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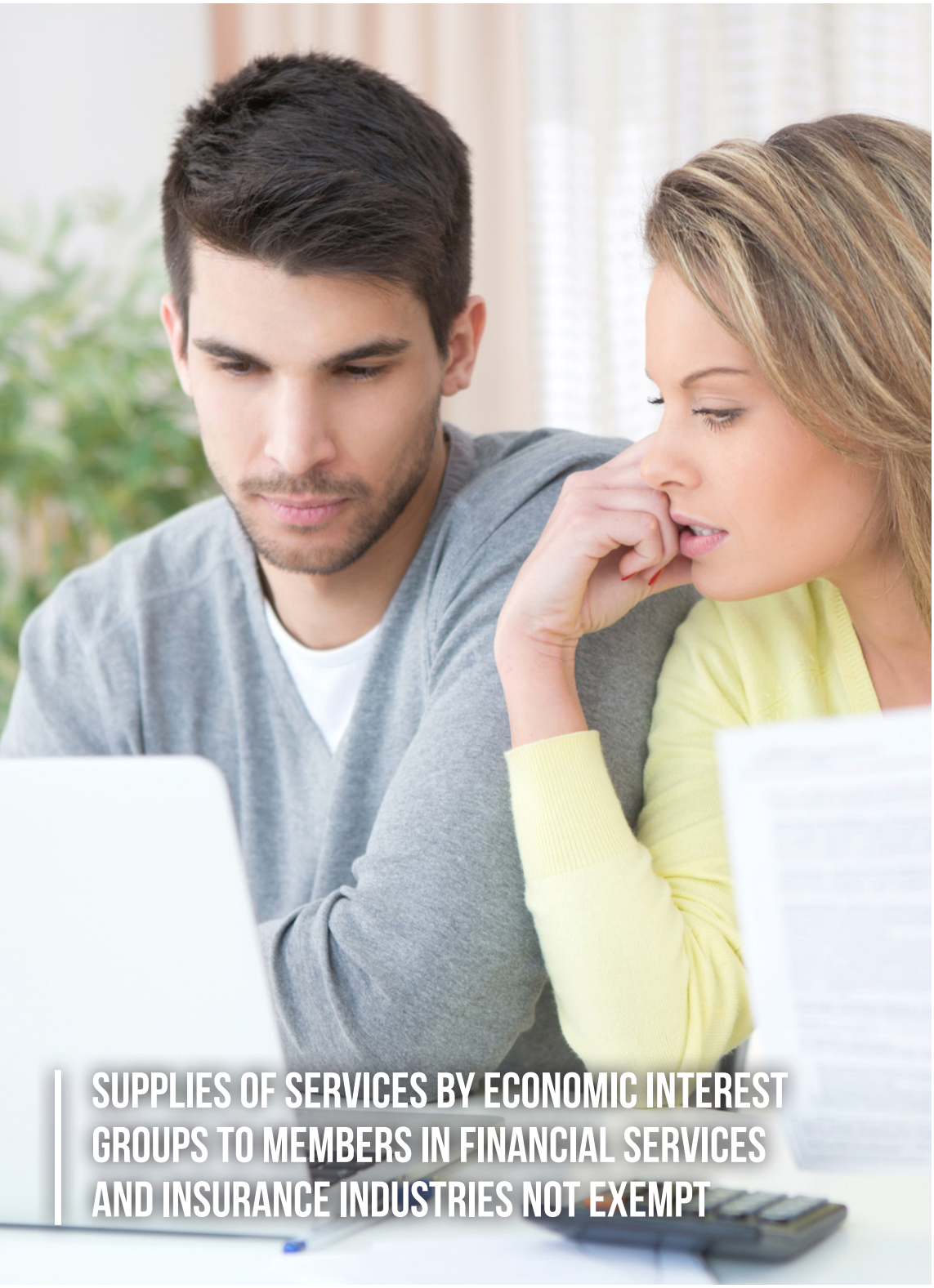
TAX

OCTOBER 2017



SUPPLIES OF SERVICES BY ECONOMIC INTEREST GROUPS TO MEMBERS IN FINANCIAL SERVICES AND INSURANCE INDUSTRIES NOT EXEMPT

SUMMARY

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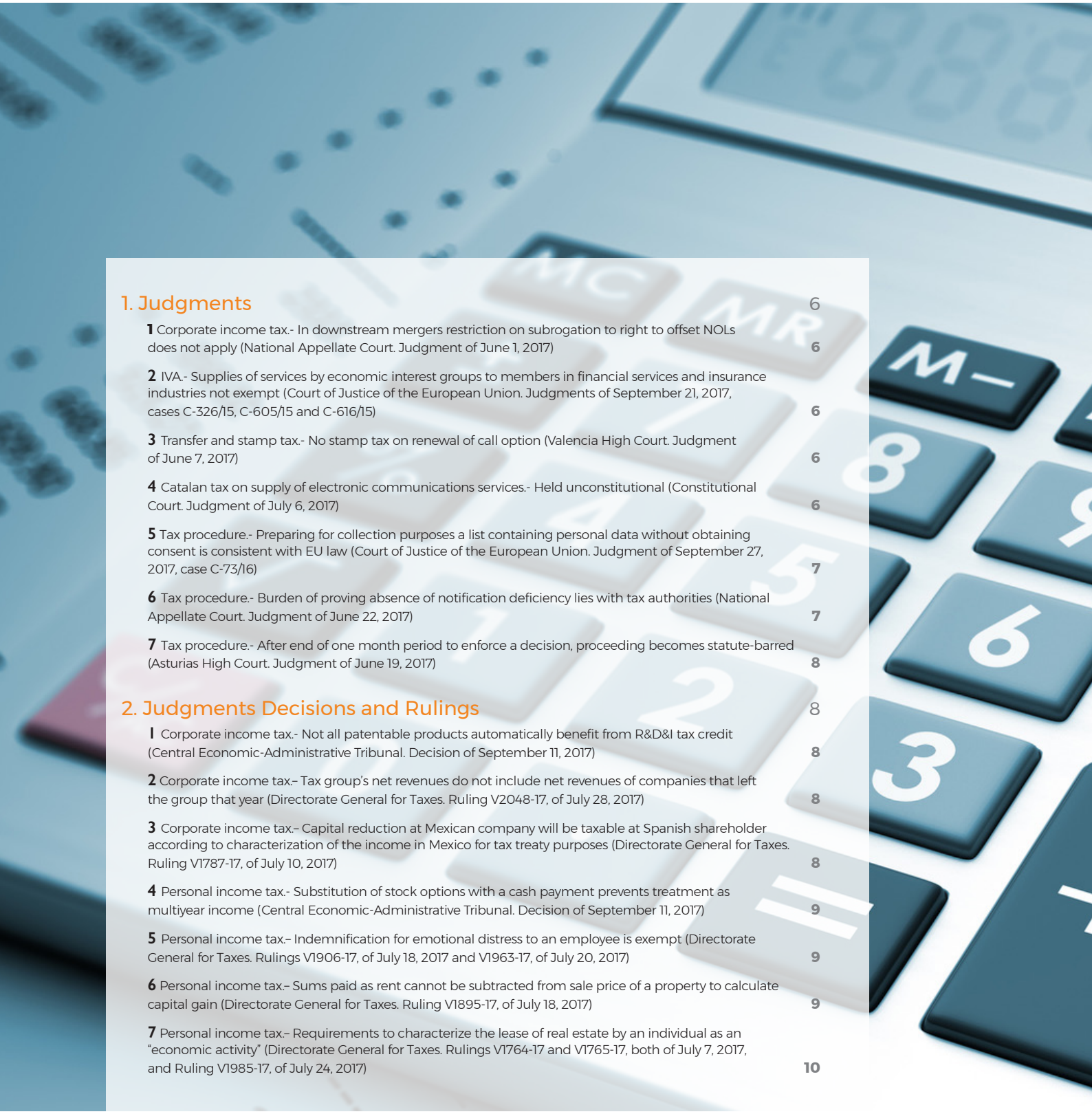


GARRIGUES
TAX

TAX NEWSLETTER

On September 21, the CJEU rendered judgments in a number of cases, Aviva (case C-605/15) DNB Banka (case C-326/15) and European Commission v Federal Republic of Germany (case C-616/15).

These judgments examine how to interpret the VAT Directive when it includes (in article 132) among the services that must be reported as exempt the supply of services by independent groups of persons who are carrying on an activity which is exempt from VAT or in relation to which they are not taxable persons. The Court concluded that the exemption is restricted to supplies of services associated with activities in the public interest. In other words, the supplies of services by those groups of persons to their members are not exempt where these members carry on any other exempt activity. From this standpoint, the Directive precludes the Spanish law providing an exemption for the services provided by an economic interest grouping (EIG) to its members, even if they carry on exempt transactions that do not fall within activities in the public interest but rather within financial or insurance activities.

These judgments throw up two important issues:

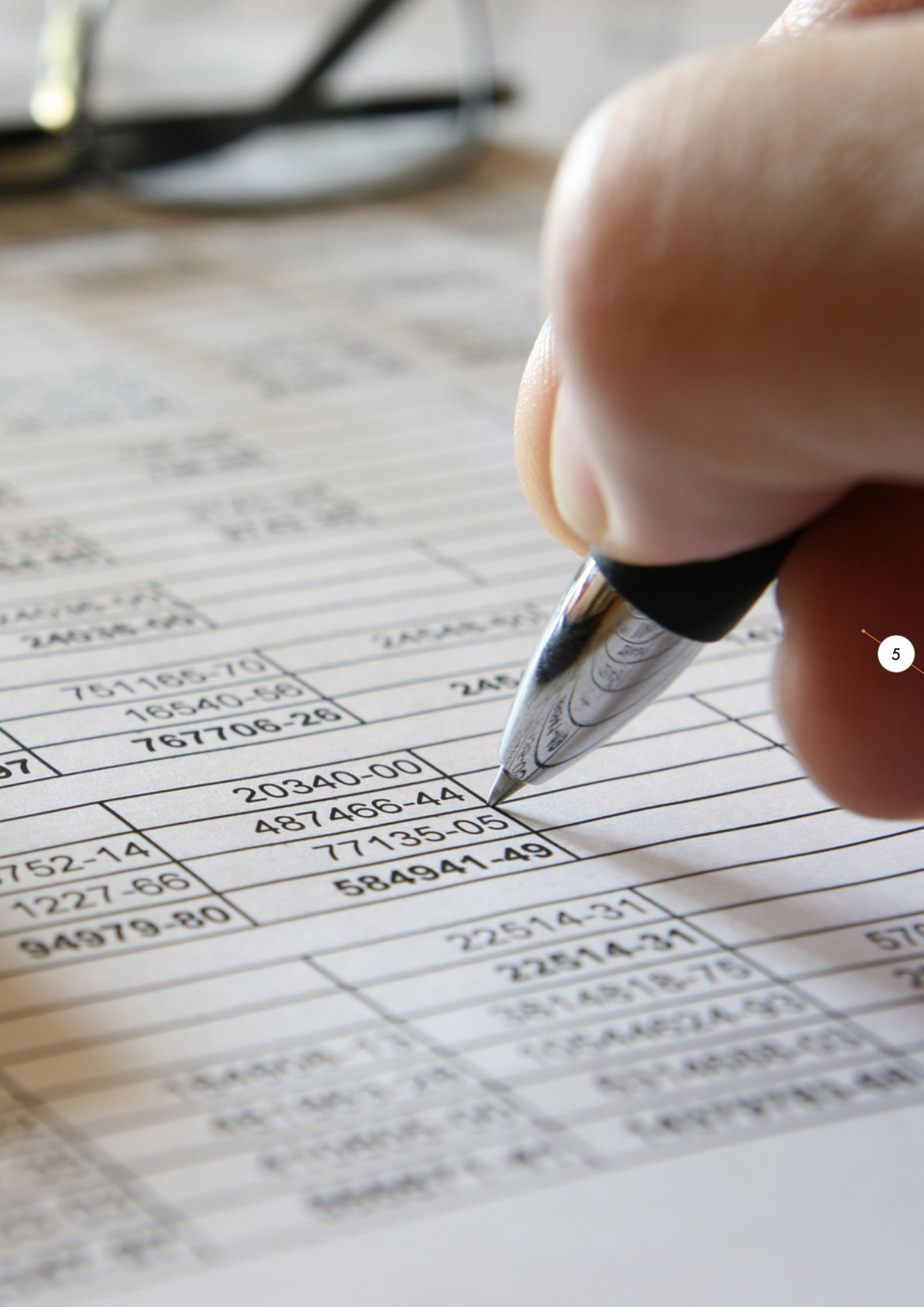
a) The first is that they make clear that VAT exemptions must be interpreted strictly; literally but also according to context and purpose (in this respect, since the purpose of the exemption allowed in the Directive for those groupings is precisely to benefit activities in the public interest, the exemption may not be considered to apply to other activities).

b) And the other important finding concerns the term in which the determinations in court judgments apply. In the judgment in case C-605/15 the Court admitted that in its judgment of November 20, 2003 (in case C-8/01; Taksatorringen) it allowed the exemption then provided for in article 13.A.1.f) of the so-called Sixth Directive to be applied beyond activities in the public interest (specifically, to an association of insurance companies). Therefore, the CJEU has recognized that many States have broadened the exemption to those groups of persons whose members do not carry on exempt public interest activities.

In relation to this point, the CJEU has settled a theory on the term in which the determinations in court judgments apply in relation to observing the principle of legal certainty. Accordingly, the CJEU:

- Affirmed that the national authorities cannot reopen tax periods that have been definitively closed, on the basis of the new interpretation in article 132 of Directive 2006/112.

- Recalled, in relation to the tax periods that have not been definitively closed, that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against that individual; and lastly that the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as a basis for an interpretation of national law *contra legem*.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1 Judgments

1 CORPORATE INCOME TAX.- IN DOWNSTREAM MERGERS RESTRICTION ON SUBROGATION TO RIGHT TO OFFSET NOLS DOES NOT APPLY (NATIONAL APPELLATE COURT. JUDGMENT OF JUNE 1, 2017)

The special merger regime allows the absorbing company to acquire the right to offset unused net operating losses (NOLs) at the absorbed company, but subject to certain limits and restrictions.

This judgment examined a downstream merger in which a company that had NOLs absorbed another company and, by adopting a literal interpretation, found that those limits and restrictions did not apply. Despite this, the auditors applied those limits and restrictions under what they claimed was a purpose-based interpretation.

Against this, the National Appellate Court concluded that a literal interpretation of the law must be implemented.

2 2 IVA.- SUPPLIES OF SERVICES BY ECONOMIC INTEREST GROUPS TO MEMBERS IN FINANCIAL SERVICES AND INSURANCE INDUSTRIES NOT EXEMPT (COURT OF JUSTICE OF THE EUROPEAN UNION. JUDGMENTS OF SEPTEMBER 21, 2017, CASES C-326/15, C-605/15 AND C-616/15)

At issue was the potential exemption from VAT of the services supplied by economic interest groupings (EIGs) to their members when their members carried on their activities in the financial services or insurance industries.

The Court concluded negatively, arguing that the exemption must be restricted to economic interest groupings (EIGs) whose members carry on public interest activities that are exempt from VAT (healthcare, welfare, education, etc.), under a restrictive and purpose-based interpretation of the scope of the exemptions envisaged in the Directive.

Furthermore, as discussed above in the introduction, the Court explained its principle on the timing effect of the determinations in its judgments.

3 TRANSFER AND STAMP TAX.- NO STAMP TAX ON RENEWAL OF CALL OPTION (VALENCIA HIGH COURT. JUDGMENT OF JUNE 7, 2017)

The obligation to pay stamp tax (notarial documents) is conditional, among other requirements, on whether the transaction or contract contained in the public deed has valuable economic content.

The Court therefore concluded in this judgment that the renewal of a call option is not subject to stamp tax, because it has no economic content.

It needs to be mentioned here that Madrid High Court took the opposite view in a judgment rendered on November 19, 2013.

4 CATALAN TAX ON SUPPLY OF ELECTRONIC COMMUNICATIONS SERVICES.- HELD UNCONSTITUTIONAL (CONSTITUTIONAL COURT. JUDGMENT OF JULY 6, 2017)

In this judgment the Constitutional Court held unconstitutional the tax on the supply of contents by suppliers of electronic communications services and of services to support the development of the audiovisual industry and the dissemination of digital culture, as defined chapter I of Catalan Parliament Law 15/2014. The Court affirmed that:

- The autonomous community legislature had overstepped its taxing power by levying a tax on a taxable event overlapping with a VAT taxable event, in relation to which it is irrelevant that the tax is fixed and VAT is proportional, or that the substitute taxpayer cannot charge the autonomous community tax to the end consumer.

- The autonomous community tax is not for non-revenue purposes, in that it does not automatically follow from the fact that the revenues obtained are used to cover certain expenses.

A dissenting vote was cast, nevertheless, by the deputy president of the Constitutional Court and four senior judges.

5 TAX PROCEDURE.- PREPARING FOR COLLECTION PURPOSES A LIST CONTAINING PERSONAL DATA WITHOUT OBTAINING CONSENT IS CONSISTENT WITH EU LAW (COURT OF JUSTICE OF THE EUROPEAN UNION. JUDGMENT OF SEPTEMBER 27, 2017, CASE C-73/16)

The Slovakian tax authorities prepared, for collection purposes, a list containing taxpayers' personal data without obtaining the consent of the individuals appearing on the list.

The CJEU was asked whether the preparation of a list such as that described is contrary to the Charter of Fundamental Rights of the European Union, in relation to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

The CJEU concluded negatively on the basis that the processing of personal data is lawful if it is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed.

A list such as the one at issue satisfies the foregoing requirements, to the extent that the collection of taxes and combating tax fraud (which are the purposes for which that list was drawn up) are indeed tasks carried out in the public interest.

The CJEU added that it is for the referring court to ascertain whether the establishment of the contested list and the inclusion on it of the names of the data subjects are suitable for achieving the objectives pursued by them and whether there is no other less restrictive means in order to achieve those objectives. It recalled in this respect that an infringement of this kind can be proportionate only if there are sufficient grounds to suspect that the persons concerned are undermining the collection of taxes and combating tax fraud.

6 TAX PROCEDURE.- BURDEN OF PROVING ABSENCE OF NOTIFICATION DEFICIENCY LIES WITH TAX AUTHORITIES (NATIONAL APPELLATE COURT. JUDGMENT OF JUNE 22, 2017)

An economic-administrative tribunal attempted to notify a decision to the person with tax obligations at the address provided by that person in the claim, and after a first unsuccessful attempt, it was published at the clerk's office at the tribunal. The claimant did not consider that it had been informed of the decision until after four years had run from when the claim had been filed. Therefore, the claimant argued that, because there had been defects in notification of the decision, since four years had run since the claim, the right to make an assessment had become statute-barred.

The National Appellate Court found in favor of the claimant:

a) Firstly, it underlined that the economic-administrative tribunals must use all the available notification options before placing decisions with the clerk's office. Among other reasons, it is not enough to make a single notification attempt. Therefore, in a case such as the one examined the decision must be considered notified upon the first step taken by the taxpayer that implied the taxpayer knew the contents of that decision.

b) It must also be taken into account that the burden of proving defects in notification cannot be made to lie with the taxpayer. This is for the authorities to prove (the tribunal, in this case).

7 TAX PROCEDURE.- AFTER END OF ONE MONTH PERIOD TO ENFORCE A DECISION, PROCEEDING BECOMES STATUTE-BARRED (ASTURIAS HIGH COURT. JUDGMENT OF JUNE 19, 2017)

An economic-administrative claim brought against an assessment decision was partially upheld, which compelled the authorities to issue a new assessment to enforce the administrative decision. This enforcement took place after the end of three months.

The appellant considered that the tax authorities should have issued the new assessment within a month, whereas the tax authorities considered they had six months, the period envisaged in article 150.5 of the General Taxation Law (point 7 in wording currently in force).

The Court found in favor of the appellant, arguing that, because a reversion of procedure is necessary to render a new assessment, the general one-month period envisaged for the enforcement of decisions or judgments rendered in the review jurisdiction will apply. Insofar as that period had not been observed, the right to enforce the decision must be considered statute-barred.

This, warned the Court, was not a settled issue, however, insofar as a decision was pending from the Supreme Court providing its view on the applicable enforcement period..

2 Judgments Decisions and Rulings

1 CORPORATE INCOME TAX.- NOT ALL PATENTABLE PRODUCTS AUTOMATICALLY BENEFIT FROM R&D&I TAX CREDIT (CENTRAL ECONOMIC-ADMINISTRATIVE TRIBUNAL. DECISION OF SEPTEMBER 11, 2017)

At issue was whether the fact of obtaining of a patent allows a "Personalized project" to qualify for tax purposes as R&D and therefore give entitlement to the R&D tax credit under the corporate income tax law.

TEAC concluded that not all patentable products necessarily imply the existence of "*significant scientific and technical novelty*", a necessary requirement to claim the R&D&I tax credit. It also recalled that the burden of proving the existence of a scientific or technical novelty lies with the taxpayer.

2 CORPORATE INCOME TAX.– TAX GROUP'S NET REVENUES DO NOT INCLUDE NET REVENUES OF COMPANIES THAT LEFT THE GROUP THAT YEAR (DIRECTORATE GENERAL FOR TAXES. RULING V2048-17, OF JULY 28, 2017)

A tax group had been filing and paying over corporate income tax prepayments under the taxable income method, until the first prepayment for the fiscal year concerned. Before the second prepayment, as a result of a number of sales, several companies were excluded from the group which took effect in that tax period.

It was asked how the tax group's net revenues had to be calculated for the following prepayment. The DGT took the view that the net revenues figure did not have to include the net revenues figures of the companies that had left the group, right from the first prepayment that relates to the change to the group's members.

3 CORPORATE INCOME TAX.– CAPITAL REDUCTION AT MEXICAN COMPANY WILL BE TAXABLE AT SPANISH SHAREHOLDER ACCORDING TO CHARACTERIZATION OF THE INCOME IN MEXICO FOR TAX TREATY PURPOSES (DIRECTORATE GENERAL FOR TAXES. RULING V1787-17, OF JULY 10, 2017)

The requesting company held a 92.32% interest in a Mexican company. Under the Mexican legislation, companies' capital stock accounts must be updated every so often, in line with the national consumer price index (*Índice nacional de precios al*

consumidor or INPC). Accordingly, the capital stock figures of Mexican companies are continually rising and falling, in line with inflation.

In this context, the Mexican company intended to perform a capital reduction with the repayment of contributions, after which the nominal value of that capital account would be reduced, with no change to shareholders' ownership percentages, who would receive repayment of their contributions according to their ownership percentages.

The request concerned eligibility for the exemption under article 21 of the Corporate Income Tax Law (LIS) in respect of the income arising from that repayment. The DGT said that:

a) The transaction could give rise to Mexican source income.

b) Because it was Mexico that would apply the Mexico-Spain tax treaty in relation to that income (if any), and according to article 3.2 of the treaty, it would be necessary to know how Mexican domestic legislation characterized the income derived from transactions of this type.

c) That characterization would determine the article of the tax treaty that would apply to the case.

d) In any case, as the country of residence of the requesting company, Spain would have to eliminate any double taxation that might arise.

4 PERSONAL INCOME TAX.- SUBSTITUTION OF STOCK OPTIONS WITH A CASH PAYMENT PREVENTS TREATMENT AS MULTIYEAR INCOME (CENTRAL ECONOMIC-ADMINISTRATIVE TRIBUNAL. DECISION OF SEPTEMBER 11, 2017)

A company granted stock options to an employee, Before the end of the exercise period for the options the company cancelled those compensation instruments, and replaced them with a cash payment. The taxpayer requested in a correction return for the payment to be treated as multiyear income.

TEAC ruled that the sum received could not be treated as multiyear income since in this case it was not income generated over more than two years insofar as what had been granted to the employee was *an ex novo* right to obtain a specific sum in exchange for the potential future gains that the employee might have obtained from exercising the stock options.

5 PERSONAL INCOME TAX.- INDEMNIFICATION FOR EMOTIONAL DISTRESS TO AN EMPLOYEE IS EXEMPT (DIRECTORATE GENERAL FOR TAXES. RULINGS V1906-17, OF JULY 18, 2017 AND V1963-17, OF JULY 20, 2017)

A court judgment ordered a company to pay an employee indemnification for emotional distress. The request concerned whether that indemnification qualified for the exemption under article 7.d) of the Personal Income Tax Law, for indemnification for personal injury in the amount recognized by the law or by a court.

The DGT concluded that the exemption did apply insofar as that emotional distress was included in personal injury as referred to in the law and also the indemnification was recognized in a court judgment.

6 PERSONAL INCOME TAX.- SUMS PAID AS RENT CANNOT BE SUBTRACTED FROM SALE PRICE OF A PROPERTY TO CALCULATE CAPITAL GAIN (DIRECTORATE GENERAL FOR TAXES. RULING V1895-17, OF JULY 18, 2017)

It had been agreed with the tenant of a property that, if the dwelling was purchased, the price would be reduced by the amount already paid as rent. In relation to the calculation of the capital gain on the sale of the property, the DGT affirmed that:

a) The transfer value of the property is the actual amount at which the transfer was made, provided it is not below the market value, and therefore, generally speaking, any discounts agreed between the parties cannot reduce the transfer value.

b) The cost value is reduced by the amount of any depreciation expense over the period in which the dwelling was rented, and therefore the agreed discount does not have any impact either on the cost value.

7 PERSONAL INCOME TAX.– REQUIREMENTS TO CHARACTERIZE THE LEASE OF REAL ESTATE BY AN INDIVIDUAL AS AN "ECONOMIC ACTIVITY" (DIRECTORATE GENERAL FOR TAXES. RULINGS V1764-17 AND V1765-17, BOTH OF JULY 7, 2017, AND RULING V1985-17, OF JULY 24, 2017)

The Personal Income Tax Law characterizes as an economic activity the organization on behalf of the taxpayer of means of production and of human resources or of either of these for the purpose of participating in the production or distribution of property and services. In relation to the lease of real estate it is specifically provided that for it to be an economic activity there must be a person with a full-time employment contract ("employee" requirement).

The DGT concluded in various rulings on this subject that:

a) Where the taxpayer hires a professional instead of an employee for management of the leasing activity the "employee" requirement will not be deemed satisfied. In these cases the income obtained from the leasing activity will be treated as income from movable capital.

b) If together with the leasing out of the building other services belonging to the hotel industry are provided (restaurant, cleaning, laundry), the income will be treated as income from an economic activity even if the "employee" requirement is not satisfied.

8 PERSONAL INCOME TAX.– CONTINUITY IN THE REGIME FOR INCOMING EXPATRIATES AFTER THE EMPLOYMENT RELATIONSHIP THAT GAVE RISE TO THE ASSIGNMENT HAS ENDED (DIRECTORATE GENERAL FOR TAXES. RULING V1739-17, OF JULY 6, 2017)

A taxable person elected the income expatriates regime but, in the same fiscal year, the employment relationship that gave rise to the assignment to Spain was terminated.

Based on these circumstances, the DGT stated that a strict interpretation of the legislation would determine that the special regime would not apply when the work that gave rise to the person's assignment to Spain stopped, but, however, from the standpoint of the purpose of the law, the right to the regime should not be forfeited if the employment or director' s relationship terminates for reasons beyond the taxpayer's control, provided the taxpayer remains unemployed or inactive for a "short" period, which is followed by a new employment or director's relationship.

9 PERSONAL INCOME TAX.- TAXPAYERS MAY BE TAX RESIDENT IN A COUNTRY WHERE THEY ARE NOT LIABLE TO TAX IN RESPECT OF THEIR WORLDWIDE INCOME (CENTRAL ECONOMIC-ADMINISTRATIVE TRIBUNAL. DECISION OF JULY 11, 2017)

An individual having family and economic ties with Spain resided in a country where the individual was allowed not to be liable to tax on his worldwide income.

In relation to this scenario, TEAC:

a) Recalled that the general rule is that, pursuant to article 4.1 of the OECD Model Convention, a person is tax resident in a State if he is liable to tax in that state by reason of his domicile, in other words, on his worldwide income.

b) Admitted, however, that, if in one territory there are tax regimes allowing a tax resident individual to be liable to tax only in respect

of the income obtained in that territory or in respect of income obtained outside that territory (such as the remittance basis applied in the UK), the foregoing article does not prevent tax residence being recognized in that country.

TEAC reached this conclusion by interpreting the commentaries on the OECD Model Tax Convention (i) which state that it is not intended to exclude those taxpayers, and (ii) they contemplate the ability to include in the treaty an express provision for these situations.

Having said that, TEAC added that this scenario could leaded to dual tax residence (if tax residence in Spain may also be affirmed), which must be resolved using the methods in the treaties.

10 NONRESIDENT INCOME TAX.– ON EXISTENCE OR OTHERWISE OF PERMANENT ESTABLISHMENT WHERE CONTRACT MANUFACTURING AND SALES PROMOTION SERVICES ARE RECEIVED FROM SPANISH SUBSIDIARIES (DIRECTORATE GENERAL FOR TAXES. RULING V1746-17, OF JULY 6, 2017)

The request concerned the Dutch controlling company of a multinational group that had a subsidiary in Spain (SESP) engaged in the manufacture of plastics (which sold mainly in Europe through other Group companies acting as commissionaires for themselves but on behalf of SESP or, to a lesser extent, directly in Spain). The group was going to carry out a reorganization in Spain in the following terms:

- SESP was going to start manufacturing under a contract manufacturing arrangement for the Dutch company.

- A new Spanish company was going to be created (SESP2), which was going to engage in the promotion of sales in Spain, acting on behalf of the Dutch company.

The request concerned the potential existence of a permanent establishment (PE) in Spain of the Dutch company. The DGT examined separately the contract manufacturing agreement signed with SESP and the marketing services to be provided by SEPS2. The DGT concluded as follows:

a) In relation to the contract manufacturing agreement, it was ascertained that:

   a. The Dutch company would exercise leadership in the taking of strategic decisions concerning the business, own the raw materials, enter into contracts with independent third parties for global logistics and storage services, and perform the supervision of the business activity.

   b. SESP would manufacture the products for the Dutch company with its own material and human resources, supervise the inventory of raw materials, internal management and staff hiring, maintenance of the machinery and coordination of local transportation and the quality parameters. In addition, it would assume the risks associated with its activity (production planning, quality and compliance with technical specifications, compliance with the labor legislation and safety legislation, and the like).

   As a result of all these elements, the DGT concluded that in the examined case it could not be said that the Dutch company had a permanent place of business for the purposes of article 5.1 of the Netherlands-Spain tax treaty and the Commentaries on the OECD Model Tax Convention in relation to that article.

   It underlined in this respect that the existence of warehouses leased to independent third parties to be used for goods and finished products would imply the existence of an auxiliary or preparatory activity; and that an important fact is that the Spanish company carries on its own activity independently, even if it does so with restricted risks.

b) In relation to the marketing services, it was ascertained that:

a. SESP2 would restrict its tasks basically to the promotion of the products, and the performance of market research.

b. All contracts with clients would be concluded by the Dutch company, which would be responsible for determining the terms and conditions of sale of the products and for the performance of the contracts, and for the inventory of finished products, order processing and claims handling.

c. In respect of providing its services, SESP2 would receive a commission calculated by reference to the revenues derived from sales.

Accordingly, there is not a PE in Spain in relation to the promotion activity either.

Despite this, added the DGT, if, according to the overall view of the business that the Dutch company carries on in Spain, it could be concluded that its primary activity is carried on in this territory, even if indirectly, through its subsidiaries and on its behalf, it could be considered that the Dutch company has a PE in Spain.

11 PERSONAL INCOME TAX.– INCOME FROM WINDING UP SPANISH COMPANY IS CAPITAL GAIN NOT TAXABLE IN SPAIN ACCORDING TO TAX TREATY WITH GERMANY (DIRECTORATE GENERAL FOR TAXES. RULING V1738-17, OF JULY 6, 2017)

Two individuals resident in Germany own the shares in a Spanish real estate development company equally between them. Following the sale of the latest development to be completed, the company was to be wound up without liquidation, and according to its accounts its assets consisted mainly of cash. According to the DGT, it cannot be inferred clearly from the Germany-Spain tax treaty whether the income from the liquidation of a company has to be characterized as a capital gain for the purposes of the treaty. This therefore has to be ascertained from the Spanish legislation (the Personal Income Tax Law read in conjunction with the Nonresident Income Tax Law).

According to the Personal Income Tax Law, the income in the hands of nonresident shareholders as a result of the liquidation of the Spanish company must be characterized as a capital gain, and that same characterization must be retained for the purposes of the Germany-Spain treaty.

From the standpoint that the company's main asset is cash, the capital gain obtained from the company's liquidation may not be taxed in Spain, only in Germany, the shareholders' State of residence.

12 VAT.- UNDER ARRANGEMENT FOR DEFERRED PAYMENT OF IMPORT VAT, NOT INCLUDING IMPORT VAT ON THE RETURN GIVES RISE TO A TAX DEBT, EVEN IF THE VAT IS FULLY DEDUCTIBLE (CENTRAL ECONOMIC-ADMINISTRATIVE TRIBUNAL. DECISION OF SEPTEMBER 28, 2017)

The arrangement for deferred payment of import VAT allows the taxable person to elect to include the import VAT levied by Customs on the self-assessment returns in the period in which imports are made, so the payment and deduction of those VAT charges may be done simultaneously on the same self-assessment return. This option implies that the payment of import VAT will be deferred until the relevant self-assessment return is filed, as opposed to applying the general principle that import VAT must be paid to the customs authorities even if they are later deducted on the periodical self-assessment return.

In relation to this arrangement, TEAC examined the consequences arising from failing to include import VAT on the VAT self-assessment return.

TEAC took the view that if the VAT levied by Customs is not included on the relevant self-assessment return, a tax debt would arise, even though if that VAT had been included as VAT levied by Customs and paid, the effect would have been zero.

For that reason, the failure to include that VAT levied by Customs on the VAT self-assessment return implies the commencement of the enforcement period on the day following the end of the voluntary payment period for that self-assessment return, in other words, an automatic right arises to receive the relevant enforcement surcharge, without impeding the taxpayer's right to deduct the amount of that VAT charge.

13 REAL ESTATE TAX.- INDIRECT CHALLENGE OF DETERMINATION OF CADASTRAL VALUES IS ALLOWED WHERE THE INDIVIDUAL ALLOCATION OF VALUE IS SPECIFIED, IF THIS IS CONFINED TO SPECIFIC APPLICATION OF THE DETERMINATION OF A CADASTRAL VALUE TO THE VALUED PROPERTY (CENTRAL ECONOMIC-ADMINISTRATIVE TRIBUNAL. DECISION OF SEPTEMBER 14, 2017)

The Regional Tax Office notified the taxpayer of an agreement to allocate a cadastral value to a property owned by the taxpayer. In an appeal, the taxpayer challenged the individual valuation directly, and the resulting determination of values, indirectly.

In the subsequent appeal, TEAC allowed (under the case law of the Supreme Court in a judgment dated April 25, 2016) a determination of values to be challenged if the individual allocation of a value to a specific property is challenged. By doing so, it changed the view it had adopted in earlier decisions.

This indirect challenge option must be restricted to the specific application of the determination of values to the exact property being valued. In other words, it is not allowed as a means to challenge the formal legality of the determination of values as a whole.

14 TAX PROCEDURES.- COMMENCEMENT OF PARTIAL AUDIT ON CERTAIN OBLIGATIONS IS NOT A PRIOR REQUIREMENT FOR ADJUSTMENT OF OTHER OBLIGATIONS RELATED THEM (CENTRAL ECONOMIC-ADMINISTRATIVE TRIBUNAL. DECISION OF SEPTEMBER 21, 2017))

A partial audit was commenced in relation to VAT in a given period. The taxpayer later filed an information return on transactions included in the taxpayer's VAT records (form 340) for that same period, which was described as a replacement for that filed earlier. As a result, AEAT, the Spanish tax agency, imposed on the taxpayer the penalty defined in article 199 of the General Taxation Law for incorrectly filing that information return.

At issue was determining whether the commencement of a partial audit on given tax obligations may be treated as a prior request for the purposes of treating as non-voluntary any adjustment that may be made to other tax obligations related to them but not expressly mentioned in the subject-matter of the notification of the commencement of the audit concerned.

TEAC concluded that any item not expressly defined in the scope of a partial audit cannot be deemed included in that audit. As a result, any adjustment made after the notification of the commencement of the audit, and in relation to other separate obligations, must be treated as voluntary (even they are related to the former adjustments).

Moreover, TEAC changed the view adopted in earlier decisions and concluded that, in cases where the party with tax obligations files a late return to adapt its tax liability to the view adopted by AEAT in an earlier audit, the circumstances to levy surcharges are present. In other words, in these cases the late return is not "spontaneous".

15 TAX PROCEDURE.- A STATUTE OF LIMITATIONS PERIOD RELATED TO TAX BENEFITS SUBJECT TO A CONDITION STARTS AT THE END OF THE PERIOD FOR MAKING A TAX ADJUSTMENT AFTER THAT CONDITION HAS BEEN BREACHED (CENTRAL ECONOMIC-ADMINISTRATIVE TRIBUNAL. DECISION OF SEPTEMBER 14, 2017)

A taxpayer purchased a dwelling and assessed transfer tax at a reduced rate, available for properties that become the purchaser's principal residence. After it had been found that the condition had not been satisfied, an administrative assessment was issued in respect of the difference between the reduced and the standard rate.

The Andalucía regional economic-administrative tribunal (TEAR) upheld the taxpayer's claim that the statute of limitations period had ended, based on the view that the statute of limitations period should have been computed from the initial voluntary period for filing the tax return. In a special appeal for a ruling on a point of law, TEAC concluded that:

a) When a tax benefit is claimed and the actual receipt of that benefit is conditional on later compliance with a requirement that was not satisfied, the taxpayer must make a tax adjustment.

b) To make this adjustment a new voluntary payment period is opened.

c) Accordingly, the right of the tax authorities to determine the tax debt through the appropriate assessment in respect of the forfeited tax benefit will start to run from the day following the end of that new payment period.

16 REVIEW PROCEDURE.- ADMINISTRATIVE APPEAL TO A SUPERIOR BODY NOT THE RIGHT REMEDY FOR CHALLENGING FACTUAL ELEMENTS (CENTRAL ECONOMIC-ADMINISTRATIVE TRIBUNAL. DECISION OF SEPTEMBER 28, 2017)

A request for information was made to a company. The notification was delivered to an individual who said he was an "employee" of the company. After the request had not been fulfilled within the stipulated time limit, the tax authorities notified it on two further occasions, on which the notifications were received by the same employee. When these two requests were not fulfilled, a penalty was imposed, which Andalucía TEAR overturned because it considered that it could not be conclusively affirmed that the taxpayer had acted with the negligence legally required for a penalty to be imposed.

In a special appeal to TEAC for a ruling on a point of law, the heart of the issue was to determine whether the rebuttable presumption of the validity of the notification made by the tax authorities at the taxpayer's domicile, received by a person saying he was an "employee", could be overcome if, in view of the specific circumstances prevailing on the date of receipt, it is pleaded and evidenced that its receipt was incorrect.

TEAC held that:

a) The presumption may be overcome whenever the interested party provides sufficient evidence (i) that, despite the diligence employed by the interested party, the decision did not come to their knowledge or did so on a date when they could not react against it; or (ii) that, despite not having acted with the required amount of diligence, the tax authorities did not act with the diligence and good faith that may be expected of them either.

b) It lies with the taxpayer to make the effort to prove those points, and that effort that must consist of a little more than just affirmations not founded on any proof.

17 PENALTY PROCEDURE.- A PARTIAL AUDIT OF VAT ON CERTAIN TRANSACTIONS TOLLS STATUTE OF LIMITATIONS PERIOD FOR ACTION TO LEVY PENALTY FOR ISSUING FALSE INVOICES (CENTRAL ECONOMIC-ADMINISTRATIVE TRIBUNAL. DECISION OF SEPTEMBER 21, 2017)

The authorities commenced a partial audit in relation to VAT in various periods and limited to "*Reviewing the truthfulness of the transactions performed*" with a given entity. Following completion of the audit a penalty procedure was commenced, in which a penalty was imposed on the taxpayer for issuing false invoices. After disagreeing with the imposed penalty, the taxpayer filed a claim with Andalucía TEAR, pleading, in short, that the tax authorities' power to impose a penalty for issuing the false invoices had become statute-barred.

Andalucía TEAR partially upheld the taxpayer's claims, arguing that the notification of the commencement of the partial audit had not tolled the statute of limitations period in relation to that infringement because a review of compliance

with procedural invoicing and record keeping obligations fell outside the scope of the audit.

In the subsequent special appeal, TEAC concluded as follows:

a) As a general rule, any elements not expressly mentioned in a notification of the commencement of a partial audit cannot be considered included in the scope of the audit, not even implicitly, even if they may be related to the obligation falling within the audit.

b) However, the review of VAT in relation to specific transactions necessarily tolls the review of the invoices and, therefore, the examination of whether the prepared invoices are correct.

3 Legislation

1 MULTILATERAL AGREEMENT ON THE EXCHANGE OF COUNTRY-BY-COUNTRY REPORTS

Under Action 13 in the OECD/G20's action plan to combat base erosion and profit shifting ("BEPS"), multinational groups of companies are required to file a country-by-country report every year with information regarding the global allocation of the income, the taxes paid, and certain indicators of the location of economic activity among tax jurisdictions in which they operate.

On September 29, 2017, the Official State Gazette (BOE) published the Multilateral Competent Authority Agreement on the exchange of country-by-country reports, done in Paris on January 27, 2016. Through this agreement, the countries that have signed it undertake to exchange that country-by-country report as soon as they can and, in all cases, within 15 months (18 months the first year it is applied) running from the last day of the group's fiscal year to which the report relates.

2 ANNUAL EFFECTIVE INTEREST RATE FOR THE FOURTH CALENDAR QUARTER OF 2017 FOR THE PURPOSES OF CLASSIFYING CERTAIN FINANCIAL ASSETS FOR TAX PURPOSES

On September 28, 2017 the Official State Gazette (BOE) published the decision of September 26, 2017, by the Office of the General Secretary for the Treasury and Financial Policy, which, as is now the custom, sets out the reference rates that will apply for the calculation of the annual effective interest rate for the purposes of classifying certain financial assets for tax purposes, this time for the fourth calendar quarter of 2017. The rates are as follows:

- Financial assets with a term equal to or below four years: -0.022%.
- Assets with a term of between four and seven years: 0.170%.
- Assets with a term of ten years: 1.232%.
- Assets with a term of fifteen years: 1.736%.
- Assets with a term of thirty years: 2.323%.

In all other cases the reference rate for the term closest to that of the issued assets will apply.

3 MUNICIPALITIES IN WHICH THE REVISED CADASTER VALUE MULTIPLIERS FOR 2018 APPLY

On September 21, 2017, the Official State Gazette (BOE) published Order HFP/885/2017, of September 19, 2017, setting out the list of municipalities in which the revised cadaster value multipliers set out in the General State Budget Law for 2018 apply.

The Order entered into force on September 22, 2017 and will take effect on January 1, 2018.

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