in an audit of reported values procedure relating to transfer and stamp tax. The tax authorities rejected the use of that value as the acquisition price for personal income tax purposes, because the legislation on this tax refers to actual value, which is not necessarily the same as the audited value for transfer and stamp tax purposes.

The Canary Islands TEAR acknowledged that the taxable amounts for personal income tax and for transfer and stamp tax purposes associated with the same transfer of assets are not, nor do they have to be, the same, because they are different taxes. This does not mean, however, that the audited acquisition value for the property for transfer and stamp tax purposes cannot be used to determine the acquisition value for personal income tax purposes. Therefore, if there is an audited value for transfer and stamp tax purposes, what the tax authorities should do is (i) verify whether it has become final and, if so, (ii) should they decide that the value is not valid for personal income tax purposes, they must issue a ruling giving sufficient reasons.

2.2 Wealth tax / family business exemption. – Although directors are not compensated for their services, if they receive income from the company for other services provided on an exclusive basis, the requirement relating to performing management functions can be considered to be fulfilled

Catalan Regional Economic-Administrative Tribunal. Decision of June 16, 2023

One of the necessary conditions for the exemption for shares in family businesses for wealth tax purposes is that the individual must actually perform management functions and receive for those functions compensation accounting for more than 50% of their total income from business or professional activities or from personal work. Royal Decree 1704/1999 of November 5, 1999 lists various positions in relation to which it may be considered that a person performs those management functions (president, chief executive officer, manager, director, heads of department, members of the board or equivalent managing body), provided they imply actual participation in the company's needs.

In the case examined in this decision the person was a company director, but, as required in the bylaws, was not compensated for his services, although he obtained amounts of income from the company in respect of providing pilot services and from the assignment of publicity rights. The Catalan TEAR concluded as follows:

(i) The list in the legislation is provided simply an example. Any other position implying the performance of management functions entailing actual participation in daily operational decision-making is therefore valid for the exemption.

(ii) In line with TEAC's interpretation (in decisions dated February 26, 2021 and November 23, 2021), the key factor is not the name used in the agreement signed between the company and the person with tax obligations, but rather whether this person clearly and verifiably performs management functions. After the performance of those functions has been evidenced, even if the amounts of income come from providing other services (on an exclusive basis) to the company, fulfillment of the requirement relating to performing management functions cannot be denied.

2.3 Inheritance and gift tax. – The reduction allowed by the Madrid autonomous community for gifts is applicable, even if recorded in the presence of a foreign notary

Madrid Regional Economic-Administrative Tribunal. Decision of May 12, 2023

The Madrid autonomous community allows a 99% reduction to the inheritance and gift tax liability for gifts if, among other requirements, they are recorded in a public document.

The Madrid TEAR has held that this requirement is met where the gift appears in a private document on which the signatures are authenticated by a foreign notary, if it fulfills the notarial legislation in the country concerned, especially since, in the examined case, the document bore the Hague Apostille, which confirms that it is a public document.

2.4 Collection procedure. - TEAC determines new principles in relation to events triggering the ability to enforce joint and several or secondary liability

Central Economic-Administrative Tribunal. Decisions of July 17 (6794/2020 and 6516/2021) and of September 14, 2023

TEAC has delivered a number of decisions examining scenarios for enforcement of joint and several or secondary liability, and has determined the following principles:

(i) Groups of companies: a proceeding for enforcement of joint and several liability does not have to be initiated to claim from the members of a tax group a tax debt in respect of corporate income tax under the consolidated tax regime. According to the tribunal, the principle determined by the Supreme Court in its judgment on March 17, 2021 (appeal 7975/2019) with respect to companies taxed under the special regime for groups of entities for VAT purposes also applies in relation to corporate income tax, and therefore the unpaid amounts must be claimed from the members of the group via a request for payment, which they must fulfill as debtors with joint and several liability.

(ii) Secondary liability: based on the principle determined by the Supreme Court in a judgment dated February 7, 2022 (appeal 8207/2019), in scenarios involving secondary liability the statute of limitations for claiming the debt from the liable party is reckoned (i) either from when the main debtor is declared in default, in relation to debts that arose before that declaration occurs, (ii) or from the end of the payment period for the main debtor if the debt has not been paid, in relation to debts that arose after the debtor was declared in default.

Where the default declaration relates to the whole debt of the main debtor, any steps for collection taken against that debtor are unnecessary and therefore do not toll the statute of limitations for collection action against the person with secondary liability (unless the default declaration is revised and certain claims determined earlier to be collectible are reinstated).

(iii) Joint and several / secondary liability: joint and several liability takes preference over secondary liability. Therefore, where the potential existence of parties with joint and several liability is inferable from information existing in the proceeding or any produced by the interested parties, the tax authorities have to perform the required verifications and assess whether this type of liability has to be declared before claiming the debt from any party potentially having secondary liability.

3. Resolutions

3.1 Corporate income tax. - A loss obtained from the sale of inventories within the tax group is deductible if it relates to actual impairment of those inventories

Directorate General for Taxes. Resolution V2352-23 of August 30, 2023

The parent company in a tax group sold its inventories to another group entity at their market value, although below production cost, which resulted in the recording of a loss in the transferor's separate financial statements.

Under the Corporate Income Tax Law, the individual tax bases of the members of a tax group must be calculated by reference to the requirements and classifications laid down in the accounting legislation for determining income or loss per books and those contained in the law on the tax for determining the tax base in relation to the tax group. As a result:

(i) If the loss relates, in terms of article 43 of the rules on consolidation for accounting purposes, to impairment of the inventories in the fiscal year the transfer took place, that impairment must be recognized in the consolidated financial statements and does not have to be eliminated. Therefore, it does not have to be eliminated either to calculate the tax base. In other words, that impairment for accounting purposes is deductible.

(ii) If the loss is greater than the impairment amount, the excess must be eliminated to determine the tax group's tax base. Its later inclusion in the consolidated tax base will occur when the inventories are transferred to third parties, or when there is a new decline in value of the inventories, until they are equal to or greater than the value of those losses.

(iii) In any event, if the impaired inventories recover their value while they are still in the tax group, the amount relating to that recovered value must be included in the group's tax base.

3.2 Corporate income tax. - Analysis of application of the patent-box rules to a licensing of patents between entities in the same tax group

Directorate General for Taxes. Resolution V2297-23 of July 31, 2023

An entity in a tax group performed a partial spinoff (applying the tax neutrality rules), in which it transferred its innovation line of business to the benefit of another company in the group. Among the transferred assets were a number of patents created by the company performing the spinoff. After the spinoff, the beneficiary entity had developed new patents and intended to license these patents for use and exploitation by the company that performed the spinoff. The issue concerned whether the reduction under article 23 of the Corporate Income Tax Law applied to amounts of income obtained from licensing the patents. One of the requirements for this reduction is that the licensor of the intangibles must have been their creator.

The DGT recalled that, in principle, the beneficiary entity of a spinoff is subrogated in respect of all the rights and obligations of the company performing the spinoff which are connected with the transferred business, if the neutrality rules were applied to the spinoff (as happened in this case). Therefore, if the entity that performed the spinoff created a number of patents, and as a result, generated the right to apply a reduction to the income obtained from licensing those patents, that right must be considered to be transferred to the beneficiary of the spinoff.

However, under a systematic and reasonable interpretation of the law, any amounts of income obtained from licensing the right to use and exploit the preexisting intangibles, precisely to the original creator of those intangibles, cannot benefit from the reduction. In relation to intangibles developed by the beneficiary entity of the spinoff, because the licensing was made to the benefit of an entity in the tax group, the income obtained from the licensing must be included in the tax base of the tax group in the taxable period in which it is considered to be performed and effective as against third parties, and therefore it is in this period that the reduction may be applied.

3.3 Corporate income tax. - Transfers of shares in photovoltaic companies which have not commenced the construction phase can benefit from the exemption in article 21 of the Corporate Income Tax Law

Directorate General for Taxes. Resolution V2200-23 of July 26, 2023

An entity engages in managing, selling and conducting technical surveys of renewable energy plants together with developing, marketing and exploiting photovoltaic solar parks. It wholly owns several entities, which will carry out the construction work on the parks. Those subsidiaries had not started construction, having only performed tasks related to (i) searching for land providing suitable sites for the projects, (ii) negotiating the lease or surface rights agreements for conducting the activities, (iii) interconnection with the network and analyzing the environmental impact, or (iv) identifying and managing the permits and licenses needed for the construction work. In the period when these preliminary functions were carried out, the subsidiaries did not have their own employees, but rather used the services of employees of the requesting entity.

It was being considered whether to transfer the shares in the subsidiaries when access to the electricity grid was obtained for the installation of electricity generation plants, in other words, before the project attained ready-to-build status (which requires it to have obtained all the permits, licenses and authorizations needed for construction of the plant). Therefore, part of the price was contingent and depended on whether those permits, licenses and authorizations were obtained, subject to any conditions laid down in them and whether the project attained that ready-to-build status.

The DGT replied that, in view of these functions, the subsidiaries carried on an economic activity, in other words, they were not holding companies. Therefore, the income obtained from that transfer could benefit from the exemption under article 21 of the Corporate Income Tax Law (if the other requirements for the exemption were fulfilled).

In relation to the timing of recognition of the income obtained from the sale of the shares, the DGT concluded as follows:

(i) Any income relating to the fixed portion of the price must form part of the tax base for the taxable period when it falls due, regardless of the collection date.

(ii) Any portion of the income relating to the variable component of the price must be included in the tax base for the taxable period in which any future events triggering the ability to claim this price occur.

3.4 Personal income tax. - Clarification of the taxation of carried interest

Directorate General for Taxes. Resolution V2295-23 of July 31, 2023

Effective on January 1, 2023, specific regulations have been introduced in the personal income tax legislation for carried interest, defined as income obtained from the successful management of certain venture capital entities. That carried interest is classed as earned income and 50% of its amount is included in taxable income, where certain requirements are fulfilled. In relation to this special regime, the Directorate-General for Taxes (DGT) has clarified the following issues:

(i) Similar investment schemes for the purpose of this treatment include similar foreign entities to those defined in the legislation, in accordance with article 14 of the Venture Capital Entities Law.

However, their treatment as equivalent entities do not exempt them from fulfilling the other requirements laid down by the personal income tax legislation. In particular, the special regime will not be applicable where the special economic rights come directly or indirectly from an entity resident in a country or territory classed as a non-cooperative jurisdiction or with which there is legislation on mutual assistance regarding the exchange of tax information.

(ii) The special regime can be applied to bonds or incentives received by the directors, managers or employees of the entities referred to in additional provision 50 of the Personal Income Tax Law, where they are connected with any carried interest to which those entities are entitled (in other words, where the special economic rights are not attributed directly to the directors, managers or employees, but rather these individuals obtain income which is determined and calculated by reference to those rights).

(iii) The fact of partial payments of carried interest occurring before the end of the five-year period set out in letter 3.b) of additional provision 50 of the law is not a breach of that requirement, although the shares or other rights must subsequently be held for the length of time needed to complete that minimum period.

If the taxpayer receives one of those payments, includes 50% of its amount, and later forfeits the right to apply this treatment due to not completing that minimum holding period, an adjustment must be made (by paying the tax liability and late-payment interest concerned) in the period they were in breach.

(iv) Tax withholdings must be calculated on 50% of any earned income that can benefit from this regime and the withholding rate must be calculated only by reference to that 50%. For directors, the 35% rate must be applied to income obtained as a result of their services as such and the rate determined from the withholding tables relating to their status as workers.

3.5 Personal income tax. - A dismissed employee may continue to benefit from the exemption for health insurance premiums paid by the entity where they worked

Directorate General for Taxes. Resolution V2162-23 of July 21, 2023

In a collective layoff procedure it was agreed that the included workers would retain their rights for the company to continue paying their health insurance premiums in subsequent years. This obligation was separate from the obligation to pay the amounts of severance agreed in the procedure.

The DGT noted that, based on the premise that the policyholder under the insurance contract is the entity where the requesting individual worked (and the worker, his spouse and/or descendants are insured), any premiums that the entity continues to pay can benefit from the exemption under the Personal Income Tax Law for this type of income in kind. Under the Personal Income Tax Law, this exemption amounts to €500 a year for each of the persons mentioned (€1,500 for persons with disabilities).

Any excess over and above those amounts must be treated as earned income in kind and recognized at the cost for the payer, and is not eligible for the exemption under article 7 e) of the Personal Income Tax Law for severance pay, or the reduction for multiyear income under article 18.2 of the same law.

3.6 Personal income tax. - Eligibility for the retirement regime entails forfeiture of the inbound expatriates regime if a new employment contract or contract for services is not started

Directorate General for Taxes. Resolution V1946-23 of July 5, 2023

A worker was expecting to take retirement and wanted to know whether this would affect the right to apply the special regime for workers assigned to Spain (inbound expatriates regime).

The DGT recalled that one of the conditions for the right to apply that special regime is for the assignment to Spain to take place, among other reasons, due to the signature of an employment contract in Spain. Therefore, if taking retirement entails termination of the employment relationship that was the reason for assignment to Spain, and a new relationship fulfilling the requirements for the regime is not started, the worker becomes excluded from this regime. That exclusion takes effect in the tax period when the requirement fails to be fulfilled.

3.7 Personal income tax / Corporate income tax / Wealth tax. - Receiving a contributory retirement pension is compatible with carrying on a property leasing economic activity

Directorate General for Taxes. Resolution V2355-23 of August 30, 2023

For the conduct of its business a company engaged in property leasing had an employee hired under an employment contract for full-time work. This individual was considering requesting active retirement, which would allow him to continue working full time as an employee at the entity.

The DGT concluded that, in view of the social security legislation, the receipt in this case of a contributory retirement pension, is compatible with the performance of any full-time or part-time work as an employee by the pensioner. Therefore, if the employee continued performing full-time work under a contract classed as an employment contract by the labor legislation in force, the requirements laid down in the corporate income tax, personal income tax and wealth tax legislation to consider that the company carries on a property leasing economic activity would be considered fulfilled.

3.8 Tax on construction, installation projects and works. – Local ordinances cannot require different rates depending on the type of construction, installation project or work or on the land on which they are performed

Directorate General for Taxes. Resolution V1691-23 of June 13, 2023

The DGT considers that the independence of local government allows municipal councils to set the rates for the tax on construction, installation projects and works, provided that:

(i) they are not higher than the 4% maximum rate provided in the legislation on the tax; and

(ii) different rates are not required for different types of construction, installation projects, or works, or for the different categories of land on which they are carried out.

3.9 Tax on increase in urban land value. - Clarification of how to calculate the increase in value of land where the transferor acquired ownership at various different times

Directorate General for Taxes. Resolution V1909-23 of July 4, 2023

This resolution clarifies how the acquisition value of a piece of land must be calculated for the purposes of applying the new calculation method for the taxable amount for the tax on increase in urban land value, where ownership of the property was acquired at various times. In the analyzed case, the transferred property was acquired at two points: (i) the original 50% was acquired in a purchase transaction (with the taxpayer's spouse) and (ii) the other 50% was acquired a few years later following the death of the spouse (that time with a much greater value than the acquisition value for the first half).

The DGT clarified that where ownership of the land is acquired on more than one date and with different values, and is later transferred in full in one transaction, there is only one taxable event. Therefore, (i) the transfer of the land gives rise to only one assessment of the tax, and (ii) the calculation of the increase (or decrease) in the value of the land by reference to the difference between its transfer and acquisition values must be done with respect to the whole value, in other words, by adding together the various partial acquisition values of the land and comparing the result with the whole transfer value.

4. Legislation

4.1 Amendments to information return forms 189 and 720

Law 11/2021 of July 9, 2021, on measures to prevent and combat tax fraud amended Wealth Tax Law 19/1991 of June 6, 1991, to add how the value of life insurance policies must be recognized where the policyholder does not have the authority to exercise the surrender right. Additionally, a new valuation rule was included for scenarios where temporary or life annuities are received under a life insurance policy (see our publication dated July 10, 2021). Order HFP/1180/2023 of October 26, 2023, published in the Official Gazette on October 31, has now amended the following information return forms:

Form 189: annual information return on securities, insurance and income

- An obligation has been included to report the value of the mathematical provision as of December 31 each year, where the policyholder does not have the authority to exercise the right to surrender the total value on that date (except for temporary insurance contracts which only include death and disability benefits or any other additional risk protection).

- If temporary or life annuities are received under a life insurance policy, the name, surnames and taxpayer identification number of the recipient of the annuities as of December 31 have to be reported, unless the policyholder is not the same person as the recipient of the annuities and continues to hold the surrender right, in which case the particulars of the policyholder on that date have to be reported. In this case the surrender value as of December 31 has to be provided or, in the applicable cases, the value of the mathematical provision.

- The designs of type 2 reporting, for reporting the recipient have been amended. In particular, amendments have been made to (i) the value code field (“*Clave de valor*”) to include a new F code to report life insurance policies without a surrender value (as well as temporary or life annuities under life or disability insurance policies without that surrender value); and (ii) the valuation field (“*Valoración*”), to specify that if the new F code has been added, the value of the mathematical provision as of December 31 must be provided.

Form 720: information return on assets and rights located abroad

- In the personal scope of the form a new scenario has been included for cases where the policyholder is not the same person as the beneficiary of the income and they hold the surrender right, in which case that policyholder will be required to file form 720.

- An amendment has been made to type 2 reporting, detailed reporting. In particular, amendments have been made to the field identified as Valuation 1: balance or value as of December 31; balance or value on the date of termination; acquisition value" ("*Valoración 1: saldo o valor a 31 de diciembre; saldo o valor en la fecha de extinción; valor de adquisición*") to specify that in cases where the Field code for type of asset or right ("*Clave tipo de bien o derecho*") is completed with code S which is the value relating to life or disability insurance policies and temporary or life annuities under a life insurance policy, for which the insurance companies are located abroad, the value of the mathematical provision as of December 31 must be reported where the policyholder does not have the authority to exercise the total surrender value on that date (except for temporary insurance contracts that only include death or disability benefits or any other additional risk protection).

5. Miscellaneous

5.1 Crypto-assets included in the scope of administrative cooperation between member states and DAC6 has been amended with respect to persons subject to professional privilege

Council Directive (EU) 2023/2226 of October 17, 2023, amending Directive 2011/16/EU on administrative cooperation in the field of taxation was published in the Official Journal on October 24, 2023. Among the main amendments, crypto-assets and their users have been included in the rules on the reporting and exchange of information.

It has also amended Council Directive 2011/16/EU of 15 February 2011, as amended by Council Directive (EU) 2018/822 of 25 May 2018 (DAC6), in line with the CJEU judgment dated December 8, 2022 (case C-694/20). The aim of this amendment is to avoid imposing on lawyers acting as intermediaries the obligation to report to another intermediary who is not their client, where they are exempt from the reporting obligation due to the legal professional privilege (for a summary of this judgment, see our December 2022 Newsletter).

5.2 The EU updates the list of non-cooperative jurisdictions

The European Council decided to update the list of non-cooperative tax jurisdictions, at a meeting on October 17, 2023.

The British Virgin Islands, Costa Rica and the Marshall Islands were removed and Antigua and Barbuda, Belize and Seychelles were added, after they were found lacking in relation to exchange of tax information on request.

Tax Department

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Hermosilla, 3

28001 Madrid, Spain.

T +34 91 514 52 00 **F** +34 91 399 24 08