2019
August-September

TAX NEWSLETTER

GARRIGUES

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1. Exemption for severance requires proof that dismissal was real

Recent decision by the Central Economic-Administrative Tribunal (TEAC) accepts that tax auditors can examine the real legal nature of a dismissal.

For some years now tax auditors have been reviewing the severance paid by companies to their workers and in particular eligibility for the exemption under article 7.e) of the Personal Income Tax Law. The issues examined in these cases are the legal characterization of the dismissal or whether unilateral termination by the employer actually existed, or whether instead there was an agreement between the parties. In this context, the tax authorities have been attaching less importance to whether employment law procedures have been strictly followed or to the fact that conciliation is an inescapable procedure in employment matters.

Along these lines, the Central Economic-Administrative Tribunal, in a recent decision on July, 2019 (R.G. 3934/2017), underlined that this characterization for tax purposes of dismissals by tax auditors falls within their powers and affirmed that:

(a) tax auditors have the power to examine the real legal nature of a dismissal, in view of its tax implications, according to article 13 of the General Taxation Law.

(b) As the tribunal has found on repeated occasions, a prior conciliation agreement reached at the Mediation, Arbitration and Conciliation Service (SMAC) between employer and employee over the unjustified nature of the dismissal, determining the amount of severance, is not an impediment to the tax auditors being able to conclude that the exemption is unjustified without having to prove the existence of simulation.

In the examined case, the tribunal held it reasonable that the auditors had concluded that a number of terminations resulted from a mutual agreement, based on items of evidence related to (i) the employees' ages (close to retirement), (ii) the amount paid (in some cases higher and others lower than that set out in the Workers' Statute), (iii) no support for the disciplinary reasons behind the termination decision, etc. Importantly, the National Appellate Court reached a similar conclusion in a recent judgment on July 3, 2019 (appeal 144/2017).

Although the fact of using a few of these circumstances as evidence of mutual agreement is surprising to say the least (the Personal Income Tax Law itself accepts that employers may pay sums higher than the amount determined in the Workers' Statute in the provisions on a reduction for multiyear income on non-exempt amounts), this conclusion compels particular attention to be paid to evidencing the grounds for dismissals, because in this context proof of the facts is a fundamental requirement.

In the same decision, TEAC also examined the exemption for work actually performed abroad (article 7 p) of the Personal Income Tax Law) and concluded (very questionably) that it can only be claimed for salary income strictly speaking, in other words, it cannot be claimed where the relationship between taxable person and employer is not an employment or public worker relationship.

2. Judgments

2.1 Corporate income tax.- Before the current Corporate Income Tax Law, the regime for companies of a reduced size only required fulfillment of the net sales/revenues limit

Supreme Court. Judgment of July 18, 2019

A company engaged in property leasing claimed the regime for companies of a reduced size in 2010 and 2011. The tax authorities found that the company could not claim the regime because in those fiscal years it had not carried on a real economic activity (it lacked the resources –a full-time employee with an employment contract- as required in the TEAC decisions of January 29, 2009 and of May 30, 2012 rendered on appeals for a ruling on a point of law).

The Supreme Court examined the requirements that must be met by a company engaged in property leasing to be eligible for the tax incentives for companies of a reduced size under the revised Corporate Income Tax Law (TRLIS), then in force. It examined in particular whether those incentives:

- could be made conditional on the performance of a real economic activity, within the meaning of article 27 of the Personal Income Tax Law, not a legal requirement at that time (although it is in the current law) or;

- it is enough for the net sales/revenues figure to be below the legally specified limit, the only legal requirement laid down in the TRLIS.

After looking at how the corporate income tax legislation had changed, the court concluded that in the examined years the regime for companies of a reduced size could not be made conditional on the performance of a real economic activity (within the meaning of the personal income tax legislation), because the TRLIS did not expressly contain this requirement. The tribunal recalled that for the fiscal years that commenced on or after January 1, 2007, after the holding company regime had been removed, the definition of economic activity for corporate income tax purposes was not determined also according to the personal income tax legislation.

2.2 Basque country and Navarra finance authorities.- To calculate turnover, advance payments are included in the year they are received

Supreme Court. Judgment of July 9, 2019

To determine the taxation of a taxpayer in the provinces of the Basque Country and Navarra or in the rest of Spain, the court examined whether, to calculate aggregate turnover for the year (article 14.2 -corporate income tax- and article 27.2 -VAT- in the Economic Accord for the Basque Country), advance payments before the supply of a good must be computed in the fiscal year the payments are received or in the fiscal year the good is supplied.

The Supreme Court held that, for the purposes of the Economic Accord, turnover must be determined in the same way for corporate income tax purposes as for VAT purposes. It used the following arguments to support that interpretation:

- The almost identical wording of articles 14.2 and 27.2 of the accord.

- The fact that the article referring to corporate income tax uses the term "turnover", associated more with VAT, rather than "net revenues/sales", a typical and specific accounting and corporate income tax term.

- The same maximum turnover figure is used for both taxes.

- Article 75.2 of the Spanish VAT Law and the legislation for the provinces of the Basque Country and Navarra determine that VAT becomes chargeable when the advance payments are made before the taxable event occurs.

Therefore, concluded the tribunal, aggregate turnover must be calculated by reference to the amount of the advance payments received in the year, even if the supply of the transferred good takes place in a later year.

2.3 Personal income tax.- Clarification of various issues related to gambling income and losses

Balearic Islands High Court. Judgment of July 23, 2019

A professional poker player obtained in a year before 2012 income and losses from carrying on gambling activities. The taxpayer took the following view:

(a) The income had to be characterized as income from economic activities not as capital gains or losses, because he played poker professionally.

The Balearic Islands High Court set aside this argument because, in its opinion, income obtained from poker does not depend only on personal work but largely on chance.

(b) That the calculation of net income had to include traveling and subsistence expenses.

Both the tax authorities and the court appeared to accept that deduction, although they denied the deduction of traveling and subsistence expenses in this specific case because their connection with the generation of income had not been supported properly.

(c) That the gambling income and losses in the same fiscal year should be netted, as has been allowed in the law since 2012, which the court accepted.

Specifically, the judgment explained that taxpayers can net income and losses, and they can also deduct the participation costs for tournaments in which no income is obtained. It added that this interpretation must be applied even before the amendment of the Personal Income Tax Law (before 2012, in other words), because otherwise the ability-to-pay principle would fail to be observed.

2.4 Real estate tax.- Local councils cannot specify uses not included in the cadastre legislation for charging separate rates

Valencia High Court. Judgment of May 29, 2019

The Local Finances Law allows local councils to charge different real estate tax rates for urban real estate assets, by reference to the uses specified in the cadastre legislation for the appraisal of structures (excluding those for residential use).

In the case examined in this judgment, the appealing local council had approved in the appropriate tax ordinance a different real estate tax rate for buildings that had been allocated for "warehouse and parking" use.

Valencia Regional High Court held that the ordinance was unlawful on this point, insofar as the cadastre legislation does not contain a specific "warehouse and parking" use. In short, different rates are allowed to be approved by reference to use, but municipal ordinances must be based on the uses included in the cadastre legislation.

2.5 Tax on increase in urban land value.- Supreme Court submits new request for a ruling on unconstitutionality concerning the legislation on the tax on increase in urban land value

Supreme Court. Order of July 1, 2019

As we reported in a tax alert published on July 18, 2019, available here, the Supreme Court has submitted a new request for a ruling on unconstitutionality in relation to the legislation on the tax on increase in urban land value, this time in a case where the tax charge was higher than the gain actually obtained by the taxpayer on the transfer of the asset.

We can now report that in an interlocutory order dated July 16, 2019, the Constitutional Court has admitted for consideration the request for a ruling submitted by Zaragoza Judicial Review Court number 2 in relation to this same matter.

2.6 Tax proceedings.- The unlawful obtaining of bank details in another country does not infringe the right to due process with all the necessary safeguards

Constitutional Court. Judgment of July 16, 2019

In an appeal for protection of constitutional rights, the Constitutional Court has examined judgment number 116/2017, of February 23, 2017 by the Supreme Court (criminal chamber), in which it held proved that the appellant had not reported the ownership of specific bank accounts and financial assets held abroad. The facts were proved using economic information that a worker at a banking institution had obtained without authorization and which was found at their address by the public prosecution service in their country and handed over, at the request of the state tax agency, to the Spanish finance authority.

The Constitutional Court held in this judgment that the right to due process with all the safeguards, as granted in article 24.2 of the Spanish Constitution, is compatible with the interpretation made by the Supreme Court in article 11.1 of the Organic Law on the Judiciary. According to that interpretation, the exclusionary rule only affects violations that occurred in the gathering of evidence in a criminal proceeding.

Additionally, observed the court, the information used by the Spanish public finance authority related to peripheral and innocuous elements falling within so-called financial privacy. In fact, the information at issue did not relate to account movements, instead to the actual existence of the bank accounts and the amounts paid into them.

Lastly, it affirmed that in this case the invasion of privacy occurred outside the territory governed by Spanish sovereignty, and therefore any potential intrusion could only attain universal status if it violated "the irrevocable core of the fundamental right inherent in the dignity of human beings".

For that reason, the Constitutional Court's plenary session unanimously declared that the obtaining of bank details, despite it being on record that they were stolen unlawfully by a third party, did not violate the right to presumption of innocence or to due process with all the safeguards.

2.7 Management procedure/requests for information.- The information obtained through requests for information to third parties must be checked if the taxpayer denies the truth of its content

Galicia High Court. Judgment of July 17, 2019

The facts in the case examined in this judgment were:

(a) The authorities had prima facie evidence that a taxpayer had obtained winnings at three casinos. They therefore made repeated requests for information to the casinos, which confirmed this and informed specifically of the amounts obtained by the taxpayer.

(b) The taxpayer denied the truthfulness of the information supplied by the casinos. Despite this, the authorities issued a personal income tax assessment to the taxpayer, who included the gambling winnings to the general component of taxable income.

(c) In court, the legal representatives of two of the casinos confirmed (in witness statements) the prior information but not the representatives of the third casino.

The National Appellate Court confirmed the validity of the inclusion of the gambling winnings obtained at the casinos whose representatives confirmed the information provided to the authorities. However it rejected the inclusion of the winnings allegedly obtained at the third casino. In the National Appellate Court's opinion, the presumption of truth for replies to requests for information compels the authorities to check the information if the taxpayer denies the content of those replies, which the tax auditors failed to do in relation to the third casino.

2.8 Management procedure.- Incorrect payments arising from a tax assessment can also be recovered within the statute of limitations period

National Appellate Court. Judgment of June 28, 2019

The taxpayer received an assessment in respect of inheritance and gift tax. The assessment was not appealed in the specified one month period, and therefore became final.

A judgment by the Court of Justice of the European Union on September 3, 2014 held that the legislation applied in that assessment was contrary to the law, and therefore the taxpayer considered that the payment arising from the authorities' tax assessment was incorrect. For that reason, although the assessment was final, the taxpayer applied for a refund of the incorrect payments.

The authorities rejected the application due to considering that, insofar as the assessment had become final, the refund procedure for incorrect payments could not be implemented.

The National Appellate Court overturned that decision by concluding that, since no time limit is expressly provided in the law for being able to apply for a refund of incorrect payments, it may be commenced at any time before the end of the statute of limitations period (four years).

2.9 Tax audits.- An order to complete the audit file does not give rise to a justified stay of the penalty proceeding

Supreme Court. Judgment of July 10, 2019

The Supreme Court rendered null and void the provision in article 25.4 of the penalty regulations under which an order to complete the file in a tax audit gives rise to a justified stay of the penalty proceedings and causes, therefore, an extension of the time limit for those proceedings.

The court held that on this point the penalty regulations run counter to the General Taxation Law, which does include this reason for staying the proceeding and which, by contrast, requires absolute separation between audit and penalty procedures.

2.10 Collection procedure.- Supreme Court clarifies how to calculate late-payment interest in the event of a partially upheld claim against enforcement of a judgment

Supreme Court. Judgment of July 18, 2019

In the case examined in this judgment, the claimant's petitions had been partially upheld. In enforcement of the judgment, the authorities issued an assessment covering tax debt and late-payment interest, which the taxpayer paid. However, a motion against an enforcement decision, was filed against the assessment, because the taxpayer did not agree with the calculation of late-payment interest. This motion was partially upheld, which resulted in a new assessment being issued to replace the previous one, in which the tax debt was not changed but the calculation of late-payment interest was, which gave an amount refundable to the taxpayer in respect of interest.

The issue with cassational interest examined in this judgment is as follows:

- Whether the tax authorities are allowed to net, as they did, the late-payment interest arising from the first and from the second assessment, and refund to the party with tax obligations the amount payable to it plus the late-payment interest relating to that refund, or

- whether, by contrast, the authorities must refund to the taxpayer the whole amount originally paid over plus the late-payment interest calculated on that amount and later issue the new assessment for the correct amount, without netting one debt against another for the purpose of calculating the interest.

The court concluded that the first alternative was correct.

2.11 Review procedure.- The taxpayer is allowed to introduce new arguments and produce new evidence in the economic-administrative jurisdiction

National Appellate Court. Judgment of June 13, 2019

A company challenged an assessment by filing an economic-administrative claim. In the claim it submitted defense arguments that had not been used in the pleadings submitted against the notice of assessment and new evidence was produced.

In the economic-administrative tribunal's opinion, it is not allowed to submit new arguments or additional proof in the economic-administrative phase.

The National Appellate Court, however, basing its judgment on the Supreme Court's case law -in a judgment rendered on September 10, 2018- affirmed that the introduction of new arguments and proof in the economic-administrative jurisdiction is not forbidden by law, if there has not been procedural bad faith.

3. Decisions

3.1 Corporate income tax.- Double taxation credit cannot be claimed for income received in respect of shareholder status

Central Economic-Administrative Tribunal. Decision of June 11, 2019

In this decision TEAC concluded that income received in respect of shareholder status (other than dividends) does not qualify for the double taxation tax credit.

The tribunal argued that the main factors differentiating income received in respect of shareholder status are the following:

- The tax law does not lay down the existence of a positive earnings figure at the company as a prior requirement for receiving it;
- It is not obtained according to the shareholder's investment in the company's capital; and
- It is not decided by a shareholders' meeting.

3.2 Inheritance tax.- If a lawsuit on the nullity of a will is initiated after the filing period for the return, the tax authorities must require assessment of the tax or order suspension

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

After the end of the filing period for the inheritance tax return a lawsuit for nullity of the will was initiated, so the taxable persons requested suspension of the running of the periods for filing the self-assessment return for the tax.

More than four years after the end of the voluntary filing period for the return, the judgment bringing an end to the lawsuit for nullity of the will became final and brought the lawsuit for nullity of the will to an end. Then the tax authorities issued an assessment of the tax.

TEAC overturned the assessment due to being statute-barred. The tribunal held that, after the application for suspension, the tax authorities should have made a request for the return to be filed or expressly ordered suspension of the running of the period. By not doing so and not otherwise tolling the statute of limitations period, that period had run its course.

3.3 VAT.- Payments for plane tickets by travelers that do not ultimately fly cannot be treated as compensation

TEAC. Decision of July 15, 2019

When a plane ticket is booked usually the whole price of the ticket has to be paid, which is not refunded if the person does not travel. This decision examined the VAT treatment in these cases.

In TEAC's opinion, the price retained by airline companies in these cases cannot be treated as compensation. Since the company has received the whole price of the ticket and retains it, the tribunal held that the VAT treatment must be the same as in cases where the customer does travel, that is, where the service is provided. In other words, in these cases it cannot be held that the aim of retention of the price by the company is to compensate for an actual harm. The fact of excluding the retained price from being treated as compensation makes it subject to VAT.

The Court of Justice of the European Union handed over a similar ruling in joined cases C-250/14 and C-289/14 (Air France-KLM and Hop!- Brit Air SAS).

3.4 VAT.- Transfer of land under development to carry out new construction work after demolishing the existing structures is not exempt

TEAC. Decision of July 15, 2019

Article 20.1.22 of the VAT Law allows a VAT exemption for second transfers of buildings.

In this decision it was examined whether that VAT exemption could be claimed for the transfer of industrial buildings, if the transferee's intention was to carry out a new development project after demolishing the existing structures.

TEAC held that, because the transferee’s real intention was to acquire the land, not the building, it does not qualify for exemption.

This criterion, however, could be altered in light of the recent decision by the Court of Justice of the European Union in case C-71/18 (Skatteministeriet and KPC Herning) in which it was affirmed that for the exemption not to be claimable it must be evidenced that the transfer of the land is so closely linked to the demolition of the building that it would be artificial to split them and that the parties’ intention alone is not enough to be decisive.

3.5 Tax on economic activities.- No statute of limitations for right to review notified status information

Central Economic-Administrative Tribunal. Decision of June 25, 2019

TEAC specified in this decision that there is no statute of limitations for the tax authorities' right to review the status information notified by taxpayers for the purposes of the tax on economic activities (IAE).

The tribunal clarified, however, that any alterations to that information by the tax authorities can only take effect for IAE assessments relating to periods that are not statute-barred.

3.6 Economic-administrative procedure.- Claims raising the same issue that is to be decided in a preliminary ruling do not have to be stayed

Central Economic-Administrative Tribunal. Decisions of July 15 and March 28 2019

A taxpayer applied to TEAC to stay an economic-administrative proceeding because the Supreme Court had submitted a request for a preliminary ruling on the same matter that had been brought before the TEAC.

TEAC held that a stay could not be ordered because the legislation only allows a proceeding to be stayed if the request for a preliminary ruling was submitted by the same economic-administrative bodies.

3.7 Economic-administrative procedure.- The tax authorities can request a stay of the decision they are appealing if they support that collection of the debt could be prevented otherwise

Central Economic-Administrative Tribunal. Decision of May 28, 2019

TEAC concluded in this decision that the authorities can request a stay of enforcement of the decision that has been challenged in an ordinary appeal, if that request is accompanied by a report supporting the existence of rational prima facie evidence that collection of the debt that could ultimately be payable would be prevented or seriously hindered if a stay is not ordered.

In the specific case raised, TEAC ordered the stay because the amount of the debt with the tax authorities was higher than the taxpayer's net worth and the amount the taxpayer was able to pay in the short and long term.

3.8 Enforcement procedure.- The authorities only have six months to levy a penalty where the previous penalty is invalid because of a partly void assessment

Central Economic-Administrative Tribunal. Decision of July 15, 2019

TEAC concluded, in a decision rendered on July 17, 2014, that if a penalty has been cancelled because the assessment behind it has been partly reversed (making it necessary to correct the amount for calculating the penalty), the authorities could impose a new penalty within four years.

However, TEAC has changed its view in a new decision and concluded that in these cases the authorities only have six months to impose a new penalty. Failure to comply with this time limit (running from when the decision partly upholding the assessment is entered on the register of body in changed of enforcing it) determines expiry of the right to carry out the procedure.

Lastly, TEAC recalled that in these cases there has not been a violation of the *ne bis in indem* principle from a procedural standpoint, because it is not necessary to commence a new penalty procedure.

3.9 Enforcement procedure.- The stipulated time periods for enforcement of decisions upheld for procedural reasons also apply for substantive grounds

Central Economic-Administrative Tribunal. Decision of May 21, 2019

Article 150.5 of the General Taxation Law (in the wording before the amendment made by Law 34/2015) determined the period the authorities had to render a new assessment if a judicial or economic-administrative body had ordered "reversion of the audit work". The Supreme Court clarified (among others, in a judgment rendered on March 27, 2017) that this period had to apply in cases where the audit had been found invalid for substantive reasons not just where it was invalid for procedural reasons.

With the apparent aim of preventing the time period in article 150.5 of the Law (now article 150.7) applying in cases where an assessment had been reversed for substantive reasons, the lawmaker expressly stated that this time period applied only where "procedural defects" are identified and a "reversion of audit work" have been ordered.

However, TEAC has now affirmed that, despite the amendment introduced in the Law, that time period applies in cases where a decision or judgment has upheld the case for substantive or factual reasons. TEAC considers that the doctrine set by the Supreme Court in relation to the former article 150.5 applies also to the current article 150.7.

3.10 Criminal tax offense.- Letters of acknowledgement of payment attached to assessments related to an offense cannot be challenged in the economic-administrative jurisdiction

Central Economic-Administrative Tribunal. Decision of June 25, 2019

A taxpayer filed an economic-administrative claim against "acts requesting payment" of an assessment related to an offense in which various customs elements were adjusted.

The General Taxation Law determines that offense-related assessments are not challengeable in the economic-administrative jurisdiction. For that reason, TEAC concluded that the documents attached to those assessments (as acknowledgments of payment) are not challengeable in the economic-administrative jurisdiction either.

TEAC affirmed that the acknowledgment of payment is simply a clerical instrument enabling payment of the debt and informing the taxpayer of the amount and payment periods, which are obligations stemming from the administrative decision containing it (the assessment). It is that assessment (not the acknowledgement of payment) that generates rights and obligations for the claimant.

4. Resolution requests

4.1 Corporate income tax.- Reduction of the administrative burden associated with capital requirements for insurance companies can be a valid economic reason

Directorate General for Taxes. Resolution V1516-19 of June 24, 2019

The requesting entity is an insurance company subject to the legislation on insurance companies operating in Spain, and parent company of a group consisting of another insurance company, wholly owned by the requesting entity. The issue concerned a merger to absorb the subsidiary.

The DGT accepted as a valid economic reason a reduction of the administrative burden arising from the capital requirements laid down for insurance companies, and, in particular, associated with gathering, preparing and filing information to be included in their mandatory reports to the Spanish Insurance Regulatory Authorities.

4.2 Corporate income tax.- If a total spin-off is followed by a gift of the received shares, the proportionality requirement may be affected

Directorate General for Taxes. Resolution V1189-19 of May 29, 2019

Eligibility for the tax neutrality regime of total spin-offs where there are two or more transferees requires the spun-off assets and liabilities to consist of lines of business if the shares allocated to the shareholders at the transferees do not represent the same proportion as at the company performing the spin-off. In other words, if that proportion is retained, it is not necessary for the spun-off assets and liabilities to be lines of business.

In the case studied for this resolution an individual intended to carry out a total spin-off from an entity at which they are sole shareholder to form three companies, so that in the future each of the individual's three children would inherit the assets and liabilities of the company performing the spin-off separately. The allocation of assets and liabilities to each of the three companies would not be based on any economic or business reasons.

The DGT concluded as follows:

(a) Insofar as the company performing the spin-off only has one shareholder who will receive all the shares of the beneficiary companies of the spin-off, the proportionality rule is not altered, and therefore it is not required for the spun-off assets and liabilities to be lines of business.

(b) However, if after the spin-off has been performed, the owner of the companies resulting from the spin-off makes a gift of a percentage of each of these three companies to each child, with the aim of bringing forward their future inheritance, the tax neutrality regime is not allowed to be claimed, because the DGT considers that the gift has the same effect in practical terms as a non-proportionate spin-off.

4.3 Corporate income tax and nonresident income tax.- The DGT clarifies taxation of transnational exchanges

Directorate General for Taxes. Resolution V1579-19 of June 26, 2019

The request concerned the case of a Spanish resident entity wholly owned by individuals (one owning more than 25% and the others owning less) and by a company, all resident in Portugal. A share exchange was being considered in which the Portuguese company would become sole shareholder of the Spanish entity.

The DGT concluded as follows:

(a) The tax neutrality regime could be claimed because (i) the Spanish company's shareholders were resident in an EU member state and (ii) the Portuguese entity would acquire shares in the capital stock of the Spanish entity that would enable it to obtain a majority of the voting rights or increase that majority.

(b) In relation to the taxation of the individual shareholders resident in Portugal for nonresident income tax purposes:

- Under the Portugal-Spain tax treaty, the capital gain generated on the exchange of shares by the shareholders with an ownership interest in the Spanish company below 25% is only taxable in Portugal.

- According to that treaty, the gain arising in the hands of the shareholder with an ownership interest above 25% is subject to and not exempt in Spain; but under the neutrality regime tax is allowed to be deferred if the conditions set out in this regime are met.

4.4 Personal income tax.- It is not possible to transfer to future years a contribution to the pension plan of a spouse who obtained income higher than €8,000

Directorate General for Taxes. Resolution V1501-19 of June 22, 2019

The Personal Income Tax Law allows taxpayers to make contributions to their spouses' pension plans (up to €2,500 a year) and for those taxpayers' own taxable income to be reduced by the amount of those contributions. For this to be allowed, the spouse's salary income cannot be higher than €8,000 a year.

In the examined case, this last requirement was not met and it was asked whether the reduction could be claimed in later years.

The DGT disallowed this option of transferring the unused reduction to later years, because in this case the inability to claim the reduction arose from failure to satisfy the requirements for the contributions made for the spouse to be used.

4.5 Personal income tax.- Reduction for multi-year income can be claimed for income from early settlement of stock options plan

Directorate General for Taxes. Resolution V1355-19 of June 10, 2019

A subsidiary's employees were included in a stock options plan on the parent company's shares in 2015. Since then the options had vested and therefore the right to exercise them had arisen, although at the time of the request no employee had exercised that right.

The plan's rules state that if a corporate transaction occurs, the board of directors may make a payment to the plan participants in respect of early settlement of the stock options plan. Under that rule, and as a result of a corporate transaction involving a merger and change of control at the parent company, the requesting company had made those payments.

The DGT concluded as follows:

(a) Since the right to early payment had been allowed in the plan from the start in the event of a corporate transaction, the income ultimately obtained started to be generated when the options were granted to the employees.

(b) Insofar as two years had elapsed between when the stock options plan was put in place and the early payment, the income obtained from that payment was multi-year income and could benefit from the 30% reduction (if the other requirements set out in the law to claim this reduction are met).

4.6 Personal income tax.- In the year a worker is hired, the exemption for work abroad is calculated by dividing the salary obtained by the total number of days in the year

Directorate General for Taxes. Resolution V1343-19 of June 10, 2019

The Personal Income Tax Law allows an exemption for income from the performance of work abroad. To calculate the exemption, if no specific salary has been specified for the work performed abroad, the worker's daily salary (annual salary divided by the total number of days in the year) must be multiplied by the number of days worked abroad.

In the case examined for this request, the requesting individual started working at a company on February 1, 2018, and was entitled to the exemption in respect of 12 days. For the calculation of exempt income, it was asked how to calculate daily salary: by dividing the salary obtained by the number of days since February 1 (334 days) or by dividing that salary by all the days of the year (365 days).

The DGT, in a questionable view, concluded that the numerator must include the whole amount of salary obtained, and the denominator, the total number of days in the year (365 days). After making that calculation, the income qualifying for the exemption is calculated by applying the result of that division to the days that the worker was sent abroad (12) to perform the hired work; all of the above subject to a cap of €60,100 for a year.

4.7 Personal income tax.- Salary income obtained from court-approved settlement agreements may qualify for the 30% reduction

Directorate General for Taxes. Resolution V1285-19 of June 6, 2019

Under a collective labor agreement and a settlement agreement between the requesting individual and their employer, each of which had been approved by a court decision, two sums were required to be paid to the worker "in respect of indemnity for the productivity bonus and unused leave for the period between 2013 and 2016" (in the collective labor agreement) and "in respect of damages for lack of progression on the long-haul fleet within the time limit and for the period between 2013 and 2016" (in the settlement agreement).

The DGT concluded as follows:

(a) These items of income must be reported in the period when the court decisions become final.

(b) Since the income is reported in a single tax period but relates to a period spanning more than two years (2013-2016), the 30% reduction for salary income generated over more than two years can be claimed.

4.8 Personal income tax.- Goodwill included in a business acquired by gift is not amortized

Directorate General for Taxes. Resolution V1259-19 of June 3, 2019

The requesting entity received a gift of a business, composed of premises, furniture, inventories and goodwill and asked whether amortization of the goodwill was an option when determining its income from the activity.

The DGT recalled that net income from economic activities is generally determined according to the corporate income tax rules and that, for this tax, book income is used, determined according to the Spanish National Chart of Accounts. According to the accounting legislation, goodwill can only appear in assets when its value is realized in an acquisition for consideration, in the context of a business combination. In other words, goodwill acquired for no consideration cannot be capitalized.

In the studied case, therefore, insofar as the business was not acquired for consideration, the goodwill cannot be amortized.

4.9 Inheritance and gift tax.- Days spent abroad do not count for determining the autonomous community of residence

Directorate General for Taxes. Resolution V1255-19 of June 3, 2019

An individual resident in Madrid wanted to make a gift to their daughter. The daughter resided in Mexico DF, for work reasons, between 2011 and May 2018, the date she relocated her own and her family's permanent residence to Madrid, where she resided at that time.

To ascertain the law applicable to the gift the autonomous community where the recipient is resident needs to be determined, which is the place where that individual spent the greatest number of days in the immediately preceding five-year period (running from date to date) ending the day before the date the tax falls due.

According to the DGT, to make this calculation it is not necessary for the recipient to have spent in any specific autonomous community half plus one of the days in the preceding five years, instead it is sufficient not to have spent more days in any other autonomous community; in other words, only the days she spent in Spain count.

4.10 Excise duty on electricity.- The exemption for electricity for own use applies to lessees of solar power infrastructure

Directorate General for Taxes. Resolution V1573-19 of June 25, 2019

Under article 94.5 of the Law on Excise Duties, electricity used by holders of electricity generation infrastructure using renewable sources, co-generation and waste with an installed capacity not above 50 MW is exempt.

This request for resolution concerned a company supplying solar panels to its customers for their own use, by either leasing or installing panels at customers' homes.

In this context, it was asked whether that exemption can be claimed for the use of energy from infrastructure installed at a customer's home, where the customer holds the materials composing the infrastructure under a lease.

The DGT concluded that, if the industry legislation allows the lessee of infrastructure to be registered as holder on the public register of electricity generation infrastructure, the exemption could be claimed, because there are no specific provisions on this matter in tax law.

5. Legislation of interest

5.1 Various tax benefits approved for people affected by storms and other catastrophic events

The Official State Gazette issued on September 21, 2019 published Royal Decree-law 11/2019, of September 20, 2019, adopting urgent measures to mitigate damage caused by storms and other catastrophic events.

The approved tax relief items are:

(a) Exemption from real estate tax charges for 2019 and, where applicable, 2020 (if the event occurs in 2020) relating to damaged dwellings, industrial, tourism, commercial, marine and fisheries, and professional establishments, agricultural and forestry farms, working premises and similar properties, where it is evidenced that both the individuals and the property they house have had to be rehoused fully or partially in other different dwellings or premises until the damage is repaired, or damage to agricultural and livestock farms is evidenced, qualifying as losses unable to be covered by public or private insurance mechanisms.

(b) Reduction to the tax on economic activities for fiscal year 2019 and, if applicable, 2020, for businesses of any nature, commercial, marine and fisheries, tourism and professional establishments where their business premises or property used in their operations have been damaged, provided that they have had to be rehoused or the damage has forced temporary closure of their operations.

(c) Exemption from personal income tax for exceptional relief for personal damage.

(d) Exemption from the fees charged by the autonomous community traffic authorities for applications to deregister vehicles and to issue duplicates of destroyed or mislaid driving licenses.

(e) Authorization for the reduction, as an exceptional measure, of the 2019 net income indexes for the personal income tax objective assessment method and the special simplified value added tax scheme for farms and agricultural activities.

5.2 New instructions approved for the single administrative document (SAD)

The Official State Gazette (BOE) issued on September 12, 2019 published the Decision of September 2, 2019 by the Customs and Excise Department of the State Tax Agency, amending the Decision of July 11, 2014, providing instructions for submission of the single administrative document (SAD).

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