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1. **A complete tax adjustment needs to cover statute-barred years also barred years also barred years also barred years also**

Madrid High Court argues that a complete tax adjustment requires the tax authorities to include statute-barred years also, to avoid double taxation

The complete adjustment principle has now been reiterated and settled by the courts. This principle determines that the tax authorities must seek to ensure that an adjustment to the tax liability of the party with tax obligations must be done “for better or for worse”. This means, for example, if a company has deducted an expense in a year before the year it fell due and the auditors make a tax adjustment by increasing the tax base for that year, the complete adjustment obligation requires to be modified also the tax base for the following year in which, according to the auditors, that expense should have been reported. This is the only way to avoid double taxation.

In a judgment rendered on April 10, 2019, Madrid High Court has now gone further by arguing that this complete adjustment must also include non-statute barred years.

In the case examined by the court:
(a) The taxpayer had deducted an expense in 2008 in respect of a provision for dismissals which, according to the auditors, should have been deducted in 2009, the year those dismissals took place.
(b) Moreover, the party with tax obligations had depreciated assets at 30% in 2008 because it classed them as tools. According to the auditors, the assets qualified as machinery, and so their depreciation rate was 12%.

During the audit the company produced documents and accounting entries to support that the dismissal costs had only been deducted once (in 2008) and that the assets had been depreciated on a straight-line basis at 30% since they were purchased. And it so happened that, when the assessment was issued in 2008, the company was no longer able to start refund procedure for incorrect payments in relation to 2009, because that year had become statute-barred.
The court held that the tax authorities should have broadened their work to the years following 2008 (including statute-barred years) to make a complete tax adjustment. Otherwise, a double taxation scenario would occur which is not allowable.

2. **Judgements**

2.1 Corporate income tax.- Meaning of “final loss” defined for offsetting losses generated by the subsidiaries of other member states

Court of Justice of the European Union. Judgments of June 19, 2019, cases C-607/17 and C-608/17
In a judgment rendered on December 13, 2005 (case C-446/03, Marks & Spencer), the Court of Justice of the European Union (CJEU) held that it is justified to restrict a company’s right to deduct a foreign subsidiary's losses (even if it is allowed to deduct a resident subsidiary’s loses) by the need to preserve a balanced allocation of taxing powers between member states and prevent the risk of losses being used twice. However, the CJEU specified that it is disproportionate for the parent company's state of residence to disallow this option when the non-resident subsidiary’s losses are “final”.

In two new judgments rendered on June 19, 2019, the CJEU has defined the term “final loss”. The following cases were referred to the CJEU:
(i) Case C-608/17, Holmen AB: in this judgment the Court examined a case in which a Swedish company has various Spanish subsidiaries that file joint tax returns in Spain. Insofar as one of the subsidiaries had accumulated a significant amount in losses, a doubt had arisen as to whether the Swedish parent company could liquidate the Spanish subsidiaries and offset the losses generated in Spain with the income obtained in Sweden.
The following points need to be considered:
 Spanish law disallows a transfer of losses in the year of liquidation of a company.
 Swedish law allows a company to offset the losses of a non-resident subsidiary that is liquidated on condition that the losses are final (within the meaning determined in the Marks & Spencer case) and the parent company does not carry on any activity in the subsidiary’s state in the year of its liquidation.

In this context, it was referred to the CJEU whether the fact that Spanish law prevents the transfer of the losses in the year of liquidation allows them to be treated as final in Sweden.

The CJEU concluded that this fact is not decisive for determining the finality of the losses, unless the Swedish parent company demonstrates that it is impossible for it to deduct those losses by means of a sale of the loss-making company, for example, which will ensure that the losses are taken into account by a third party for future periods. It is irrelevant for these purposes whether a portion of the losses might not have been able to be deducted from the period income of the subsidiary that generated the losses or from another entity in the same group.

Moreover, the CJEU clarified that if the Spanish subsidiaries are not owned directly by the Swedish parent company, restricting the transfer of losses to the parent company would be justified (even if the requirements for them to be treated as final are satisfied), because the group could be seeking strategies to optimize tax rates which could jeopardize a balanced allocation of taxing powers between member states.

(ii) Case C-607/17, Memira Holding AB: in this second judgment the Court examined whether a Swedish company could deduct the losses generated by its German subsidiary in a scenario where that parent company was considering absorbing its subsidiary with dissolution without liquidation of the German subsidiary.

It must be taken into account here that German legislation does not allow the transfer of losses between companies subject to German corporate income tax in the event of a merger. Swedish law, by contrast, does allow those losses to be transferred in the event of a merger.

In this context, the issue referred to the CJEU was whether the losses generated by the German company may be treated as final and therefore may be offset by the Swedish parent company to avoid a restriction on freedom of establishment.

The CJEU concluded, once again, that the losses generated by the German subsidiary are not final, unless the Swedish parent company demonstrates that it is impossible to deduct those losses by means of a sale of the loss-making subsidiary, for example.

2.2 Corporate income tax.- A waiver of preemptive subscription rights for no consideration entails the obtaining of income

National Appellate Court. Judgment of March 28, 2019

A limited liability company was set up to be used as an investment vehicle. Its two members (company A and company B) later signed an investment agreement with a potential shareholder (C), an individual, to whom they proposed investing in that investment vehicle by contributing capital including additional paid-in capital. For this capital increase to be performed, both shareholders (A and B) partially waived their preemptive subscription rights. Later further capital increases were performed and subscribed by the three shareholders (A, B and C), which entailed a waiver of subscription rights by some in favor of others.

The auditors reviewed the tax liability of shareholder A and concluded, as was later confirmed by TEAC (Central Economic-Administrative Tribunal) and the National Appellate Court, that an examination of the transaction as a whole shows that in a short space of time shareholder A (an entity) had waived its own subscription rights to benefit shareholder C (an individual) and had acquired other subscription rights from shareholder C, all for no consideration.
The National Appellate Court concluded in this respect that:

(a) Preemptive subscription rights are transferable rights linked to ownership of an interest and have economic content. The purpose of these rights is to protect the shareholder from the loss arising for that shareholder from a capital increase subscribed by a third party.
(b) A waiver of rights of subscription to shares to benefit an entity and an acquisition from that company of the same type of rights for no consideration by an entity are transactions subject to corporate income tax under article 15.3 of the Revised Corporate Income Tax Law (article 17.4 of the current Corporate Income Tax Law). According to that legislation, assets transferred and acquired for no consideration must be recognized at their normal market value.
(c) This implies that in a transfer for no consideration of subscription rights the difference between the normal market value of the transferred elements and their carrying amount must be included in the tax base; and that in an acquisition of the same type of rights the normal market value of the acquired element must be included.

In this case, however, after examining the whole transaction, because some subscription rights are waived and others are received, all for no consideration, the net increase in the tax must be calculated by reference to the difference between the market value of the received rights and the market value of the waived rights (which had no carrying amount for accounting purposes).

2.3 Personal income tax.- A taxpayer may prove full use of the vehicle in their economic activities

Supreme Court. Judgment of June 13, 2019

In a recent judgment, the Supreme Court gave its view on cases in which the use of vehicles may be treated as taking place in economic activities for personal income tax purposes even if they are also used for private needs.

Article 29.2 of the Personal Income Tax Law allows partial use of assets in economic activities, but adds that “partial use shall not be allowed under any circumstances for indivisible balance sheet items”; and authorizes the Personal Income Tax Regulations to determine the cases for treating use of the assets as taking place in economic activities because their use for private needs is ancillary and clearly insignificant.

To implement these provisions in the law, article 22.4 of the Personal Income Tax Regulations provides:
(a) That use of the assets must be deemed to take place for private needs in an ancillary and clearly insignificant manner where private use is made of them only on nonworking days or in nonworking hours in which the performance of the taxpayer’s activity is not interrupted.
(b) That, however, this category does not include saloon cars and their trailers, mopeds, motorcycles, aircraft or sports or recreational vessels (with certain exceptions).
The Supreme Court concluded in this judgment that the above article of the Personal Income Tax Regulations is not illegal because it only clarifies the rule in article 29.2 of the law.
In other words, because the vehicles mentioned are indivisible assets, what the regulations do is establish a presumption that for these assets private use cannot be distinguished from professional use. The Court stressed, however, that it is a rebuttable presumption, although it is very difficult to obtain this type of proof.

2.4 Taxes on advertising and other sectoral taxes.- The establishment of a progressive system does not amount to prohibited state aid

General Court of the European Union. Judgment of June 27, 2019

In a recent judgment, the General Court of the European Union examined the consistency with EU law of a Hungarian tax on advertising which entered into force in 2014, with the following notable features:
(a) The taxable person is the person distributing the advertising (newspapers, audiovisual media, etc.) not the advertisers.
(b) The taxable amount is the net revenue (turnover) in a year generated from distributing advertising.
(c) To determine the tax liability, progressive rates were put in place ranging between 0% and 50%, by reference to the taxable amount.
(d) Lastly, any taxable persons who in 2013 recorded zero income before tax or a loss before tax may deduct from the taxable amount for 2014 50% of the losses from prior losses.
In this context, the European Commission (EC) declared the existence of state aid prohibited by article 108 of the TFEU, by holding that:
(a) The progressive tax rates determined a difference between companies with high advertising revenues and companies with low advertising revenues. In other words, according to the EC a selective advantage was granted to the latter by reason of their size.
(b) The ability to deduct 50% of their losses for companies that did not record income in 2013 also granted a selective advantage.

Against the EC’s decision, Hungary lodged an appeal with the General Court of the European Union, which has upheld the appeal and set aside the decision. The General Court's conclusion was based on the fact that a progressive system may be included in these tax arrangements, which, in principle, do not have to be considered discriminatory for the other companies in the sector. According to the court, the lawmaker’s intention to tax an activity only after it reaches a given size is lawful. As a

matter of fact, according to the court, when a company reaches a certain level there is already a selective advantage because it may reasonably be presumed that companies with higher turnovers may have, thanks to economies of scale, proportionately lower costs than companies with lower turnovers.

Exactly the same findings were described by Juliane Kokoda, Advocate General in case c-75/18, examining the consistency with EU law of a turnover-based tax in Cyprus on telecommunications for companies, in her opinion delivered on June 13, 2019. Particularly relevant are the references in this opinion to the new digital services tax (widely known as the Google tax) proposed by the EC, which is also based on companies' turnovers. Specifically, the Advocate General criticizes the EC for arguing that there is no direct relationship between turnover and a company's financial strength in the case of certain sectoral taxes, and yet she proposes a digital services tax that has an almost identical legal definition.

2.5 VAT.- The activities of members of a foundation's oversight board are not subject to VAT

Court of Justice of the European Union. Judgment of June 13, 2019

In a recent judgement, the CJEU examined the VAT chargeable on the services provided by a member of a foundation's oversight board.

The main powers of these types of boards, acting as collective bodies, are: (I) appointing, suspending and removing members of the foundation's managing body and determining the terms and conditions of their employment, (ii) staying enforcement of the managing body's decisions, (iii) advising that managing body, (iv) approving the financial statements, and (v) appointing, suspending and removing the oversight board's own members and determining their fixed compensation.

In the CJEU's opinion, the members of the oversight board do not carry on an independent economic activity because (I) even though they are not connected with and subordinate to the foundation's managing body under a hierarchical relationship, (ii) and are not connected with the oversight board either under the same type of relationship in relation to the performance of their activities as members of that board, they do no act on their own behalf or subject to their own responsibility, but do so on behalf and subject to the responsibility of that board. Moreover, they do not bear the economic risk arising from their activities, in that they receive a fixed amount of compensation that does not depend on either their participation at meetings or their hours of actual work.

For this reason, their activities are not subject to VAT.

2.6 VAT/Transfer tax.- The transfer tax due on the acquisition of jewelry is not contrary to the VAT Directive

Court of Justice of the European Union. Judgment of June 12, 2019

The Supreme Court requested a preliminary ruling by the CJEU as to whether a rule that requires a company to pay an indirect tax other than VAT (transfer tax) on the acquisition of movable property (gold, silver, jewelry) from individuals, even if those assets are intended for use in transactions

subject to VAT within the company's economic activities, is compatible with the VAT Directive and the principle of fiscal neutrality.

On the basis of its earlier decisions, the CJEU concluded that a tax like transfer tax is not precluded by the Directive and neither the Directive nor the principle of fiscal neutrality prevent the tax being charged in the case described by the Supreme Court.

2.7 Transfer and stamp tax.- The withdrawal of tenants in common is subject to transfer tax if the tenancy in common continues

Supreme Court. Judgment of June 26, 2019

A couple and their two children purchased a property with a mortgage. Later the condominium was partially dissolved, and ownership of the whole building was transferred to the couple in exchange for (ii) taking on the whole debt in respect of the unpaid amount of the mortgage, and (iii) paying their children a cash sum equal to 50% of the building (less the amount of debt concerned) that was transferred to their parents.

Stamp tax was assessed on the partial liquidation of the condominium insofar as the transaction involved extinguishment of a tenancy in common on an indivisible asset. The tax authorities took the view, however, that transfer tax in respect of a transfer for consideration had fallen due because the condominium was not extinguished, but continued to exist with fewer tenants in common.

According to the court, this case did not involve (i) an instance of exercising a right to divide the jointly owned property, (ii) or an allocation to a tenant in common for the purpose of extinguishing a condominium. In short, because the tenancy in common was not extinguished (it continued to exist for two tenants in common), the transaction gave rise to an excess allocation subject to transfer tax as a transfer for consideration, not to stamp tax.

The judgment had a dissenting vote by three senior judges concluding that a transfer does not take place because the outgoing tenants in common only receive the value of their ideal share and, therefore, the cash payment they receive is not an excess allocation but instead the result of not dividing the jointly owned property, which does not alter the balance between the tenants in common.

2.8 Local taxes.- A local tax cannot be charged on the inspection and monitoring of vacant dwellings performed by a local council

Supreme Court. Judgment of June 18, 2019

In a recent judgment, the Supreme Court confirmed that amendment of articles in the tax rules approved by Barcelona city council in relation to the tax on monitoring and inspection work on vacant dwellings in the city carried out by that local government was null and void.

The court affirmed that the government's work on which the local tax was attempted to be charged does not fall within any of the services or activities taxable with a charge of this type.

2.9 Administrative procedure.- Liability for taking part in the concealment of assets to prevent the payment of tax debts only exists where the unlawful acts took place after the debts arose

National Appellate Court. Judgments of March 22 and June 12, 2019

Article 42.2.a) of the General Taxation Law lays down joint and several liability for any individuals or legal entities causing or taking part in the concealment or transfer of assets and rights of the party with payment obligations to prevent action by the tax authorities.

The National Appellate Court held that an interpretation consistent with the letter and spirit of this law would be to conclude that a necessary requirement for implementation of the law is that the skirted tax debt must have already fallen due when the actions seeking liability took place.

The National Appellate Court took the view that only after the tax giving rise to the debt has fallen due may it be held that the person held liable knew of the existence of the debt and to avoid collection by the tax authorities, took part in the transactions to conceal assets.

2.10 Collection procedure.- A judgment must have become final before the tax authorities' right to collect a debt can recommence

Supreme Court. Judgment of July 2, 2019

An assessment was issued which, in addition to tax liability and late-payment interest, also contained the relevant penalty (at a time when penalties procedures did not yet have to be carried out separately). After confirmation of the assessment by the National Appellate Court, the taxpayer lodged a cassation appeal against only the portion relating to the penalty, which was upheld by the Supreme Court. In enforcement of the Supreme Court's judgment, the tax authorities requested payment by the taxable person of the tax liability and the relevant late-payment interest and interest on stayed debt obligations (enforcement of the debt had been stayed by the court).

The taxpayer filed an appeal against the enforcement decision, pleading that the tax authorities' right to collect had expired in relation to tax liability and interest, insofar as only the portion relating to the penalty had been challenged at the Supreme Court and more than four years had run since the National Appellate Court's judgment.

The Supreme Court concluded that:
(a) In this case we are dealing with a single administrative measure that consists of two distinguishable parts: (i) tax liability and late-payment interest, and (ii) the penalty.
(b) The injunctive remedy to stay enforcement of the debt related to the whole debt, in other words, it applied to both the penalty and the tax liability and interest; and that injunctive remedy remained in force during the cassation appeal period.
(c) Therefore, while the appeal was being conducted, the tax authorities could not partially enforce the tax debt, even though only the penalty had been challenged in the appeal. There is no "partial finality" of judgments for these purposes that would enable a kind of "partial lifting" of injunctive remedies. As a matter of fact, the tax authorities cannot enforce a decision that has been stayed (i) until the court expressly orders the lifting of the injunctive remedy, or (ii) until a final judgment is rendered.

For those reasons, the Supreme Court confirmed that the enforcement decision by the authorities was correct.

2.11 Collection procedure.- Applications for a stay and deferred payment of tax debts are compatible

Supreme Court. Judgment of June 12, 2019

A supreme court judgment has set aside article 46.8 of the General Collection Regulations, which laid down that when an application is made for deferred or split payment of a debt together with a stay of the same debt (even if one petition was made on a secondary basis to the other), the application for deferred or split payment had to be set aside.

The court explained as a ground for setting aside the application that:
(a) Article 65 of the Generation Taxation Law (LGT) defines deferred and split payment of tax debts and gives authority to the regulations to determine the terms and conditions for obtaining the right to deferred payment, but not to define non-acceptance of deferred payment. Article 65 of the LGT sets out a finite list of tax debts for which deferred or split payment is not allowed, and the debts on which a stay was requested are not among them.
(b) Therefore, it must be concluded that what article 46.8 of the General Collection Regulations does is create a condition for non-acceptance that is not provided for in the LGT, which entails that the regulations have overstepped the bounds of their rulemaking authority.

What we have here, in short, are two legally recognized rights for the taxpayer (to apply for deferred or split payment of a debt and a stay of its enforcement) which are compatible and relate to different purposes, and therefore cannot be restricted by the regulations.

3. Decisions

3.1 Administrative procedure.- TEAC continues adding flexibility to the definition of “tax option”

Central Economic-Administrative Tribunal. Decisions of May 14 and April 2019

The General Taxation Law provides (article 119) that tax options may only be rectified within the filing period for returns determined in the regulations, but does not define the meaning of “tax option”. The Central Economic-Administrative Tribunal (TEAC), for its part, has in a large number of decisions broadened the definition of tax option. In three recent decisions, it concluded that the following are tax options:
(i) Reporting capital gains on a collection (as opposed to a due and receivable) basis on personal income tax returns.
(ii) Offsetting tax losses on corporate income tax returns.
In line with this view, TEAC affirmed that:
(i) After election of the option to report capital gains on a collection basis on a personal income tax return, this option cannot be modified by filing a supplementary return, even if this return is filed because an amendment to the legislation occurs under which this collection basis makes the taxpayer worse off.
(ii) If a corporate income tax return is filed outside the time limit, no losses may be carried forward for offset on that return. In other words, if the option to offset is not elected within the time limit, it must be concluded that the taxpayer has chosen not to make the offset, and this decision is unalterable.
Outside that time limit, the option may only be elected in exceptional cases in which the circumstances at the end of the filing period set by the regulations had changed in relation to the existing losses.

3.2 Audit procedure.- The taxpayer's own appraisal is not an option when the comparable uncontrolled price method is used

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

As part of an audit an assessment decision was rendered in respect of personal income tax. Specifically, the adjustment related to the arm's length value of a transaction between the party with tax obligations and the company in which it was shareholder, determined using the comparable uncontrolled price method.
In the economic-administrative claim the taxpayer pleaded, among other issues, that the assessment decision was null and void because it did not inform about the taxpayer's right to submit its own expert appraisal.
TEAC dismissed the claim and concluded that the taxpayer only has the right to submit its own expert appraisal when one of the pricing methods set out in article 57.1 of the General Taxation Law has been used, and the uncontrolled comparable price method does not appear among them.

3.3 Review procedure.- AEAT cannot introduce new arguments in appeals brought against regional economic-administrative tribunals' decisions

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

The Andalucía Regional Economic Administrative Tribunal (TEAR) rendered a decision concluding that where a personal income taxpayer fails to report a gain obtained on the transfer of their principal residence, it must be considered that the taxpayer has elected the option to claim the exemption for reinvestment in the taxpayer's principal residence, even if the option was not expressly elected on the tax return.

The head of AEAT's tax management department filed an ordinary appeal against that decision, which contained an argument that (i) had not been used by the authorities in the challenged administrative act, (ii) or examined by the TEAR. Specifically, it contended that it could not be considered that this option had been elected because the new residence had not been made into the taxpayer's principal residence.
While TEAC shared this new argument by AEAT submitted in the appeal (as it mentioned obiter dicta), it dismissed the appeal because it considered that arguments cannot be raised in an ordinary appeal, or requests or petitions submitted that are clearly separate from those set out by the authorities in the acts challenged in the economic-administrative jurisdiction at first instance, and which could not be settled by the regional or local economic-administrative tribunal.

3.4 Review procedure.- Penalties for a breach of statistics obligations for the INTRASTAT system cannot be the subject-matter of an economic-administrative claim

Central Economic-Administrative Tribunal. Decision of May 22, 2019

A penalty was imposed on a taxpayer for breaching a statistics obligation for the INTRASTAT system. Based on the appeal information footnote included in the administrative decision containing the imposed penalty, the appellant filed an economic-administrative claim with TEAC.

TEAC did not admit the claim because it held that penalties for a breach of statistics obligations for the INTRASTAT system cannot be the subject-matter of an economic-administrative claim. It affirmed in this respect that the INTRASTAT system is a specific mechanism for gathering information for the purposes of drawing up statistics which falls outside matters related to "application of the government's taxes or of the surcharges imposed in relation to those taxes and the imposition of tax penalties", as set out in article 226 LGT.

In line with this, TEAC ordered the procedure to be rolled back so that the administrative agency that rendered the challenged administrative decision could notify the party with tax obligations correctly of the appeals available against that decision.

3.5 Enforcement procedure.- If a stay is not requested, late-payment interest accrues in respect of the length of time taken over and above a year to settle the claims

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

The auditors rendered an assessment decision, which was appealed by the taxpayer to the Valencia TEAR, despite which the taxpayer paid over the debt. After the claim was upheld, AEAT set aside the assessment decision and refunded the sums paid over, along with the relevant amount of late-payment interest.

The head of AEAT's audit department filed an ordinary appeal that was upheld by TEAC, which meant the debt was claimed once more from the taxpayer. In an appeal against enforcement, the taxpayer pleaded that late-payment interest should not have been charged for the length of time in excess of the one-year period the TEAR and TEAC had to settle the appeals filed against them.

TEAC set aside the appeal by concluding that the rule mentioned by the taxpayer only applies when a decision has been rendered to stay payment of the tax debt. In other words, insofar as the taxpayer had not applied for a stay of enforcement of the tax debt when it filed its claim, the accrual of late-payment interest cannot be restricted even if the economic-administrative tribunals have not decided within the specified time limit.

4. Resolution requests

4.1 Corporate income tax.- An exemption is not claimable for transfers of holding companies even if operating companies take part

Directorate General for Taxes. Resolution V1135-19 of May 23, 2019

The examined issue concerned an entity that transferred its interest in a second entity which qualified as a holding company for corporate income tax purposes. The assets of this holding company were wholly owned by a third entity that carried on an economic activity. According to the statements recorded in the deed of sale, the purchasers' intention was to take control of this third entity, even though, for various reasons, the acquired interest was in a holding company.

In relation to this transaction, it was asked whether it qualified for the exemption under article 21 of the Corporate Income Tax Law for the transfer of shares in entities.

The DGT recalled that this exemption is not applicable to gains obtained from the transfer of holding companies and accordingly denied entitlement to the exemption in the examined case, without considering for these purposes the fact that the company's main asset is the interest in a company that is not a holding company or that the purchaser's real intention is to acquire the entity owned by the holding company.

4.2 Corporate income tax.- Professional services provided free of charge by a shareholder to a company in non-statute barred years are shareholder contributions

Directorate General for Taxes. Resolution V1084-19 of May 21, 2019

The sole shareholder and sole director of a company did not receive any fees in respect of services provided to the entity. In an audit, a personal income tax adjustment was made for the period between 2010 and 2012 after pricing at arm's length the services provided by the taxpayer to the company.

Since the company had been set up in 2006 and no adjustments had been made for the period between 2006 and 2009, the taxpayer asked whether the company's accumulated reserves for the period between 2006 and 2009 could be treated for tax purposes as shareholder contributions, in an amount equal to the value of the free professional services.

The DGT confirmed that, for tax purposes, pricing at arm's length price the professional services provided free of charge by a shareholder to its company gives rise to:
(a) An amount of income from the shareholder's economic activities equal to the arm's length price of the professional services provided to the company.
(b) A deductible expense at the company in the same amount.
(c) A shareholder contribution equal to the amount not billed by the shareholder to the company, which therefore increases the cost price of the shareholder's ownership interest.
The DGT drew attention, however, to the fact that these adjustments are only allowable in relation to non-statute barred years. Therefore, the reserves relating to the 2006-2009 period cannot be treated as shareholder contributions for tax purposes.

4.3 Corporate income tax.- Clarification of various issues regarding the tax credit for hiring disabled workers

Directorate General for Taxes. Resolution V1044-19 of May 13, 2019

The Corporate Income Tax Law allows a tax credit to be claimed, amounting to €9,000 per person per year, in relation to the increase in the average number of disabled workers in the workforce with degrees of disability of 33% or greater and below 65%, with respect to the average number of workers of the same type in the immediately preceding period; or to €12,000 for workers with degrees of disability of 65% or greater.

In this resolution, the DGT clarified various elements of this tax credit:
(a) Firstly, it was asked whether, in cases where an employee included in the average number of disabled workers in earlier years goes on leave, the worker must continue to be included in that average number during the leave period or, by contrast, it must be considered that the worker leaves and is then re-registered as an employee (so the leave period does not count).
The DGT concluded that in these cases the worker on leave is not part of the average number of disabled workers (unless the worker may be treated as a registered employee during the leave period).

Otherwise, disabled workers who must be registered as a result of their reinstatement after a period of leave will start to be included in the calculation of the average number of disabled workers.
(b) Moreover, it was examined how part-time workers must be treated for the purpose of calculating the average number of disabled workers.
DGT considers that in these cases the proportion that the hired hours bear to full-time time hours must be included in the calculation.
(c) In relation to cases where the disabled workers enter a company as a result of a transfer of undertakings, the DGT concluded that they may be included to calculate the average number of disabled workers at the new company, and they stop being included in the calculation to be made by the transferring company.
(d) As for employees who become disabled while they are employed, they are allowed to be included in the calculation of the average number of disabled workers, even if they are already part of the workforce.
Similarly, if a worker's degree of disability falls to below 33%, that worker must stop being included in the calculation of the average number of disabled workers.
And if a worker's disability increases from between 33% and 64% to 65% or greater, that worker must be included in the average number for each group in proportion to the length of time they had each degree of disability.

4.4 Corporate income tax.- Nondeductible VAT is a deductible expense for corporate income tax purposes

Directorate General for Taxes. Resolution V1066-19 of May 2, 2019

The DGT has reiterated that input VAT incurred on purchases of goods and services that is not deductible under the VAT legislation is a deductible expense for corporate income tax purposes.

The DGT recalled that the Corporate Income Tax Law does not contain any special rule on this issue and therefore the accounting rule must be applied. Since the Spanish National Chart of Accounts states that non-deductible VAT forms part of the cost price of goods and services, it must be deductible to determine the corporate income tax base.

4.5 Personal income tax.- Subsistence expenses are deductible from income from economic activities

Directorate General for Taxes. Resolution V1290-19

Starting on January 1, 2018, the Personal Income Tax Law provides that a taxpayer's subsistence expenses incurred in the taxpayer's activity are deductible to determine net income under the direct assessment method if they were incurred in restaurant and hospitality establishments and were paid electronically, subject to certain limits on amount.

In relation to the ability to deduct these expenses, the DGT confirmed that, although as a rule deductible expenses are associated with revenues (it is not allowed to deduct expenses incurred in the taxpayer's private sphere), subsistence expenses are a special type of expense that may only be deducted on satisfaction of the requirements mentioned above, relating to amount and to (i) electronic payment and (ii) being incurred in certain types of establishments.

Although the DGT added that because the association of these expenses with revenues concerns factual circumstances, the circumstances and characteristics of the activity must be verified in these cases.

4.6 Personal income tax.- The tax credit for international double taxation cannot be claimed until the return has been filed in the other country

Directorate General for Taxes. Resolution V1163-19 of May 28, 2019

The DGT examined the case of a personal income taxpayer who travels to spend a few periods in the year in the UK to provide services in that country for the parent company of the taxpayer's employer, although the taxpayer's tax residence continues to be in Spain. The income obtained from the taxpayer's work (performed in both Spain and the UK) is paid in full by the taxpayer's employer in Spain and withholding tax is deducted in that country. However, according to article 14 of the Spain-UK tax treaty and UK domestic legislation, the UK parent company is required to withhold tax on income from that country under a PAYE (pay as you earn) system.

In relation to whether the UK tax can be deducted in Spain, the DGT concluded as follows:
(a) It started by recalling that, if the conditions set out in article 14.2 of the tax treaty were satisfied, the income received for the work performed in the UK would only be taxable in Spain. Therefore deduction of the tax withheld in the UK would not be able to be claimed in Spain, although the taxpayer could apply to the UK tax authorities for a refund.

(b) If, however, under the tax treaty provisions, the UK could tax the income received for work performed in that country, Spain would have to eliminate the double taxation. Because the UK PAYE income tax is equivalent to Spanish personal income tax, it is deductible from the Spanish personal income tax liability. The procedure for deducting the tax is as follows:
 Insofar as when the personal income tax return form is filed in Spain the relevant UK tax return has not yet been filed, no amount may be included on the self-assessment return in respect of a credit to avoid double taxation. This is regardless of whether tax has been withheld in that country.
 After the tax has been reported, the taxpayer may correct the originally filed self-assessment return.

4.7 Personal income tax.- The withholding percentage for directors' compensation is separate from whether the company is part of a group

Directorate General for Taxes. Resolution V0861-19 of April 23, 2019

Tax is withheld from the compensation received by directors and board members for their services, at 35%. The withholding percentage is 19%, however, where the compensation comes from entities whose net revenues in the latest taxable period ended before payment of the compensation are below €100,000.

In this resolution of the issue, the DGT clarified that the applicable withholding percentage will depend on the net revenues figure of the company where the director's or board member's services were provided, regardless of whether or not the company is part of a business group or regardless of its connection with other companies.

4.8 Personal income tax.- Inbound expatriates cannot benefit from the exemption for work performed abroad

Directorate General for Taxes. Resolution V0856-19 of April 23, 2019

The personal income tax legislation contains a special system allowing individuals acquiring tax residence in Spain as a result of moving to Spain to elect (subject to satisfying a number of requirements) to be taxed in respect of nonresident income tax, with certain specific conditions.

Those specific conditions are that the exemptions under article 14 of the Revised Nonresident Income Tax Law cannot be claimed, which refers to the exempt income mentioned in article 7 of the Personal Income Tax Law.

As a result, if the worker elects the special inbound expatriates' arrangement, that worker cannot benefit from the exemption contained in the Personal Income Tax Law for work performed abroad.

4.9 Nonresident income tax.- The sale of bitcoins is taxed in Spain if the company providing the storage service is located in Spain

Directorate General for Taxes. Resolution V1069-19 of May 20, 2019

The requesting party has been resident outside Spain since 2005. He has a certain number of bitcoins that he could sell in exchange for euros. He asked about the obligation to be taxed on that transaction in Spain. According to the DGT, sales of bitcoins in exchange for euros entail the receipt of income equal to the difference between the price obtained and the cost price, which qualifies as a capital gain or loss. This is treated as income obtained from the transfer of intangible movable property, and therefore treated as income obtained in Spain in the case of goods located in Spain.

For these purposes, the bitcoins are regarded as located in Spain if the entity with which the storage service of the codes that allow them to be managed and used on their website takes place is located in Spain.

4.10 Transfer and stamp tax.- Clarification as to who the taxable person is for the purposes of stamp tax on mortgage loans after the recent amendments

Directorate General for Taxes. Resolution V1133-19 of May 23, 2019

As a rule, the taxable person for stamp tax purpose is the person acquiring the asset or right and, in their absence, the parties who request or apply for the notarial documents, or the parties in whose interests they are issued. Royal Decree-Law 17/2018, however, has laid down a special rule determining that the taxable person in deeds for loans secured with a mortgage is the lender.

The following clarifications were made in relation to this amendment:
(a) The general rule applies to (i) loans or credit facilities with security other than a mortgage (pledge or antichresis rights, for example), (ii) the creation of mortgage rights not related to loans or credit facilities, (iii) finance lease transactions, and (iv) transactions for removing security related to mortgage loans or credit facilities (although the removal of a mortgage is exempt from tax).
(b) The special rule applies to transactions for the assignment of mortgage loans or credit facilities, although, because in these cases both transferor and transferee are lenders, it appears to make sense for the taxable person to be the transferee of the loan, in that they are the person who expresses financial strength in that acquisition.

The special rule also applies to transactions for novation of mortgage loans, irrespective of the exemption provided by Law 2/1994, of March 30, 1994, on subrogation and amendment of mortgage loans for these transactions.

Moreover, following the entry into force of the amendments introduced in relation to transfer and stamp tax by Royal Decree-Law 17/2018 and, later, by Law 5/2019, the exemption system for secured loans is as follows:
(a) Deeds for subrogation or novation of mortgage loans or credit facilities meeting the requirements set out in Law 2/1994: in these cases, insofar as the exemptions are associated with the item subject to the tax, they remain fully in force, regardless of whether the taxable person is now the lender, because it is the transaction itself that is exempt.
(b) Deeds for mortgage loans or credit facilities, signed with the developer or end customer, relating to officially sponsored housing where the other requirements set out in the legislation are met: as in the previous case, insofar as the exemption is associated with the item subject to the tax, it remains fully in force, regardless of whether the taxable person is now the lender, because it is the transaction itself that is exempt.
(c) Provision of security to fund purchases of properties where the seller is SAREB, companies majority owned by SAREB, or bank asset funds. In this case, there are three different scenarios:
 Exemption for the provision of security of any type, where the taxable person is SAREB:
This exemption is associated with the taxable person, because the taxable person must be SAREB. Therefore, any change to the taxable person also changes the meaning of the exemption. With the new special rule on determining the taxable person, SAREB is exempt for transactions on loans secured with a mortgage in which it acts as lender, but for transactions where it acts as borrower the exemption disappears.
This exemption ceased to be valid on June 16, 2019, although:
 In the case of deeds recording lending transactions secured with a mortgage, the exemption has ceased to be valid.
 The exemption continues to be applicable if security is provided in relation to preexisting loans or as security provided outside loans, in other words to secure other types of obligations.
 Exemption for the provision of security to fund purchases of other real estate assets from SAREB:

This exemption is associated with the item subject to the tax, and therefore remains fully in force regardless of the change of taxable person (which only takes place when the security provided is a mortgage and is simultaneous with the loan, in other words, when it involves a deed for a loan secured with a mortgage).
 Exemption for novations of loans covenanted by mutual agreement between lender and debtor, according to Law 2/1994, where lender status lies with Sociedad de Gestión de Activos Procedentes de la Reestructuración Bancaria:
This exemption is also associated with the item subject to the tax, and therefore remains in force.
 Exemption for transactions for mortgages provided to housing cooperatives:
This exemption is associated with the taxable person, and therefore has ceased to apply when the taxable person becomes the financial institution providing the loan. This exemption ceased to be valid on June 16, 2019.

5. Legislation

5.1 Amendment of a number of rules on keeping personal income tax records

The July 17, 2019 issue of the Official State Gazette (BOE) published Order HAC/773/2019 of June 28, 2019 on keeping personal income tax records, which has revised the formal, accounting and registration obligations for personal income taxpayers who are traders or professionals.

The main new change is the need, in notes added to record books for sales and revenues and purchases and costs, to state the taxpayer identification number of the other party to the transaction.
On its website, AEAT will publish a standard format for record books.

The order came into force on July 18, 2019, and will apply to notes added to record books for 2020 and the following years.

5.2 Publication of the annual equivalent rate for the third calendar quarter of 2019, for the purpose of characterizing certain financial assets for tax purposes

On June 28, 2019 the Official State Gazette (BOE) published the decision of June 26, 2019, 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 characterizing certain financial assets for tax purposes, this time for the third calendar quarter of 2019. The rates are as follows:
 Financial assets with terms of four years or less: -0.326 percent.
 Assets with terms between four and seven years: -0.146 percent.
 Assets with ten-year terms: 0.671 percent.
 Assets with fifteen-year terms: 0.706 percent.
 Assets with thirty-year terms: 1.695 percent.
In all other cases, the reference rate for the period closest to the period when the issuance is made will be applicable.

6. Miscellaneous

6.1 The Ministry of Finance has published various exchanges of letters and agreements in relation to a few tax treaties signed by Spain

The website of the Ministry of Finance (SEE HERE) has published exchanges of letters and agreements relating to a few tax treaties signed by Spain and which had not been published to date.

As a rule, they either have no major changes or had already been revised in the public materials of the Directorate General for Taxes. A few of the published documents, however, contain important changes:
(a) Agreement with the Netherlands: this is a mutual agreement in which it is decided that the treaty with the Netherlands will be applicable to investors in “closed” mutual funds. The agreement states that the agreement is intended to come into force in January 1, 2013.
(b) Agreement with the United Kingdom: this is a mutual agreement to settle the mode of application of the arbitration process provided by article 25.5 of the tax treaty with the United Kingdom. The agreement appears to have been reached in 2014.
(c) Exchange of letters with Chile: these are two letters dated August 23, 2017 and September 17, 2018, relating to (i) the most favored nation clause in paragraph X of the Protocol to the convention between both states, and to (ii) article 11 (interest) and article 12 (royalties) in the same treaty, which have been given new wording.It is to be noted that, on the basis of the most favored nation clause, since January 1, 2019 the withholding tax percentage at source has been reduced from 15% to 10% on the interest paid by the resident in one state to a resident in the other state (except for financial institutions, public finance and sale on credit which have specific reduced rates).
(d) Letter from the Spanish minister of finance and public authorities to his counterpart in Estonia, dated June 14, 2016, relating to modification of the treaty between both territories as a result of applying a most favored nation clause.

Specifically, the concept of permanent establishment under that clause is changed. Accordingly (i) the period of time after which a building site or construction or installation project or connected activities may be treated as a permanent establishment is increased from 9 months to 12; and (ii) the definition of permanent establishment no longer includes assembly projects.

6.2 AEAT publishes the draft legislative instruments to transpose the tax intermediaries directive (DAC 6)

AEAT made public on June 20 (i) the preliminary bill for the law amending the General Taxation Law and (ii) the bill for the royal decree amending the regulations on the application of taxes, through which it is sought to transpose into Spanish law Council Directive (EU) 2018/822 of May 25 2018 as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.
The contents of those instruments were discussed in our Spain Tax Alert dated June 20, 2019.