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1.Catalonia brings back its tax on legal entities' non -productive assets productive assets productive assets productive assets

The Catalan tax, introduced in May 2017, was suspended when the Spanish government filed an appeal with the Constitutional Court and now the suspension has been lifted after the court held it was constitutional.

Law 6/2017, of May 9, 2017, created a new tax in Catalonia on legal entities' non-productive assets. It stopped being charged after an appeal relating to its constitutionality was lodged by the Spanish prime minister, a suspension that has now been lifted by the Constitutional Court in judgment 28/2019, rendered on February 28, 2019, holding the tax constitutional and denying that it overlaps with wealth tax or local taxes such as the real estate tax or the tax on mechanical traction vehicles. It also held that the tax does not go beyond its allowed geographic scope because it is only charged on (i) properties located in Catalonia and (ii) any other assets that the law classes as "non-productive" which are owned by entities domiciled in that autonomous community (wherever located).
For this reason, the tax will now come into force with effect from 2017, so anyone with obligations related to this tax must file self-assessments for 2017 through 2019 between October 1 and November 30 2019. In later years, returns must be filed in June of the year the tax falls due.
You are reminded that this tax is charged on assets that the law treats as non-productive, meaning properties, motor vehicles with at least 200 horse power, pleasure craft, aircraft and art and antiques worth over the value set out in the Law on Historic Property; where:

(a) The taxable person's owners, members or investors (or to persons related to them) have been granted the right to make private use of them, unless (i) for grants made for no consideration, income in kind is recognized for personal income tax purposes in respect of that use; or (ii) for grants made for consideration, the price paid for the right to use them is the market rate and the users work for the owner and receive in exchange income higher than the assignment price.

(b) The assets are not used for economic activities and no right to use them has been granted.
These types of assets are taxable, in the case of real estate assets, where they are located in Catalonia. In all other cases, where they are owned by taxpayers domiciled in that autonomous community. All in all, in the case of properties the tax may be payable by companies and entities domiciled outside Catalonia.

2. Judgments

2.1 Corporate Income Tax.- Entities not carrying on an economic activity could not claim the regime for entities of a reduced size either before the current Corporate Income Tax Law

National Appellate Court. Judgment of May 3, 2019

The Corporate Income Tax Law provides a special regime for entities of a reduced size. Among other requirements for claiming the regime, the entity must not be a holding company within the meaning of article 5.2 of the law, which, generally, means the entity must carry on an economic activity.

However, the Revised Corporate Income Tax Law in force for fiscal years that began before or in 2014 did not lay down this requirement. Despite this, in the National Appellate Court's opinion, that

requirement has always been necessary to be able to claim this special regime. In other words, it is necessary for there to be an economic activity and assets used in that activity.

It must not be forgotten, nevertheless, that this matter has been submitted to the Supreme Court (Admission decision of April 9, 2018, appeal 468/2018).

2.2 VAT.- Centralized management of fuel cards used by the entities in a group does not involve the acquisition and resale of fuel by the company managing them

Court of Justice of the European Union. Judgment of May 15, 2019

The Court of Justice of the European Union (CJEU) examined the case of a group engaged in transport operations, in which, for organizational and economic reasons, all transactions carried out with fuel cards are centralized by the parent company in Austria.

Every month, the parent company receives from the fuel suppliers invoices for the purchase of fuel with VAT, and recharges the cost to its subsidiaries (so that they supply the vehicle transportation service) with a 2%. surcharge.

According to the CJEU, these transactions do not involve a purchase and resale of the fuel, instead the granting of credit exempt from the tax.

2.3 VAT.- A change to the taxable amount cannot be barred because the debtor that has not paid the debt is no longer a taxable person

Court of Justice of the European Union. Judgment of May 8, 2019

The CJEU considered whether it is in line with the VAT Directive for a national law to bar a change to the taxable amount when all or part of a debt has not been paid, simply because the debtor is no longer a VAT taxable person.

The CJEU concluded that it is not, so a bar of this type is not in line with the VAT Directive.

2.4 VAT.- The values of transactions with prices paid in kind must be determined according the terms agreed by the parties

Supreme Court. Judgment of April 23, 2019

The Supreme Court examined in this judgment how transactions must be treated for VAT purposes when their prices are paid in money.

Basing its judgment on EU case law, the court concluded that:

(a) As a general rule, if the transactions: have prices not paid in money, are not made between related parties, and the value of the price in kind is expressed in money, then the tax authorities must take the value or amount agreed between the parties as the price.

(b) Therefore, in these cases, it is not correct, when determining the taxable amount, to take as reference the market value obtained from a transaction that took place after the one being examined.

Note that the judgment was rendered in relation to transactions performed before the amendment to the legislation which expressly sets out that in these cases the taxable amount is the value agreed between the parties, a rule that was introduced precisely to bring Spanish legislation into line with EU law.

2.5 VAT.- The activity of renting a space for the operation of type B slot machines is not exempt from VAT

Supreme Court. Several judgments in March 2019

The Supreme Court examined activities related to slot machines.

It concluded, in this particular case, that regardless of the characterization of the agreement signed between one trader (owner of a hotel establishment), and another (owner of type B slot machines), it is to be considered that:

 The owner of the type B slot machines carries on a gaming economic activity, subject to VAT but exempt under article 20.1.19 of the VAT Law.

 The owner of the hotel establishment makes a supply of services subject to VAT which, together with other related obligations, consists principally of the delivery of a space for the installation of machines in exchange for a price, regardless of whether the compensation it receives may vary according to the revenues it obtains from the machine (a supply that cannot be treated as exempt from VAT).

2.6 Transfer and Stamp Tax.- A deed that cannot be registered because it has defects is not subject to Stamp Tax

Madrid High Court Judgment of April 04, 2019

Notarial deeds, records and certificates are the taxable event for stamp tax, as notarial documents, for transfer and stamp tax purposes, within the meaning of article 31 of the revised Transfer and Stamp Tax Law. Specifically, the variable stamp tax charge applies for first copies of notarial deeds and records relating to a sum or valuable item where they contain acts that are able to be registered at given registries and are not subject to inheritance and gift tax or other transfer and stamp tax headings.

The Supreme Court was asked to determine whether stamp tax is payable on a deed that cannot be registered as a result of defects assessed by the registrar. According to Madrid High Court, in this case the taxable event does not take place because the requirement in relation to the act being able to be registered is not satisfied.

2.7 Collection procedure.- Late filing surcharges for tax returns cannot be imposed automatically

National Appellate Court. Judgment of April 11, 2019

The General Taxation Law sets out a late-filing surcharge system with varying amounts according to the length of time that ran between the end of the voluntary filing period and when they were filed. So, the charges may be 5%, 10% or 15% where the returns are filed within three, six or twelve months after the end of the voluntary filing period; and 20% when they are filed after the end of twelve months. In this last case, late-payment interest also falls due after twelve months have run from the end of the voluntary filing period.

In practice, these surcharges are imposed by the tax authorities automatically simply as a result of the late filing of a return (either the return that should have been filed originally or a supplementary return to the one that was filed) and the return gives rise to an amount of tax payable.

The National Appellate Court, however, set aside this automatic mechanism in a recent judgment. In its view, the principles of good faith, legitimate expectations and prohibiting arbitrary decisions by public powers require attention to be paid in each case to the specific circumstances of the case and to the reasons why the taxpayer acted in a given way.

In this specific judgment the court examined the case of a taxpayer who had filed an inheritance tax return within the time limit but later filed a supplementary return to include assets that were part of the inheritance and located abroad, which the heir did not know existed until after the original return had been filed (this is a very common occurrence in inheritances, because the heirs or devisees cannot be expected to know about all the deceased's assets, rights and debts).

The National Appellate Court held that, for this reason, and to protect the principles mentioned above, in this case it was not reasonable to impose a surcharge.

This is not the first time the courts have set aside surcharges in certain cases relating to supplementary returns. In fact a number of judgments have denied that these surcharges are reasonable. For example, where the supplementary returns are filed to apply the interpretation adopted in an audit to later years falling outside the audit.

2.8 Review procedure.- Costs cannot be ordered to be paid in an economic-administrative proceeding

Supreme Court. Judgment of June 3, 2019

Article 51.2 of the regulations on review in the administrative procedure provide that, where one of the parties is ordered to pay costs in an economic-administrative proceeding, "they must be calculated at 2% of the amount of the claim" and range between €150 and €500 according to whether the authority responsible for deciding the claim is a single person or a collective body, respectively. The Supreme Court has held that this article is null and void because it found that procedural costs lose their true nature if they are calculated generally and abstractly without regard to the specific proceeding in which the costs to be covered arise.

2.9 Mutual agreement procedures.- The tax authorities may deny the commencement of a mutual agreement procedure if there has been tax fraud

National Appellate Court. Judgment of April 22, 2019

A national appellate court judgment dealt with a case in which the auditors held that there had been tax fraud and, as a result, proposed an adjustment which, in practice, involved taxing revenues that had been taxed in another country. For this reason, the taxable person applied for the commencement of a mutual agreement procedure, which was rejected by the tax authorities on the basis of a decision declaring the existence of tax fraud.

The National Appellate Court confirmed that, in cases of the type being examined, the Spanish tax authorities are allowed to reject the application to commence a mutual agreement procedure. The court affirmed that, although there is a risk of double taxation, it is reasonable to disallow tax treaty benefits where there has been fraudulent conduct.

3. Decisions

3.1 Corporate Income Tax.- Asset values determined by autonomous community authorities are binding on the central government authorities

Central Economic-Administrative Tribunal. Decision of May 14, 2019

The Central Economic-Administrative Tribunal (TEAC) studied a case related to a capital reduction with repayment of contributions, performed by delivering real estate owned by the company. In a later audit, the autonomous community authorities calculated the values of the properties to determine whether transfer and stamp tax had been assessed correctly.

Later, in the course of a corporate income tax audit, the Spanish Tax Agency (AEAT), when verifying the tax consequences arising from that capital reduction, assigned different values to the same properties.

Taking its cue from the interpretation settled by the Supreme Court in judgments of January 15, 2015 and December 9, 2013, TEAC concluded that the values determined by a competent autonomous community authority are binding on the central government authorities. In other words, the central government auditors must observe the values audited by the autonomous community authorities.

3.2 Personal Income Tax.- For sums paid to replace pension supplements to be multiyear income they must result from a unilateral step by the company

Central Economic-Administrative Tribunal. Decision of February 14, 2019

As a result of the removal of one of its directors, a company agreed to make annual payments to him in the following years until he reached retirement age; in the following years a pension supplement was to be paid to achieve the same annual amount.

A few years later, the employer and the taxpayer signed a novation instrument terminating that agreement, which replaced the supplement to his retirement pension with a fixed amount paid in a lump sum.

The taxpayer considered that this fixed amount could entitle him to the reduction set out in the Personal Income Tax Law for multiyear income. AEAT adjusted the taxpayer's income after finding that the reduction was not applicable.

TEAC dismissed the claim filed by the taxpayer for the following reasons:

(a) From one angle, it argued (i) that the undertaking to pay a future supplement to the pension was simply an expectation; and (ii) that entitlement to the indemnity payment replacing it arises anew with the novation terminating the previous agreement. For that reason, TEAC held that the income was generated in a period under two years, and therefore, that reduction was not applicable.

(b) From another angle, TEAC held that another reason for the reduction not being applicable is that the amount received does not qualify as clearly multiyear income according to the definition in the regulations. Specifically, it held that the case of indefinite compensation or indemnity in respect of salary supplements, pensions or annuities only applies where the payment is made as a result of a unilateral step by the employer which is detrimental to the employee. Otherwise, the payment made cannot be classed as "compensation or indemnity". In other words, it is necessary for salary supplements to be altered or changed as a result of a unilateral decision by the company, "a step resulting in it later being required to make good, indemnify or compensate".

3.3 Form 720.- Late-filing penalties cannot be imposed for Form 720 if sufficient reasons are not provided for the existence of fault

Central Economic-Administrative Tribunal. Decisions of February 14 and January 16 2019
TEAC has rendered three decisions on various issues relating to Form 720, for reporting assets and rights abroad.

The tribunal has expressed agreement in these decisions with the option of allowing, in the event of the late filing of Form 720, an unjustified capital gain to be recognized for the taxpayer equal to the value of the reported assets (unless it is evidenced that they were acquired with reported income or in periods when the taxpayer was not resident in Spain). TEAC concluded that this regime is in line with EU law even though it gives rise to something resembling an obligation without a statute of limitations period which runs counter to the general principles of debts becoming statute-barred. TEAC explained that the CJEU has allowed similar statute of limitations periods in other cases and that it is reasonable for the statute of limitations to be calculated from when the authorities learn of the existence of the assets.

In relation to the penalty regime, however, it concluded that, regardless of the clarity of the legislation in relation to the late-filing penalties required for the return, those penalties cannot be imposed automatically, and it is necessary (as with every penalty procedure) to provide sufficient reasons for the existence of fault.

It must be remembered that on June 6, 2019, the Commission decided to refer Spain to the European Court of Justice “for imposing disproportionate sanctions for failure to report assets held abroad” (on form 720), as we discussed in our Tax Alert on the same date.

3.4 Management procedures.- A new limited review procedure cannot be commenced if the first has not ended by reason of an express decision or a time bar

Central Economic-Administrative Tribunal. Decision of April 09, 2019

A taxpayer received a notice requesting certain documents related to corporate income tax for a given period. In that notice the taxpayer was advised of the commencement of a limited review procedure.

The taxpayer later received another notice advising of the commencement of a new limited review procedure. In this notice additional documents were requested relating to the same tax and period as for the previous limited review procedure which had not ended.

TEAC concluded that it may not be considered that a new limited review period commenced with the receipt of a new notice, insofar as a procedure had commenced earlier of the same type and with the same subject-matter which had not ended by reason of a time bar or an express decision. TEAC therefore took the view that all the tax authorities’ steps are part of a single limited review procedure commenced, for all purposes, on the date on which the first request for information was served.
In the specific case at issue, because more than six months had run between the date of the notice of the first request and the assessment made on the taxpayer, TEAC held that the time limit had expired for the procedure and the statute of limitations had run for the right to assess the tax on the basis that the (single) review procedure had not tolled the statute of limitations period.
3.5 Collection procedure.- Enforced collection is not allowed for a penalty appealed outside the time limit.

Central Economic-Administrative Tribunal. Decision of April 24, 2019

A taxpayer lodged an appeal against a decision to impose a penalty, which was not admitted because it fell outside the time limit. The taxpayer filed an economic-administrative claim against the failure to admit the appeal.

Before the appeal was lodged (which, as we have mentioned, was filed outside the time limit), the taxable person was notified of an interlocutory order initiating enforced collection proceedings as a result of nonpayment of the penalty.

TEAC rendered the order null and void because, in its opinion, the filing of a claim against the decision to impose a penalty, even if it takes place after notice of that order is served, automatically stays the duty to pay the penalty. TEAC added that the decision regarding the late filing of the appeal, moreover, lies with the economic- administrative tribunal that is hearing the claim against the penalty and not with the tax authorities themselves (which have the jurisdiction to decide on the appeal).

3.6 Penalty procedure.- Any penalties imposed without having regard to proof requested by the taxpayer are null and void

Central Economic-Administrative Tribunal. Judgments of March 28 and February 21 2019

A penalty was imposed on a taxpayer for contraband. The taxpayer submitted pleadings against the proposed decision in which it requested proof to be taken to defend its interests. The penalty procedure was confirmed in a decision that failed to take that request into consideration.
In the decision on the later economic-administrative claim, TEAC concluded that the fact that the authorities failed to express a decision in relation to the proof proposed by the taxpayer is an omission of an essential step in the penalty procedure, which deprives the party with tax obligations of its right of defense (a right protected by the constitution). In view of this, TEAC held that the penalty imposed on the taxpayer was null and void as a matter of law.

4. Resolutions by the Directorate General of Taxation

4.1 Corporate Income Tax.- The conversion of an agricultural processing company into a limited liability company does not stop the clock on the holding period for the company's shares

Directorate General for Taxes. Resolution V0577-19, of March 19, 2019

A taxpayer requested a ruling in relation to converting various agricultural processing companies (owned by two individuals) into limited liability companies and later contributing the shares to a newly created holding company. The request concerned whether the tax neutrality regime could be claimed for this nonmonetary contribution. Specifically, whether the minimum holding period was deemed to be met for the contributed shares.

The Directorate General for Taxes (DGT) explained that the neutral regime may be claimed because the starting point for the requirement to own the shares uninterruptedly for a year is when the agricultural processing companies were originally acquired, because the change of legal form does not alter its corporate income tax regime.

4.2 Corporate Income Tax.- An indemnity payment expense is not deductible if it is recognized after it has become statute-barred

Directorate General for Taxes. Resolution V0578-19, of March 19, 2019

An entity owned agricultural land which it leased as such. Following certain types of urban development work the land became urban land, which gave rise to termination of the rural land lease agreements. The company transferred the building rights to a developer in 2007. In these cases, the Valencia autonomous community legislation grants the previous lessees of rural land the right to be indemnified. After payment of the indemnification had been claimed by the rural lessees, the parties reached (years later) an agreement in principle on an amount without having to take the case to court. It was asked in the request whether the indemnification payments are tax deductible in the period when the out of court agreement is reached.

The DGT concluded, in line with the interpretation adopted by the Spanish Accounting and Audit Institute (ICAC), that the indemnification expense should have been recognized in 2007, when the obligation to indemnify arose and, therefore, it was likely that an outlay of funds by the entity took place, regardless of whether the out of court agreement was reached years later.

The failure to record this expense in 2007 is an accounting error which should have been corrected by recognizing a liability against reserves. From a tax standpoint, the expense should have been included in the tax base through a negative adjustment for tax purposes (in other words, without the need to apply for a correction in relation to 2007), but only if the late recognition of the expense does not result in lower tax than would have been payable if the expense had been recognized in the period when it arose (2007).

The DGT added that the potential effect of the statute of limitations must be taken into account here, because if an expense that arose in a statute-barred year is recognized in a later period, the expense would not be able to be deducted in the year it was recognized.

4.3 Personal Income Tax.- Income obtained from a capital reduction with repayment of contributions must be reported in the period when the transaction is performed not when the transaction is registered

Directorate General for Taxes. Resolution V0597-19 of March 20, 2019

A limited liability company made two capital reductions with repayment of contributions to its shareholders in 2017, but the registration of those transactions at the commercial registry took place in a later tax period.

The DGT recalled that, according to the Supreme Court's case law, the registration of a capital reduction at the commercial registry does not give rise to the existence of a right, so the income obtained from that transaction must be recognized in the year in which it was performed not the year it was registered.

4.4 Personal Income Tax.- Dividends paid out of a tax refund to a holding company are exempt
Directorate General for Taxes. Resolution V0547-19 of March 13, 2019

On its 2006 corporate income tax return a company claimed the regime for entities of a reduced size. In 2009 it applied for correction of its self-assessment because it considered it should have claimed the holding companies regime, which entitles it to a refund of the excess tax paid. After that application was denied by AEAT, the TEAR, and TEAC, the National Appellate Court upheld the appeal and AEAT refunded the relevant amount together with late-payment interest.

Now the company wanted to distribute the refunded amount among its shareholders (all individuals) as a dividend and asked whether it was eligible for the exemption for the distribution of income obtained in years when the special holding companies regime was applicable.

The DGT recalled that the aim of that exemption is to avoid double taxation, because the dividends relate to income that has been taxed at the company under the special holding companies regime. It explained, additionally, that the refunded amount relates to excess tax which, had it not been

charged when it was (in 2006, when the company was taxed incorrectly), would have caused a higher amount of distributable income that would have been exempt.

As a result, it concluded that the exemption applies to the distribution of income relating refunded tax.

4.5 Inheritance and Gift Tax.- Legally separated but not divorced spouses fall into Group II for inheritance and gift tax purposes

Directorate General for Taxes. Resolution V0698-19 of March 28, 2019

An individual was going to give a property to their spouse, the couple are legally separated but not divorced. The request concerned which family relationship group applies to determine the multiplier to be used to calculate the tax liability.

The DGT explained that, under article 85 of the Civil Code, a marriage is only dissolved by reason of the death of either spouse or by reason of divorce. In other words, the separation of spouses does not terminate the relationship that exists between them.

Since the inheritance and gift tax legislation makes no distinction, both separated and non-separated spouses must be included in family relationship Group II.

4.6 Real Estate Tax.- Exemption from real estate tax for not-for-profit entities is claimable for properties leased to third parties

Directorate General for Taxes. Resolution V0534-19 of March 13, 2019

A request was submitted to the DGT in relation to a not-for-profit entity owning a property that it leases to a third party which uses it to operate a hotel business. The revenues obtained from that rental arrangement are used by the not-for-profit entity for its foundational purposes. The request concerned whether that property is allowed to benefit from the real estate tax exemption contained in the legislation on tax incentives for patronage.

The DGT recalled that the real estate tax exemption is claimable for real estate assets owned by not-for-profit entities, unless they are used for business operations not exempt from corporate income tax. In other words, the exemption is only claimable where the activities are carried on to achieve the entity's specific purpose or aim.

Therefore, the real estate tax exemption is applicable, regardless of the use that the lessee makes of the property.

5. Legislation

5.1 The voluntary payment period for 2019 tax on economic activities charges has been determined

In a decision rendered on June 13 and published on June 19, AEAT's Revenue Department determined the voluntary payment period for the tax on economic activities (IAE) charges for fiscal year 2019 in respect of the national and provincial charges, along with the place for payment of those charges.

Specifically, the voluntary payment period for 2018 falls between September 16 and November 20 2019, inclusive, for national and provincial charges collected through the credit institutions authorized to collect the tax.