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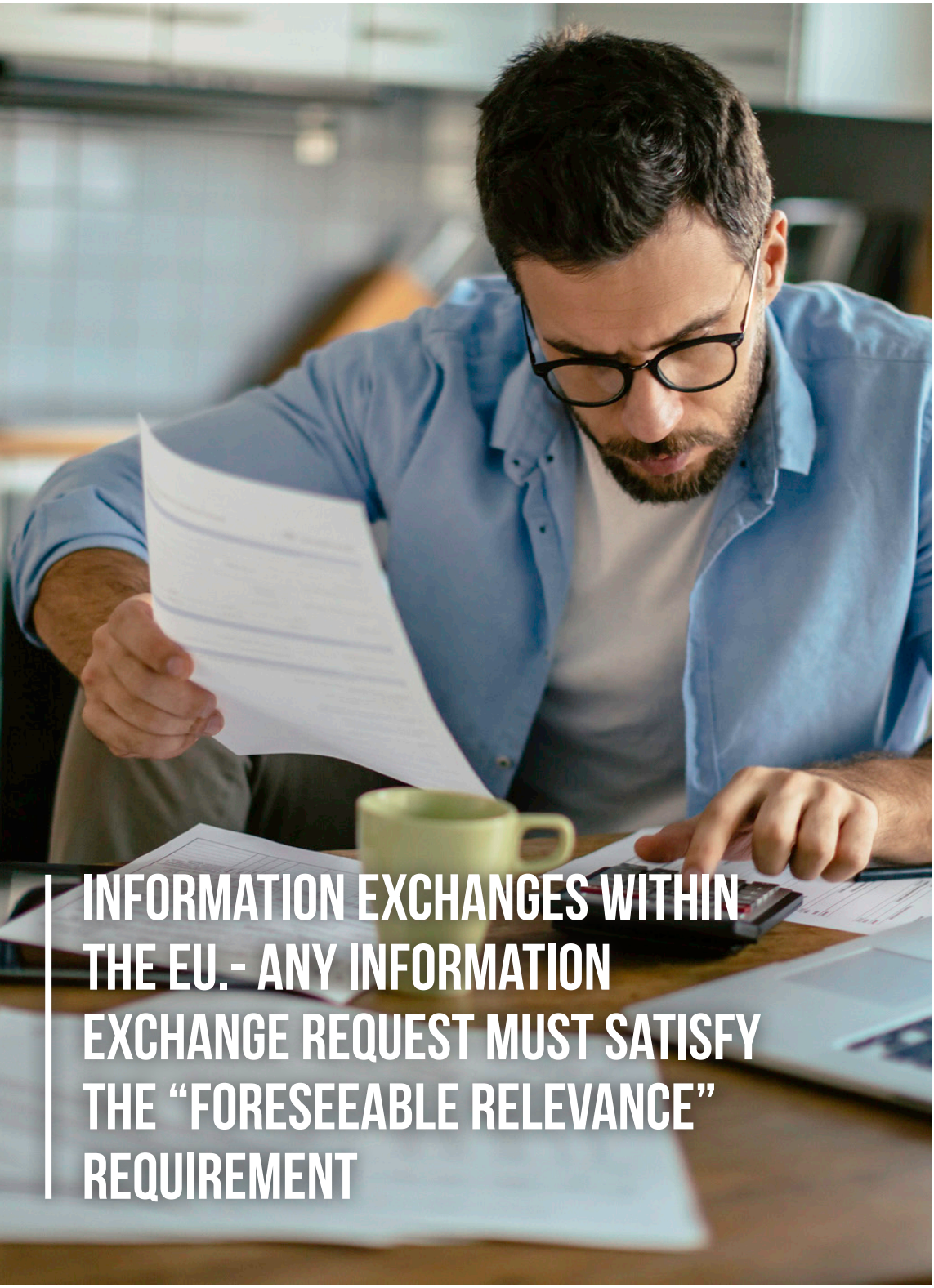
JUNE 2017



INFORMATION EXCHANGES WITHIN THE EU.- ANY INFORMATION EXCHANGE REQUEST MUST SATISFY THE "FORESEEABLE RELEVANCE" REQUIREMENT

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TAX NEWSLETTER

The CJEU recently rendered an interesting judgment on information exchanges between public authorities. The interest in the judgment lies in its support for observance of the principle of legality in the use of these mechanisms available to the authorities, basically by requiring requests for information to be relevant and reasoned.

In the case concerned a French company had distributed a dividend to its parent, a Luxembourg company, on which it had claimed an exemption. Doubtful as to whether the requirements for claiming that exemption were met, the French tax authorities sent the Luxembourg tax authorities a request for information exchange. To comply with that request, the Luxembourg tax authorities requested the relevant information from the Luxembourg company, which produced only part of the requested information. In view of this, the Luxembourg tax authorities imposed a fine, which the company challenged.

In connection with the appeals lodged against that penalty, the Luxembourg court referred a number of questions to the CJEU for a preliminary ruling as to whether article 47 of the Charter of Fundamental Rights of the European Union (the Charter) and the provisions of Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation precludes the described legislation. The CJEU concluded that they do, on the basis of the following considerations:

a. The Charter is applicable to a case such as the one described. According to article 47 (right to an effective remedy before a tribunal), a relevant person on whom a fine has been imposed for non-compliance with an information order in the context of an information exchange between different tax authorities may challenge the legality of that decision.

b. The national court has jurisdiction to alter the imposed penalty and review the legality of the information order. In this respect:

- It falls within the courts' jurisdiction to review the manifest absence of "foreseeable relevance" of the requested information.
- The "foreseeable relevance" of the information requested by a member state from another is a requirement that the request for information must satisfy in order to trigger an obligation on the part of the requested member state to act on that request and, as a result, a condition for the legality of the penalty imposed on that person for failure to comply with that decision.
- For a judicial review by a court in the requested member state, that court must have access to the request for information addressed to the requested member state by the requesting member state (even if the relevant person does not have that right of access to the whole of that request for information because it is a secret document).

01 JUDGMENTS

1 Direct taxation.- The Parent-Subsidiary Directive applies to any tax on dividends which may give rise to double taxation (Court of Justice of the European Union. Judgments of May 17, 2017, cases C-68/15 and C-365/16)

The CJEU has rendered two judgments in relation to two new taxes in Belgium and France, which are triggered by the redistribution of dividends received by parent companies. In both cases they are formally different from corporate income tax itself, and the CJEU was asked to rule whether those taxes are compatible with Directive 2011/96/EU on parent companies and subsidiaries. A factor to be taken into account is that both Belgium and France apply a method that exempts 95 percent of dividend income, and take the option provided in the Directive of excluding from that exemption 5 percent of the amount of the dividend income in respect of costs relating to the holding.

Three elements give considerable significance to the CJEU's decisions:

(i) Firstly, remember that the Directive does not stop at the absence of withholdings at source on the income distributed by a subsidiary to its parent company; it also requires that the parent company's state of residence avoid any double taxation on that income. To do that, it will have to refrain from taxing such income (if it does not give rise to a deductible expense at the subsidiary) or tax it while authorizing deduction of the tax paid by the subsidiary or any lower-tier subsidiary in the EU.

(ii) The court underlines in this regard that a tax charged on that same economic aggregate (the received income) even if it is charged when those dividends are redistributed, is equivalent to a tax on the dividends distributed by the subsidiary which is contrary to the Directive.

(iii) Lastly, it concludes that the Parent-Subsidiary Directive does not only apply in relation to corporate income tax but in relation to any tax that may give rise to double taxation at a parent company on the income received by that company and distributed by its subsidiaries in the EU.

2 Information exchanges within the EU.- Any information exchange request must satisfy the "foreseeable relevance" requirement (Court of Justice of the European Union. Judgment of May 16, 2017, case C-682/15)

As discussed in the introduction, the CJEU takes the view that, even though the relevant person does not have the right to access the requests for information made between tax authorities (despite those requests for information concerning them and giving rise to an express request for information to the relevant person by the requested authority), the national court is still entitled to access to those requests.

Accordingly, the national court may review the legality of the requests and, among other elements, whether they satisfy the principle of relevance.

The CJEU has stressed that those requests must be reasoned and the requested authority does not have to act on any request not meeting that principle of relevance.

3 Tax on economic activities.- The exemption for the commencement of an activity may be claimed in business groups (Valencia High Court. Judgment of January 23, 2017)

The provisions on the tax on economic activities determine an exemption from the tax in the first two years of the taxable person's activity. They also specify that the tax relief does not apply if the activity had been conducted earlier by another owner.

In the case under examination the exemption for the commencement of an activity was denied

because the company concerned belonged to a group of companies in which other companies conducted that same activity, and so it could not be treated as a new activity.

Against this view, the Valencia High Court concluded that these circumstances did not satisfy the test to preclude the exemption, unless it may be evidenced that there is succession in the ownership or in the conduct of the activity conducted by another company, regardless of whether or not it belongs to the same group of companies.

4 Voluntary disclosure program.- The "tax amnesty" overturned (Constitutional Court. Judgment of June 8, 2017)

On June 8, 2017, the Constitutional Court rendered null and void additional provision one of Royal Decree-Law12/2012 which introduced the special tax return widely known as a "tax amnesty".

Personal income, corporate income and nonresident income taxpayers owning assets or rights on which no income had been reported for the purposes of these taxes could use this return to come into compliance (generally, their assets as of the 2010 year-end).

Our Tax Alert 2-2017 (available at the link attached) reported on this judgment.

5 Tax liability.- Effects of entry at the registry of the formation and extinguishment of companies (Supreme Court (Civil Chamber). Judgment of May 24, 2017)

The Supreme Court (Civil Chamber) examined a case in which a real estate buyer brought action against the developer in relation to defects identified at the property. The developer had been wound up and liquidated when the claim was brought, which raised in the lawsuit the issue of whether it had standing or aptness to be sued.

The Supreme Court confirmed that the claim could be brought against the company represented by the liquidator, thereby altering the classic view that a company obtains its legal personality on the entry of the deed of formation and forfeits it with the entry of the deed of extinguishment.

Although this judgment was rendered by the Supreme Court (Civil Chamber), it could pose issues in the field of tax law in relation to (i) the interpretation and enforcement of provisions such as article 7 of the Corporate Income Tax Law (LIS) (definition of corporate income taxpayer) or article 40 of the General Taxation Law (LGT) (regarding the successors for tax purposes of legal entities); (ii) the treatment of companies in formation or unregistered companies; or (iii) the work of the management and audit bodies, with respect to the capacity of the entity or of the liquidators to take part in the proceedings on their own behalf, or the standing of the entity, represented by the liquidators, to appeal against any decisions that may be adopted unless a specific interest in the bringing of that action can be evidenced.

6 Audit procedure.- The notice informing the taxable person of a change to the audit body stops the clock for the time period (National Appellate Court. Judgment of April 12, 2017)

The appellant asserted that the audit work had been interrupted for no justifiable reason for a period longer than six months. In the period in which the taxpayer considered no work had been performed, the taxpayer was only served a notice informing it that, from that point, the audit work would be performed by a different audit body. In the appellant's judgment, the purpose of that notice was not to reassess the tax, and therefore, it could not have the effect of tolling the time period.

The National Appellate Court held, however, that the notice of a change to the audit body is relevant in the audit proceeding and therefore satisfies the requirements to toll the time period for the right to assess.

02 ADMINISTRATIVE DOCTRINE

1 Corporate income tax.- The tax credit for reinvestment requires the acquisition of ownership of at least 5% (Central Economic-Administrative Tribunal. Judgment of May 9, 2017)

The taxpayer reinvested the amount obtained on the transfer of a tangible asset to acquire shares in a company in which it already held a given percentage. As a result of that reinvestment –including the shares already held– the taxpayer came to own more than 5% of that company, and for that reason claimed the tax credit for reinvestment on its tax return. The tax authorities held that the requirements to claim that tax credit had not been satisfied because the block of shares acquired in the reinvestment did not, when taken individually, add up to more than 5% of the company.

This standard was confirmed by TEAC based on the standard set by the Supreme Court and by TEAC itself in earlier decisions.

2 Personal income tax.- Maternity benefit not exempt (Directorate General for Taxes. Ruling V0954-17, of April 18, 2017)

The request concerned the eligibility for exemption of maternity benefit received from the Spanish Social Security Institute in view of the Madrid high court judgment of July 6, 2016.

The DGT reiterated the standard determined in its ruling V3163-13 to deny eligibility for any type of exemption.

It therefore considers that the exemption under article 7.h) of the Personal Income Tax Law is not applicable, because under that article only the maternity benefits paid by the autonomous communities and local authorities are exempt.

They are not eligible either for the exemption under letter z) of article 7 of the Personal Income Tax Law, which relates to benefits and family support received from any public authority, in connection with the birth, adoption, fostering or care of minors, because maternity benefits do not fall within those benefits.

This standard was confirmed by TEAC in its Decision of March 2, 2017, ruling on a point of law.

3 Personal income tax.- The net income from an economic activity must include the exchange differences at year-end (Directorate General for Taxes. Ruling V0933.17, April 12, 2017)

The request was made by a self-employed worker issuing invoices in foreign currency because her clients are outside the European Union. She receives the payments into her bank account (in euros) at the exchange rate on the date of payment. Those revenues may be received in a quarter other than when the invoice is issued.

According to the DGT, the tax treatment of any differences that may arise as a result of fluctuations in exchanges rates in the transactions performed in conducting an economic activity, is the treatment under the corporate income tax legislation, and that legislation refers to accounting legislation.

Accordingly, under Recognition and Measurement Standard 11 "Foreign currency", any potential differences that may arise as a result of fluctuations in the exchange rate in the transactions performed in conducting an economic activity are invoiced, (i) which arise between when the transaction is recognized for accounting purposes and when it is subsequently paid in euros (where both take

place in the same fiscal year); (ii) or between when the transaction is recognized for accounting purposes and the year-end; (iii) and between the adjusted value as of the year-end and when the transaction is paid (when the transaction and its payment take place in different years); they are treated as a revenue or an expense which is included to determine the income from an economic activity.

4 Personal income tax.- Teleworking is done at the place where the worker is physically present (Directorate General for Taxes. Ruling V0906-17, of April 11, 2017)

The request was made by an individual working for a US company, who had her residence in the US until December 2014, when the worker returned to Spain and established her residence there. She kept her employment relationship with the US company until August 2015, by working from home using the internet. The US company does not have an establishment in Spain nor is it related to the requesting individual and the work performed by the requesting individual for that company has no connection with Spain.

The DGT concluded in relation to the position of the requesting individual that:

a) The requesting individual must be treated as a personal income taxpayer in 2015, because she spent more than 183 days in Spain in that calendar year, although if she were determined to be resident in Spain and at the same time she could be determined to be resident in the US, a residence conflict would occur between the two states which would have to be resolved from the standpoint of article 4 of the Spain-US tax treaty.

b) Her salary income may only be taxed in Spain. This is because, according to that tax treaty, the income obtained by a resident in Spain in respect of an employment may be taxable only in Spain unless the employment is exercised in the US.

According to the commentary on article 15 in the Model OECD Convention, work is performed at the place where the employee is physically present when carrying on the activities for which the income is paid. Therefore, if the recipient of the income resides in Spain, the recipient's salary income will be taxable only in Spain even if the results of this work are exploited in the US, because the work was performed in Spain (even though it was done through teleworking).

c) Any taxes the employee may have paid in the US on the salary income received may not be deducted, because the amount of US tax that may be deducted from the personal income tax liability may not under any circumstances exceed the tax that would have to be charged in the US as determined through a correct application of the Spain-US tax treaty.

5 Personal income tax and VAT.- Treatment of the lease of a residence to legal entities for use by employees (Directorate General for Taxes. Ruling V0983-17, of April 20, 2017)

To reply to this ruling request the DGT examined the treatment for personal income tax and VAT purposes of the lease of a residence to a company which is to use it for a residence for its employees.

The DGT concluded that:

a) The 60% reduction may be applied when calculating the income from movable capital for personal income tax purposes if it has been evidenced that the building is used for a residence by legal entities,. The purpose of the lease must be identified right from the start.

With this conclusion the DGT has amended its previous standard, in view of the TEAC decision of September 8, 2016, ruling on a point of law.

b) Moreover, insofar as it is a lease of a residence by companies for their employees, the lessee company does not have to withhold any tax on the rent it pays.

c) Lastly, the lease will be treated as a supply of services subject to but exempt from VAT if it is evidenced, by any means of proof admitted by the law, that the lessee does not intend to exploit the leased property but rather to make direct and effective use of it as a residence for a specific individual, who must necessarily appear as user in the lease agreement.

Conversely, if the individual or individuals who are the end users of the residence do not appear specifically and precisely in the lease agreement (the lessee is allowed to name them later), that lease will not be exempt from VAT.

This new standard was adopted by the DGT in view of the recent TEAC decision of December 15, 2016.

6 Inheritance and gift tax.- The 99% reduction cannot be denied for family members not having their principal residence in the autonomous community of Valencia (Central Economic-Administrative Tribunal. Decision of April 20, 2017)

The inheritance and gift tax legislation of the autonomous community of Valencia contained a 99% reduction for which the taxpayer (the heir) had to reside in that autonomous community.

In an appeal, TEAC upheld a claim that the reduction should apply in a case in which that requirement was not satisfied, and by doing so adopted the declaration of the unconstitutionality of that rule in the constitutional court judgment of March 18, 2015.

TEAC recalled that, according to the findings in that judgment, the effects of a declaration of unconstitutionality only apply to new cases and to administrative or court proceedings in which a final decision has not been rendered on the date of that judgment.

It should be noted in this respect that this requirement was removed by Law 7/2014, of December 22, 2014, on tax, administrative and financial management measures, and measures related to the organization of the Valencia autonomous community government (Generalitat) effective January 1, 2015.

03 LEGISLATION

1 Approval of Budget Law for 2017

Law 3/2017, of June 27, 2017, the General Budget Law for 2017 was published in the Official State Gazette on June 28, 2017.

For further details see our Tax Commentary 3/2017, (available at the link attached).

2 Approval of self-assessment form 221 for the levy in respect of the conversion of DTAs

Royal Decree-Law 14/2013 introduced in the corporate income tax legislation the regime for conversion of deferred tax assets. Later, Law 48/2015, of October 29, the General Budget Law for 2016, amended the regime to establish the conversion as a right for the taxpayer, set out new eligibility conditions for the conversion and introduced certain reporting obligations in relation to the DTAs falling under the provisions. It also introduced a transitional regime applicable to the DTAs generated before January 1, 2016 according to which, if certain conditions were not satisfied, the right to the conversion would be retained but a levy would have to be paid.

On June 16, 2017 Order HFP/550/2017, of June 15, 2017 approving self-assessment form 221 for the levy in respect of conversion of deferred tax assets into a sum claimable from the tax authorities was published. The form serves to elect the right to the conversion. If the company belongs to a tax group the election to make the conversion will be notified by the parent company or a representative.

The form must be filed electronically. The filing receipt identifying self-assessment and payment of the levy must be added later, on the corporate income tax return (forms 200 or 220, as applicable).

The Order will enter into force on July 1, 2017. If their filing period for the levy return had commenced before that date, taxpayers must file form 221 within the 25 calendar days following that date. Its filing period is the same as for the corporate income tax self-assessment return.

3 The Secretary General for Science and Innovation will have the authority to issue the reasoned reports for the purposes of the R&D&I tax credits

On May 27, 2017 the Official State Gazette published Royal Decree 531/2017, of May 26, 2017 implementing the basic organic structure of the Ministry of Economy, Industry and Competitiveness; amending Royal Decree 424/2016, of November 11, 2016, establishing the basic organic structure of the ministerial departments; and amending the bylaws of entities attached to the Department which have the status of an own resource to adapt their name to the provisions in Law 40/2015, of October 1, 2015.

According to the royal decree, the Secretary General for Science and Innovation will have the authority to issue the reasoned reports under Royal Decree 1432/2003, of November 21, 2003, on the issuance by the Ministry of Science and Technology of reasoned reports on compliance with scientific and technological requirements for the purposes of the application and interpretation of research and development and technological innovation tax credits, without limiting the powers conferred on other bodies.

04 MISCELLANEOUS

1 68 countries sign the Multilateral Convention

On June 7, 2017 the signing took place in Paris of the Multilateral Convention which it is predicted will modify the application of thousands of bilateral tax treaties concluded to eliminate double taxation. The Multilateral Convention was signed by 68 jurisdictions and eight more expressed their intention to sign it in the near future.

Among the signatories are jurisdictions that have traditionally featured prominently in the field of international taxation such as Luxembourg, Ireland or the Netherlands and others which until recently appeared on the list of tax havens for Spanish tax purposes, such as Guernsey, Jersey, Cyprus or Hong Kong. Notably, the US did not sign the Multilateral Convention.

The signature of that Convention was discussed in our Tax Alert 1-2017 (available at the link attached).

2 Note from the Spanish Tax Agency (AEAT) on the invitation of professionals to seminars

In our Tax Newsletter for April 2017 we discussed the TEAC decision of April 4, 2017 examining the personal income tax treatment of invitations to healthcare professionals by a pharmaceutical company to attend congresses (for the purposes of providing information on and making known the products it markets).

For further details see our **Tax Newsletter** for April, 2017 at.

Basically, TEAC concluded that the invitations to congresses generated income for the invited medic, which could be earned income or income from an economic activity according to whether the invitation was made personally to the medic or to the hospital where the medic works.

Mirroring the contents of the TEAC decision, a note was published on May 5, 2017 by AEAT on this subject (Taxation of healthcare personnel on the expenses paid by pharmaceutical companies for attending the congresses and conventions that they organize and are attended by those personnel'), in which it adopts TEAC's standards and adds some others. Accordingly, it concluded that:

a) The invitation generates income in kind for the invited medic. This income is characterized as salary income or income from an economic activity. Therefore:

- If a medic attends through a representative selected by a given (public or private) hospital where the medic works, the income has to be characterized as salary income.

- If the professional practices independently and is invited in his own right as a specialist, it will be income from a professional activity. The same characterization has to be given to the income obtained by a specialist who works at a hospital but attends the congress after being invited personally, on the basis of his professional reputation.

b) The regime for exempt per diems is not applicable to this income because there is no employment relationship between the doctor and the company making the invitation.

c) Nor can the regime for (nontaxable) training be applied. For this regime to apply:

- The courses must be decided by the employers themselves.

- The whole cost of the courses must be paid by the employers (partial financing of the cost does not qualify).

- The aim of the training must be to update, improve or add to the doctor's skills and the courses must be required to conduct the doctor's activity or by the characteristics of the doctor's job.

Lastly, on the subject of doctors participating as speakers, AEAT states that:

- If the enterprise provides them with the means to travel to the place where they must carry out their functions, there will not be any income for them, because there is no particular income for these members.

- If the enterprise reimburses the expenses incurred to travel to the place where they are to provide their services, the same conclusion will apply only if it is evidenced that the reimbursed amount was strictly to pay for those expenses. Otherwise it will be monetary income.

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