Tax Newsletter

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GARRIGUES

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1. Late-payment interest charged by the tax authorities is deductible

For some years the tax authorities and the courts have upheld as a general rule that late-payment interest was not deductible for corporate income tax purposes before the current Corporate Income Tax Law (Law 27/2014, of November 27, 20109) whereas it was deductible after that law came into force. The National Appellate Court has now come to the opposite conclusion.

In a judgment delivered on October 8, 2020, the National Appellate Court held that late-payment interest charged to the taxpayer as a result of an audit was deductible for corporate income tax purposes while the Revised Corporate Income Tax Law approved by Legislative Royal Decree 4/2004, of March 5, 2004 (TRLIS) was in force.

In its opinion, the letter of the TRLIS is no different from the letter of the law currently in force, in relation to which the Directorate General for Taxes (DGT) has already allowed the ability to deduct that item.

2. Judgments

2.1 Controlled transactions. - Supreme Court analyzes how to apply the rules in article 9.1 of tax treaties

Supreme Court. Judgment of November 5, 2020

Article 9.1 of the France-Spain tax treaty states that, in the case of associated enterprises, if the conditions made in their commercial or financial relations differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises (and were not so accrued), may be taxed.

In the case examined in this judgment shares had been purchased in a company and the tax authorities had found that there was no justification for the purchase so, based on the described article 9, they denied deduction of the impairment loss on investment securities.

The Supreme Court considered whether transactions between Spanish and French companies can be adjusted under article 9.1 directly, without having to employ the specified methods for determining arm's length values in controlled transactions.

After analyzing that article, the court noted that to be able to apply that article, it is needed: (i) first, to determine whether the arranged commercial or financial transactions have an explanation justifying them which is consistent with legal or economic reasoning; and (ii) after finding the answer, quantify the tax scope of the specific commercial or financial transaction for which justification has been recognized or accepted.

The court held that article 9.1 must be applied in conjunction with domestic rules, which may be transfer pricing or other rules. For example, article 16 of the Corporate Income Tax Law (now article 18) must be applied where rather than justification it is pricing that is questioned. However, where the actual justification of the legal transaction is disputed, the

rules relating to substance over form, conflict in the application of a tax provision or simulation (sham transactions) contained in the General Taxation Law (LGT) must be applied.

2.2 EU law/Transfer and Stamp Tax - Directives become directly applicable (vertical effect) if they have not been transposed in time

Supreme Court. Judgment of November 11, 2020

Council Directive 2008/7/EC of 12 February 2008 specified, among other measures, that capital contributions could not be taxed at over 1%. The directive did not allow capital contributions to be subject to a tax such as the Transfer and Stamp tax in the form of onerous transfers (which in Spain is TPO).

The time limit for transposing that directive ended on December 31, 2008. It was not transposed by Spanish lawmakers, however, until the amendment of article 108.2 of the Securities Market Law by Law 7/2012, of October 29, 2012, after which capital increases ceased to be subject to that tax.

At issue in this case was what treatment should be given to capital increases made between January 1, 2009 and December 31, 2012, in other words, between the end of the time period granted for transposing the directive into Spanish law and the date of its actual transposition.

The Supreme Court concluded that in these cases, rather than domestic law the directive had to be applied, in that, once the time limit for their transposition has ended, directives have direct vertical effect and may be relied on by private parties against the government.

2.3 Corporate income tax. - A director's compensation was not a related-party transaction while the Revised Corporate Income Tax Law (TRLIS) was in force

Valencia High Court. Judgment of July 30, 2020

Tax auditors adjusted the expense recorded by a company in respect of its directors' compensation by arguing that the compensation was not arm's length.

In contrast to the current Corporate Income Tax Law (LIS), the corporate income tax legislation then in force did not make an exemption from the requirement to be treated as a related-party transaction for the compensation paid by a company to its directors for their services as such.

Despite this, Valencia High Court concluded in this judgment that from the standpoint that corporate legislation stipulates the validity of any compensation determined by an entity for its directors, the actual provisions on that compensation imply that comparables are not able to be used to determine whether directors' compensation may be regarded as arm's length. As a result, the court held that directors' compensation did not fall within the definition of a related-party transaction.

The court added that, although the law applicable to the examined case did not contain any express provision in this respect, the current wording of the law nevertheless serves as an interpretation method.

2.4 Personal income tax. - Interest on refunds of incorrectly paid tax is not taxable for personal income tax purposes

Supreme Court. Judgment of December 03, 2020

As we discussed in our alert dated December 14, 2020, the Supreme Court has concluded that late-payment interest obtained by a personal income taxpayer in respect of refunds of incorrectly paid tax are not taxable because otherwise the interest would be prevented from serving its purpose as compensation.

2.5 Personal income tax. - Purchase of treasury shares by a company having voluntary reserves is subject to personal income tax for the shareholders partly as a capital gain and partly as income from movable capital

Supreme Court. Judgment of November 25, 2020

A company that had recorded reserves purchased treasury shares from a few of its shareholder individuals. Under the substance over form principle, the tax authorities argued that the price received by the shareholder individuals should be taxed partly as a capital gain and partly (on the amount relating to the reserves) as income from movable capital. The Supreme Court delivered the same conclusion.

2.6 VAT. - The supplying of goods in the Spanish VAT area may lead to having a fixed establishment for VAT purposes

Supreme Court. Judgment of November 11, 2020

It was examined whether the making of supplies of goods by a nonestablished entity may give rise to the existence of a fixed establishment for VAT purposes in the Spanish VAT area.

According to the Supreme Court, it may be concluded on the basis of an adequate interpretation of the VAT rules and case law, and of the case law of the Court of Justice of the European Union (CJEU), that the concept of fixed establishment is applicable not only to the making of supplies of services but also to supplies of goods.

The necessary requirements for finding the existence of a fixed establishment for VAT purposes are: (i) the existence of a fixed place of business in the VAT area with a sufficient degree of permanence, and (ii) an adequate structure in terms of human and technical resources. The court added to this that as a general rule subsidiaries are not fixed establishments of their parent companies for VAT purposes, because they have their own legal personality, unless they operate in an auxiliary role, in which case underlying economic substance should prevail over legal independence.

2.7 Transfer and Stamp tax. - Transactions qualifying for registration at the Personal Property Registry are taxable for stamp tax purposes, even if their registration is not mandatory

Supreme Court. Judgments of November 26, 2020 (appeals 3873/2019 and 3631/2019)

At issue was whether or not the transfer of a pharmacy is subject to stamp tax. The tax authorities argued that it was subject to stamp tax because the pharmacy is property qualifying for registration at the Personal Property Registry; whereas the appellant contended that since that registration is not mandatory in the Madrid autonomous community and does not create rights or effects against third parties, stamp tax is not chargeable.

The Supreme Court concluded that it was subject to stamp tax. It held that the simple fact of qualifying for registration at the Personal Property Registry makes it subject to stamp tax, regardless of whether registration is mandatory or voluntary, of whether or not the registration is made, and even of the effects conferred on it.

2.8 Transfer and Stamp tax. - Transfer and Stamp tax and Inheritance and Gift tax are not connected taxes

Supreme Court. Judgment of November 11, 2020

Following its amendment in 2015, the General Taxation Law defined a legal regime on "connected" tax obligations for the first time. Namely:

(a) The Law specifies (in article 68.9) that tax obligations are connected where any of their elements are affected or determined by those relating to another obligation or different period.

(b) It further specifies (in the same article 68.9) that if the statute of limitations for the right to determine the tax debt is tolled as a result of an assessment in relation to a tax obligation, the statute of limitations for the same right in relation to connected tax obligations of the same taxpayer (and for the taxpayer's right to request refunds) will be tolled, if certain tests are met.

(c) It adds (in article 225.3 and article 239.7, relating to decisions settling appeals for consideration and economic-administrative claims, respectively) that, when enforcing a decision fully or partially upholding an appeal or claim against the assessment of a tax obligation connected with another obligation of the same taxpayer, an adjustment must be made to the connected obligation other than the one that is challenged, in relation to which the tax authorities had applied the principles and elements on which they based the assessment of the tax obligation that is the subject matter of the claim.

The general nature of the definition of connected tax obligations may pose doubts over its scope; although it should not cause its scope to be extended to include cases not intended by the law.

In relation to this issue, the Supreme Court has rendered an interesting judgment examining a case in which a public deed had been executed recording the transfer of a building in exchange for a lifetime pension annuity. Under article 14.6 of the Revised Transfer and Stamp Tax Law, where the value of a transferred asset is higher by a certain percentage than the pension, it is taxable for transfer tax purposes to the extent of the value of the transferred asset and the remaining amount is treated as a gift subject to inheritance and gift tax.

The taxable person filed a transfer tax self-assessment, but not for inheritance and gift tax. Years later, the tax authorities assessed the portion relating to inheritance and gift tax arguing that the transfer tax self-assessment had tolled the statute of limitations for the right to assess inheritance and gift tax. The Supreme Court noted that the tax authorities had mistaken "alternative taxes" for "connected taxes". This case involved alternative taxes and therefore the statute of limitations for each tax is tolled separately.

It must be remembered that the tolling of the statute of limitations for connected taxes does not apply to taxable events before the amendment of the General Taxation Law in 2015.

2.9 Transfer and Stamp tax. - The tax authorities cannot use the appraised value for a mortgage to adjust the taxable amount for transfer tax purposes

Valencia High Court. **Judgment of July 23, 2020**

An audit was conducted of the value of a building to adjust the self-assessed transfer tax on the transfer. The tax authorities considered that the market value of the building (and therefore the taxable amount for transfer tax purposes) was its appraised value for the mortgage not the price paid and recorded in the deed for the transaction.

Basing its findings on the theory settled by the Supreme Court, Valencia High Court concluded that:

(a) The tax authorities have to give reasons for considering that the value reported by the taxable person in their self-assessment is not valid.

(b) The appraised value for the mortgage is connected with the mortgage liability and therefore cannot automatically be identified with the market value of the building on the transfer date.

2.10 Transfer and Stamp tax. - The revocation of a sale transaction causes Transfer tax to accrue again

Madrid High Court. **Judgment of July 20, 2020**

It was examined whether the revocation or termination of a sale agreement by mutual agreement may give entitlement to (i) correct the transfer tax self-assessment filed when the sale was completed and (ii) the resulting refund of incorrectly paid tax.

Madrid High Court took the view that the termination of a sale agreement does not alter the fact that the original agreement was completed and its effects took place. Therefore, termination of the agreement implies the existence of a new transfer. In short, besides the tax paid on the sale not being refundable, termination of the transaction causes tax to accrue again.

TEAC reached a similar conclusion in a **decision delivered on October 28, 2020** concerning a taxpayer who had filed two transfer tax self-assessments, relating to two sale agreements that were later terminated by mutual agreement between the parties, which was sanctioned by a court.

TEAC confirmed that the termination of the sales in this case is not really a court decision, because the court's only action was to sanction an agreement between buyer and seller. It therefore denied the right to obtain a refund of paid transfer tax.

2.11 Inheritance and gift tax. - The requirement relating to the main source of income must be satisfied as a general rule in the year of death, even if the person carrying out management activities was not the deceased

Supreme Court. Judgment of November 19, 2020

On the death of an individual, his offspring and wife received (among other assets) shares in family businesses. The management activities at those companies were carried out by his offspring. The heirs claimed the reduction in respect of a "family business" for inheritance and gift tax purposes.

Among the requirements for claiming this reduction, the management activities at the entity must be the main source of income for the deceased or any member of their family group.

In this judgment the court examined what period should be taken into account to determine satisfaction of this requirement where it occurs in relation to another member of the family group rather than the deceased. With reference to its judgment on April 5, 2019, the court summarized its view as follows:

(a) Although personal income tax for the heir is not brought forward to the year of the death, what must be substantiated is that until the decedent's death, the income received by the heir in respect of management activities at the family business exceed 50% of the other income in the general component of their taxable income.

(b) This general principle must be altered or refined according to principles of fairness where exceptional circumstances exist, such as, among others, (i) in cases involving farming operations in which their crops, by nature, cannot generate income until the second half of the year; and (ii) besides it has been substantiated that in earlier years the economic activity was their main source of income.

2.12 Excise tax on oil and gas. - The self-consumption of energy products that the producer has produced to make non-energy products that provide an economic benefit does not fall within the exemption concerning the chargeable event for the excise tax on oil and gas

Court of Justice of the European Union. Judgment of December 3, 2020. Case C-44/19

A Spanish company engaged in the production of energy products by the process of refining crude oil, and in this process generated products which it either sold to third parties or used in its other production processes.

According to the tax authorities the products used by the producer at its own premises for the purposes of production were subject to the excise tax on oil and gas. In a cassation appeal, the Supreme Court submitted a request to the CJEU (reference for a preliminary ruling) as to whether or not the self-consumption of energy products within the curtilage of the producer are included in the chargeable event for the tax.

The CJEU ruled that where an establishment producing energy products intended for use as motor fuel or as heating fuel consumes energy products which it has itself produced and that, by that process, it also inevitably obtains non-energy products from which economic value is derived, the portion of the consumption leading to the production of such non-energy products does not fall within the exemption concerning the chargeable event giving rise to the tax allowed in EU law.

2.13 Tax on increase in urban land value. - The liability in respect of the tax on increase in urban land value cannot exceed the increase in value obtained by the taxpayer

Supreme Court. Judgment of December 9, 2020

An entity transferred a property and obtained an increase in value amounting to slightly over €17 thousand (difference between the sale and purchase prices recorded in the relevant public deeds). As a result of that transaction, the entity had to pay over more than €76 thousand in respect of the tax on the increase in urban land value.

The Supreme Court noted in this judgment that according to the case law made in judgment number 126/2019 delivered by the Constitutional Court on October 31, 2019, the portion of the tax liability that exceeds the increase in value actually obtained must be held unconstitutional. And going even further it stated that the whole assessment (including the portion for which the tax liability matched the increase in value) is null and void because an assessment in which the tax liability uses up the whole increase in value is not legal. It has therefore recognized the taxable person's right to obtain a refund of the whole tax liability.

The court also explained that it is not its job to set the threshold above which the tax liability must be considered unconstitutional, but it recalled the lawmaker’s task to adapt the legal regime on the tax on increase in urban land value to the constitutional requirements expressed in recent years.

2.14 Tax on increase in urban land value. - Supreme Court disallows purchase price of real estate assets to be revised in line with Consumer Price Index to evidence absence of increase in land value

Supreme Court. Judgment of November 10, 2020

The Supreme Court rejected in this judgment that, for the purposes of the tax on increase in urban land value and to provide evidence that there had not been a taxable increase in land value, the purchase price could be revised in line with the CPI (or using any other inflation adjustment mechanism).

2.15 Tax on construction, installation projects and works. - Tax authorities can seek payment of the tax on construction, installation projects and works from the person who physically performs the work, even if the owner applied for the building permit

Supreme Court. Judgment of November 19, 2020

Under the legislation on the tax on construction, installation projects and works, the taxable person for the tax as taxpayer is the owner of the project. Moreover, the legislation confers substitute status on anyone who applies for or files the relevant permits or returns or, alternatively, anyone who physically performs the construction, installation or project work. The tax authorities may seek payment of the tax from the substitute, and the substitute is allowed to claim the tax they paid from the owner of the project.

In the case examined in this judgment the owner of a project had applied for a permit for the work to be performed. For that reason, the builder argued that he could not be considered a substitute and that all steps by the tax authorities in relation to the tax on construction, installation projects and works should be directed at the permit applicant.

The Supreme Court concluded, however, that under the legislation governing the tax on construction, installation projects and works, substitute status must be conferred on the taxpayer who performs the project, regardless of whether the owner of that project is the person who had first applied for the permit.

2.16 Tax on construction, installation projects and works. - The statute of limitations for applying for a refund of the tax on construction, installation projects and works starts to run when the tax authorities declare that the permit has expired or when the taxpayer states that it has withdrawn from or discontinued the project

Supreme Court. Judgments of November 4, 2020 and November 11, 2020

An entity obtained a permit to carry out a project and paid the associated tax on construction, installation projects and works. The work was not ultimately performed however so the entity applied for a refund of incorrectly paid tax, and attached to its application, among other documents, an expert report evidencing that the work had not been performed.

According to the local council, on the date when the entity filed the application, the statute of limitations for its right to obtain a refund had expired, on the basis that the period started to run when the permit expired because the work for which it was granted had not been performed.

The Supreme Court explained however that to determine when the statute of limitations for applying for a refund of incorrectly paid tax on construction, installation projects and works starts, there has to be either an express act of withdrawal or discontinuance by the applicant, or a formal act by the tax authorities declaring expiry of the permit, and neither of these existed in these proceedings.

2.17 Local authority fees. - A challenge of the assessment of a local authority fee indirectly allows the local authority tax ordinance to be challenged due to insufficient reasons in the technical and economic report preceding its approval

Supreme Court. Judgment of November 6, 2020

In this judgment, the Supreme Court clarified that:

(a) Local authority tax ordinances may be challenged indirectly through a challenge of tax assessments in which they were applied, on the basis of insufficient reasons in the technical and economic report that the tax authority must adopt before approval of those ordinances (reports issued to justify the economic indicators used to quantify the debt in respect of local authority fees).

(b) Nevertheless, in line with the method adopted in its earlier judgment of November 5, 2020, in an indirect appeal against a tax ordinance, the taxpayer must provide evidence of the relationship that exists between the specific illegality attributed to the tax ordinance and the unlawfulness of the tax assessment issued by applying that tax ordinance.

2.18 Administrative procedure. - Assessment notices that had failed to be successfully notified at an address cannot be taken as valid, where the subsequent notice of the initiation of enforcement proceedings is served correctly

Constitutional Court. Judgment of November 16, 2020 **(Official State Gazette (BOE) of December 22, 2020)**

Constitutional court judgment 160/2020, of November 16, 2020, was published in the Official State Gazette (BOE) on December 22, 2020.

The judgment concerns the case of a taxpayer who, after accepting an inheritance from his parents in May 2004, filed, in June 2004, an inheritance and gift tax self-assessment as sole heir. Following a data verification procedure, the tax authorities issued proposed assessments and gave notice of them in the Official Gazette for the Madrid Autonomous Community after several failed attempts at notifying them. They had attempted to notify them at the address appearing in the deed of acceptance of inheritance and in the filed self-assessment, and at the address of the taxpayer's parents, which also appeared in the self-assessment.

Later, following the absence of payment in the voluntary period, enforcement proceedings were initiated. The orders initiating enforced collection proceedings were notified to the taxpayer and received by him in October 2008, although at a different address from those where it had been attempted to notify him of the proposed assessments. This was the address appearing on the identity card, the local authority register of residents, or the personal income tax returns.

The taxable person challenged the orders initiating enforced collection proceedings, pleading failure to notify the debt in the voluntary payment period and expiry of the tax authorities' right to claim payment.

The National Appellate Court concluded that:

(a) The filing of the self-assessment of the tax tolled the statute of limitations, as did the attempts at notification of the commencement of the audit to determine the tax debt, due to being done within four years after the tax fell due.

(b) Those notification attempts were valid because they were made at the address appearing on the self-assessments and even at the address of the taxable person's parents and it was only after being unable to give notification at those addresses that the procedure under article 112 LGT was commenced (notification by appearance, through a notice in the relevant official gazette).

(c) The notification difficulties would have been resolved if the taxpayer had informed the Spanish tax agency (AEAT) of his current address as was his obligation.

In the subsequent appeal for protection of constitutional rights, the Constitutional Court held that the national appellate court judgment breaches the appellant's right to effective judicial protection. According to the court:

(a) The right to effective judicial protection is breached where a court judgment is based on incorrect reasoning, as long as the error is irrefutably verifiable and is a determining factor for the adopted decision.

(b) In the appealed judgment an interpretation was adopted that was not reasonable. It cannot be found in this case that the appellant failed to exercise the required standard of care, because his real address did appear on various registers and documents. It was contended against this that the taxable person was not informed of the tax proceeding in the voluntary payment period, but he was located later at his real address in the enforced collection and debt enforcement period; which shows that the tax authorities did not act with the required standard of care in addition to which they tried to benefit from their incorrect actions.

(c) The validity that the appealed judgment conferred on the defective notification conditioned the reasons underlying the court's response and the incorrect principle that was determined in the appealed judgment on the alleged expiry of the statute of limitations, thereby breaching the claimant's right to effective judicial protection.

2.19 Review procedure/Tax on economic activities. - Tax assessments are void if the tax authorities offer the taxpayer an incorrect regime to appeal against them

Supreme Court. Judgment of December 3, 2020

The Supreme Court confirmed in this judgment that the tax assessments that had been issued to an entity in an audit of the tax on economic activities were void because the local council that conducted the audit offered the taxpayer an incorrect regime for appealing against those assessments.

2.20 Financial liability of the legislating state. - Supreme Court examines the regime on the financial liability of the legislating state on the ground of rules contrary to EU law

Supreme Court. Judgment of November 18, 2020

The Supreme Court provided a detailed examination of the regime for claiming the financial liability of the government against the legislating state on the ground of rules held to be contrary to EU law and concluded as follows:

(a) The simple fact of approving a rule contrary to EU law does not trigger the financial liability of the government. The damage is caused by actually applying the rule.

(b) A breach of EU law may be declared by the national courts as well as by the CJEU.

(c) The filing of self-assessments may give rise to that liability, even if the government has not strictly speaking performed any act, because the government receives the self-assessment and accepts the payment.

(d) The law requires a final judgment to be obtained dismissing the appeals lodged by the taxpayer against the act causing the damage. This judgment may be obtained, in particular, in a proceeding to request a refund of incorrectly paid tax brought against the self-assessment in which the rule contrary to EU law was applied.

(e) The time periods for claiming (a year from publication of the judgment declaring the rule contrary to EU law and five years following the date the damage occurred) start to run when the judgment becomes final.

2.21 Enforcement of decisions. - Before the 2015 reform of the LGT, failure to meet the one month period for enforcing a decision arising from a management procedure did not render the enforcement decision null or voidable

Supreme Court. Judgment of November 19, 2020

The Supreme Court examined the rules on the enforcement of economic-administrative tribunals' decisions relating to administrative acts arising from procedures by tax management bodies.

The court noted that in its pre-2015 wording the General Taxation Law did not have any specific provisions on the enforcement of decisions. These provisions were in the Review Regulations, approved by Royal Decree 520/2005, of May 13, 2005, which contained a general article applicable to all review decisions, whatever the procedure in which they were delivered (article 66), and another specific article for those arising from economic-administrative claims (article 68). The provisions in article 66 were later included in article 239.3 of the General Taxation Law which, for timing reasons, was not applicable in the examined case.

The specific issues raised in this judgment were:

(a) Whether the one-month time period contained in article 66.2 of the Review Regulations for the enforcement of a decision arising from a tax management procedure must be taken to start when the economic-administrative tribunal's decision was registered at AEAT or when it entered the register of the specific body responsible for its enforcement.

(b) Whether failure to meet that one-month time period renders the administrative measure voidable or a simple irregularity that is not an invalidating factor, with the legal effects set out in the legislation in force, such as being prevented from seeking late-payment interest from when the government fails to meet the time period.

In relation to the first issue, the court held that the phrase *"register of the body responsible for its enforcement"* must be interpreted broadly, in other words, to include the tax authorities as a whole, and therefore the one-month time period must be taken to run from when the decision to be enforced is entered on AEAT's register. Any other interpretation would leave determining whether the time period had been met to the "discretion" of the government and would go against the principle of good administration in the field of the management and review of taxes. Taxpayers' rights cannot depend on an internal register held by the tax authorities (that of the body responsible for enforcement) which is opaque for the taxpayer and subject to any internal organizational decisions made from time to time by their governing bodies.

In relation to the second issue, the court concluded that enforcement outside the time period does not have the effect of rendering the enforcement decision either null or voidable, but rather only prevents the ability to seek late-payment interest from when the government fails to meet that time period. This is not an obstacle to a different interpretation being made of the current article 239.3 of the General Taxation Law.

3. Decisions

3.1 Corporate Income Tax. - While the Revised Corporate Income Tax Law was in force it was not required carry on an economic or business activity in order to claim the regime for enterprises of a reduced size

Central Economic-Administrative Tribunal. Decision of October 27, 2020

Legislative Royal Decree 4/2004, of March 5, 2004, approving the Revised Corporate Income Tax Law, contained a special regime for enterprises of a reduced size. Under article 108, the regime could be claimed by corporate income tax payers whose net revenues in the previous tax period were under €10 million (special rules were provided for

calculating that amount for newly created enterprises and entities belonging to a group of companies).

TEAC concluded from this rule that, when the Revised Corporate Income Tax Law was in force, the regime could be claimed by any taxpayers which satisfied that quantitative requirement, even if they did not carry on an economic or business activity.

By doing so, TEAC adopted the principle determined by the Supreme Court in judgments dated **July 18, 2019** (appeal number 5873), **March 11, 2020** (appeal number 6299/2017) and **May 19, 2020** (appeal number 4236/2018).

It must be remembered that the current Law 27/2014, of November 27, 2014, does specify that the entity must not be a holding company.

3.2 Personal income tax. - If before a dismissal the employer had agreed with the worker for them to continue providing the same services using a company, relief cannot be claimed when calculating the tax to be withheld from the severance payment

Central Economic-Administrative Tribunal. **Decision of June 29, 2020**

A worker received a severance payment which was treated as partly exempt by both employer (on paying the severance) and worker (on completing their return). In procedures conducted on the company, the tax authorities concluded that the relief was not applicable because there had been no actual severing of ties between company and employee. The tax auditors observed that, before the dismissal, the employer and the worker had agreed that the worker could continue providing the same services through a company (which the tax authorities characterized as "interposed"). As a result the auditors issued an assessment due to arguing that a withholding deficiency had taken place.

TEAC shared the auditors' conclusions:

(a) Firstly, it found that no actual severing of ties had taken place between worker and employer, because the worker continued to have a relationship with the company, by providing services through an interposed company.

(b) It concluded further that, because the parties had agreed to continue having the same services provided as before, a tax adjustment could be made to the tax liability of the payer of the severance not just to that of the worker.

3.3 Personal income tax. - The absence of revenues does not prevent it being considered that an economic activity existed and that the expenses incurred in that activity are deductible

Murcia Regional Economic-Administrative Tribunal. **Decision of June 1, 2020**

The tax authorities disallowed the deduction for personal income tax purposes of expenses incurred in an economic activity, because no revenues had been generated in the period concerned. According to them, the matching principle had not been met.

Against this view, Murcia TEAR recalled that, under the Supreme Court's case law, the personal income tax legislation does not condition the existence of economic activity on the obtaining of gains or losses in the period, instead only on the existence of an organization of work and capital for their own account with the intention of acting in the market for goods and services.

Therefore, while any expenses that may be considered to be incurred for private purposes rather than for the activity, are not deductible, there is no general restriction on deducting expenses if they did not generate revenues.

3.4 Personal income tax. - Partial disclosure of assets and rights on the special tax return (form 750), which were not included on the later form 720, gives rise, in principle, to an unjustified capital gain without a penalty in this case

Catalan Regional Economic-Administrative Tribunal. **Decision of December 12, 2019**

The person with tax obligations disclosed a bank account in Switzerland by filing the special tax return (form 750) in 2012. The disclosure was partial, however, because the individual only included part of the balance of the account (the amount that was not statute barred). On their 2011 wealth tax return filed in 2012 they did report the whole balance of the account. Despite this, they did not file the return for assets abroad (form 720) for fiscal year 2012. The first time they filed form 720 was for fiscal year 2013.

The tax auditors concluded that, because the individual had not included the information on the account on form 720 in 2012, an unjustified capital gain arose under article 39.2 of the Nonresident Income Tax Law. They also imposed a penalty for a serious tax infringement.

The Catalan TEAR (referring to a TEAC decision dated February 14, 2019) concluded, firstly, that the Spanish legislation on the obligation to disclose assets abroad does not breach EU law and, specifically, the free movement of capital and persons.

After entering into an analysis of the specific case, the TEAR confirmed the disclosure for personal income tax purposes. The tribunal stated that, in the examined case, to avoid the attribution of an unjustified capital gain, only the portion of the asset included on the special tax return (form 750) can be treated as reported income. There is no change to this conclusion if a portion of the asset had not been reported on that form 750 (due to being statute barred) in line with the guidelines specified in the Report by the General Directorate for Taxes dated June 27, 2012.

According to the tribunal, the treatment of the statute of limitations is different in relation to the special tax return from that for a breach of the disclosure obligation relating to form 720, probably due to the different aims of both mechanisms (to contribute to the success of that instrument due to collection needs, for the first, and the fight against tax fraud, for the second). Moreover, before the special tax return was filed (in November 2012, in this case) Law 7/2012 had already been published laying down the obligation to report assets abroad on form 720, so it cannot be argued that any expectation had been violated.

The penalty was nevertheless overturned because the tax authorities had failed to provide evidence of the fault element and, additionally, in this case the account had been reported on form 720 in 2013 and on the wealth tax return for 2012. In this respect, the Catalan

TEAR noted, in line with the TEAC decision mentioned above, that the conduct of someone who, knowingly and willingly, concealed assets abroad and did not file the information return cannot be treated in the same way as that of someone who had no such intention and performed their obligation, even if they did so outside the time limit in a later period.

3.5 VAT. - The standard VAT rate is chargeable on home repair services covered by insurance contracts

Central Economic-Administrative Tribunal. Decision of November 19, 2020 (reiterated principle)

The examined case concerned an entity which, among other activities, provided services for managing repairs at the homes of private parties covered by insurance policies. The entity managed the repairs of insured damage by hiring subcontractors.

The tax auditors questioned the reduced 10% VAT charge (as opposed to the standard 21%) on the repair services because, in their opinion, those services should be treated as if they were provided to the insurance company not to the private parties, in addition to which they considered a penalty should be imposed for charging that reduced rate.

TEAC concluded that:

(c) The service provided by the appellant entity covers a number of elements that benefit both the insureds and the insurance companies.

(d) The customer is the individual who makes private use of the home where the type of compensation under the insurance policy is the payment of indemnification by the insurance company; whereas it is the insurance company if the indemnification is replaced by the repair or replacement of the damaged item.

(e) Since the types of compensation described above are not similar from the standpoint of the average consumer - because each of them implies a materially different type of action - the fact of charging different tax rates in one case and another cannot be held to be contrary to the neutrality principle governing the tax.

Lastly, on the subject of the penalty, the tribunal concluded that no reasonable doubt may be observed in relation to the fact of charging the standard rate on the repair services provided, and therefore it confirmed the challenged penalty decisions.

3.6 VAT. - Indemnification for termination of contract that covers the cost of completed works and installations is subject to VAT

Central Economic-Administrative Tribunal. Decision of July 22, 2020

As a result of a breach attributable to the government in a concession agreement for the construction and operation of a desalination plant, the concession-holder sought termination of the concession agreement and indemnification for the damage and losses caused. The Council of State issued a favorable report on termination of the agreement and payment of indemnification to the recipient of the concession, equal to the price of the unpaid completed works and installations. As a result, the concession holder issued an

invoice on which it charged VAT, which was rejected by the government by arguing that VAT was not chargeable because it was indemnification.

TEAC recalled that the VAT legislation does not make every type of indemnification exempt from being included in the taxable amount, instead only indemnification that cannot be regarded as consideration for supplies of goods or services. And, on the basis of various judgments by the CJEU, it concluded that it is lawful for the concession holder to charge the tax, because the sought amounts do not relate to damage and losses incurred in the performance of the failed project, instead to the price of completed works and installations.

3.7 VAT. - TEAC examines effective use or enjoyment rule for electronically supplied advertising services

Central Economic-Administrative Tribunal. Decision of July 22, 2020 (reiterated principle)

In an audit, the tax authorities concluded that, as a general rule, electronically supplied advertising services for customers (advertising agencies) that are not established in the Spanish VAT area are in principle supplied outside that area. If the advertisements are inserted on websites in the ES domain, in other words, in Spanish, and the recipients of the messages may be surfers located in the Spanish VAT area, then the place of supply of those services (or part of them at least) must be the Spanish VAT area.

On the basis of the CJEU's case law, TEAC concluded that:

(a) The country in which the effective use and enjoyment of a service of this type takes place is that from which the advertising messages are disseminated, regardless of whether use is made of them by the original customer in the transaction or a customer further down the chain.

(b) The effective use clause is allowed to be applied in proportion to the supplied services that may be regarded as effectively used in the Spanish VAT area. Due to the particular characteristics of the services, it is allowed in particular to use percentages estimated by reference to the electronic traffic associated with the transactions.

3.8 Canary Islands general indirect tax/Transfer and Stamp tax. - A leased hotel is not an independent business unit

Central Economic-Administrative Tribunal. Decision of October 21, 2020

A company bought a hotel establishment that the former owner had leased out to another entity, which operated the hotel with its own personnel. The deed recorded a waiver of exemption from the Canary Island general indirect tax, so it was considered that the transfer was subject to stamp tax rather than transfer tax.

The tax auditors considered that the transaction was not subject to the Canary Islands general indirect tax, because they concluded that the hotel establishment was an independent business unit. Therefore, according to the tax auditors, the transaction was subject to transfer tax rather than stamp tax.

Against this view, TEAC concluded that the transferred hotel establishment was not an independent business unit, because the human resources needed to carry on the business by its own means had not been transferred.

3.9 Management procedure. - Incorrect use of the data verification procedure renders all previously performed acts null and void ab initio

Central Economic-Administrative Tribunal. Decision of June 11, 2020 and Decision of October 27, 2020

In these two decisions, TEAC held that incorrect use of the data verification procedure renders all previously performed acts null and void ab initio. The court stated, in opposition to what it had said in earlier decisions, that, to reach this conclusion, it is not necessary for a direct, manifest, evident and patent breach of the rules on that procedure to have occurred, or for the taxpayer to have been denied of their right to defense.

As a result of the procedure being rendered void, neither the acts performed within it, nor the economic-administrative claims filed against them, toll the statute of limitations for the government's right to assess.

Additionally, in a decision dated October 27, 2020, TEAC recalled that the data verification procedure is not a suitable channel for audits relating to facts other than those reported on the self-assessment filed by the taxpayer.

This change of principle by TEAC results from the Supreme Court's determinations on this issue, most particularly in its judgment of May 19, 2020 (appeal number 3940/2017).

3.10 Management procedure. - Absence of right-to-be-heard period in procedures for refunds to non-established traders or professionals is a ground for rendering the administrative acts made in those procedures null and void

Central Economic-Administrative Tribunal. Decisions of October 21, 2020 in claims 00/00275/2018/00/00 and 00/05745/2017/00/00

In the cases examined by TEAC in these decisions an application for an input VAT refund had been filed by a number of traders or professionals not established in the Spanish VAT area, under the special procedure allowed for this purpose in the VAT law.

The tax authorities denied the refunds without first allowing interested parties the right to be heard.

TEAC concluded that, even though the special refund procedure for non-established parties does not expressly state that interested parties must be allowed the right to be heard before a decision is delivered, that right still has to be granted, because otherwise the claimants' basic rights would be denied.

All these arguments are consistent with the CJEU's case law that the right to defense is a general principle of EU law which applies where the authorities are minded to adopt a measure which will adversely affect an individual.

3.11 Enforcement procedure. - The collection of a tax debt must be suspended where a decision has yet to be rendered on an ancillary proceeding brought against a decision not admitting a suspension request

Central Economic-Administrative Tribunal. Decision of October 19, 2020

In this decision, TEAC concluded that where an application for a stay of enforcement of a tax debt has been filed and was not admitted, and an ancillary proceeding is later brought, enforced collection proceedings cannot be initiated until a decision has been rendered on that ancillary proceeding. Therefore, an order initiating enforced collection proceedings in these circumstances is null and void.

TEAC based this view on the principle determined by the Supreme Court in a **judgment dated October 15, 2020** (appeal number 1652/2019).

3.12 Review procedure. - The length of time periods for bringing action for annulment must take into account the suspension in place between March 14 and May 30 2020 as a result of the state of emergency

Central Economic-Administrative Tribunal. Decision of October 21, 2020

In opposition to dismissal of an enforcement appeal received on March 6, 2020, the person concerned brought action for annulment on May 5, 2020.

TEAC recalled that action for annulment must be brought within 15 days. It concluded however that in this case the action had not been brought outside the time limit, because of the suspension approved by Royal Decree-law 463/2020, of March 14, 2020 and amended by Royal Decree-Law 11/2020, of March 31, 2020. This legislation suspended or paused limitation and expiry periods between March 14 and May 30, 2020.

As a result, TEAC concluded that the action for annulment was brought within the time limit and entered into examining the facts of the case.

4. Requests for resolution

4.1 Corporate Income Tax. - New requests for resolution on economic reasons for claiming the tax neutrality regime

Directorate General for Taxes. Resolutions: V3099-20 of October 16, 2020; V3213-20 of October 27, 2020; and V3229-20 of October 28, 2020

The DGT has issued new resolutions in reply to requests concerning the tax neutrality regime and concluded that the following economic reasons are valid for claiming it:

(a) In a nonmonetary contribution of shares in entity A to a holding company, the performance of a shareholders' agreement requiring that contribution to be made was accepted as a valid economic reason. It was added to this that the contribution simplifies and enables performance of the obligations assumed by the founding shareholders in relation to corporate governance at entity A and the divestment

program scheduled to be carried out at a future date, by the founding shareholders and the majority shareholder exercising cross call and put options.

(b) In a share exchange, it confirmed that the fact that after the exchange the contributed entity and the beneficiary of the contribution would form a tax group does not prevent the regime being claimed, if there are reasons (such as a restructuring or rationalization of activities) justifying the transaction.

(c) Lastly, in a merger where an indebted entity absorbs another entity created to obtain a "developer loan" (specific finance mechanism for entities engaged in developing real estate), a valid reason is considered to exist if the merger is carried out to meet the condition imposed by financial institutions for providing that finance.

4.2 Personal income tax. - Interest paid on a loan made to transfer the obtained sum to a family member is not deductible

Directorate General for Taxes. Resolution V3180-20 of October 22, 2020

The requesting party wished to provide a loan to a few family members, and to do so that party had applied for a loan from a financial institution. Both loans were provided subject to the same terms and conditions. The reason for the transaction is that the financial institution would not provide the loan to the family member whereas it would to the requesting party. The family member was going to use the loan in their business activity.

The DGT specified the following principles:

(a) Any interest obtained by the requesting party on the loan made to the family member is treated as income from movable capital from the transfer of own funds to third parties.

(b) Whereas any interest that the requesting party has to pay to the financial institution would not be deductible.

(c) Lastly, because the loan to be provided to the family member would be used in a business for their own account carried on by that family member/borrower, they would have a withholding obligation so the required amount of tax would have to be withheld from interest payments.

4.3 Personal income tax. - Providing a prepaid card to employees is compensation in kind

Directorate General for Taxes. Resolution V3009-20 of October 6, 2020

An entity pays out bonuses by giving employees two types of cards:

(a) A prepaid card issued by the employer and bearing the employee's name, which may be used to buy any goods or services at establishments where it is an accepted payment method (card A).

(b) A prepaid card with no name issued by a retail establishment, which may be used as a payment method only in that establishment (card B).

According to the DGT, if the cards could be classed as electronic money, they would qualify as monetary compensation. Otherwise, they would be given as compensation in kind.

After analyzing the Electronic Money Law, the DGT concluded that neither of the cards may be treated as electronic money. Therefore, it must be interpreted that compensation in kind takes place when the cards are awarded, which must be priced at their normal market value, and the company is required to pay withholding tax on payments in kind.

4.4 Nonresident income tax. - The simple fact of distributing products in Spain does not imply the existence of a permanent establishment in Spain, even if the company has a logistics operator in this country

Directorate General for Taxes. Resolution V3248-20 of October 30, 2020

A Hong Kong resident company engages in exporting the products manufactured by the group from its headquarters located in China to all the countries in which the group operates, including Spain, where it has a subsidiary acting as a low risk local distributor.

The arrangement has the following main characteristics:

(a) The Hong Kong company does not have any employees in Spain and signs an agreement with a logistics operator, which provides logistics services for storing and transporting the products.

(b) The logistics operator is an independent third party, who also works for other customers and only uses part of its warehouse to provide services to the Chinese group.

(c) The Chinese group's staff can only enter the warehouse if they have a permit from the logistics operator. Visits (which must always be accompanied) are only allowed in specific circumstances.

(d) While stored at the warehouse, the products belong to the Hong Kong company. In other words, ownership of the products transfers from the Hong Kong company to the Spanish subsidiary when they leave the warehouse to be delivered to the end customer.

(e) The Spanish subsidiary does not have any legal or implied power to bind the Hong Kong company.

(f) The Hong Kong company does not have a dependent agent in Spain with the authority to conclude contracts on its behalf.

Based on these characteristics, the DGT rejected that the logistics operator's premises implied that the nonresident had a fixed place of business available to it in Spain for the performance of that activity. It also rejected that the nonresident entity acted in Spain through an agent authorized to conclude contracts, in the name and on behalf of the taxpayer, and who habitually exercises such powers (dependent agent), insofar as neither the Spanish subsidiary nor any of the persons acting on its behalf have the authority to negotiate or conclude contracts in the name and on behalf of the Hong Kong company.

Therefore, the Hong Kong company does not have a permanent establishment in Spain for nonresident income tax purposes.

4.5 Wealth tax. - Debts incurred to buy goods based in Spain are deductible

Directorate General for Taxes. Resolution V3112-20 of October 19, 2021

A German tax resident was negotiating to purchase a property in Mallorca, which was to be funded by a mortgage from a German financial institution. As a nonresident in Spain, but with property located in that country, he is required to file a wealth tax return as a nonresident taxpayer.

The DGT noted that their debt is deductible on the wealth tax return if it is used to purchase a property located in Spain (and as long as evidence of this fact is provided by any legally valid means of proof).

5. Legislation

5.1 General State Budget Law for 2021 is published

The General Budget Law for 2021, was published in the Official State Gazette (BOE) on December 31, 2020. For a summary of the main new tax legislation, see our **alert**.

5.2 Approval of the Canary Islands General Budget Law for 2021

The Canary Islands General Budget Law for 2021 was published in the Canary Islands Official Gazette on December 31, 2020. We summarized the new tax legislation in our **alert**.

5.3 Amendments made to the country-by-country report (form 231) and the annual summary of personal income tax withholdings (form 190)

Order HAC/1285/2020, of December 29, 2020, was published in the Official State Gazette on December 31, 2020 and makes amendments to forms 231 and 190.

(a) Form 231 (for the country-by-country report): Its schedule has been amended to reflect the changes proposed by the OECD regarding the exchange of information in the country-by-country report. The OECD has indicated that information must be exchanged on entities resident in Spain and directly or indirectly dependent on a non-Spanish resident entity which is not itself dependent on another, as well as on the permanent establishments in Spain of nonresident entities, where the nonresident entity refused to supply all or part of the information relating to the group.

(b) Form 190 (annual summary of personal income tax withholdings): New subcodes have been added to allow the inclusion of both minimum income support and guaranteed minimum income payments as exempt income.

The order entered into force on January 1, 2021 and the amendments relating to form 231 and form 190 will apply for the first time on forms with filing periods beginning on that date.

5.4 LGT has been amended to transpose DAC6

Law 10/2020, of December 29, 2020, amending the General Taxation Law to transpose Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements (DAC6) was published in the Official State Gazette (BOE) on December 30, 2020.

We summarized the contents of this law in our **alert** dated December 30, 2020.

5.5 The time period for making the investments covered by the Reserve for Investments in the Canary Islands in 2016 has been extended by a year

As we reported in our **alert**, in the December 30, 2020 edition of the Official State Gazette (BOE) a year has been added to the time period for the associated investments to be made by taxpayers who had recorded amounts in the Reserve for Investments in the Canary Islands in periods that began in 2016.

5.6 Amendments made to the Corporate Income Tax Regulations in relation to hedging credit risk at financial institutions and the country-by-country reporting rules

Royal Decree 1178/2020, of December 29, 2020, amending the Corporate Income Tax Regulations, approved by Royal Decree 634/2015, of July 10, 2015, was published in the Official State Gazette on December 30, 2020.

This royal decree adapts the terminology used in article 8 and article 9 of the Corporate Income Tax Regulations in relation to hedging credit risk at financial institutions, to the new accounting terms used by Bank of Spain Circular 4/2017 of November 27, 2017.

It also amends article 13 of the Corporate Income Tax Regulations to specify the country-by-country reporting rules related to the provisions in Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory exchange of information in the field of taxation, including the rules on the filing of country-by-country reports by multinational groups and, in particular, in relation to Spanish resident entities obtaining information from their foreign parent companies.

These amendments came into force on December 31, 2020 and will take effect for tax periods beginning on or after January 1, 2020 and that have not ended on December 31, 2020.

5.7 Amendments made to VAT self-assessment forms 303, 322 and 353 and form 349 for the statement of intra-community transactions

The December 30, 2020 edition of the Official State Gazette (BOE) published Order HAC/1274/2020, of December 28, 2020, amending various VAT forms (303, 322 and 353) and form 349 for the statement of intra-Community transactions.

These are mostly technical amendments. Notable non-technical amendments are the addition on form 353 of a new box for identifying groups subject to the provincial legislation for the Basque Country and Navarra; and on form 349 the codification of the VAT ID number has been changed to allow intra-community transactions to be stated correctly following Brexit.

Added amendments will come into force on December 31, 2020 and apply for the first time to VAT self-assessments for assessment periods beginning on or after January 1, 2021 and to recapitulative statements of intra-community transactions relating to 2021.

5.8 Amendments made to various orders relating to information returns

Order HAC/1276/2020, of December 28, amending certain information returns was published in the Official State Gazette (BOE) on December 30, 2020.

It contains the following amendments:

(a) **Form 180** (the information return for the annual summary of withholdings from lease payments in cash and in kind on urban properties): The status codes for properties have been adapted to the new status of cadastral reference numbers included on other forms, to allow a distinction between properties with a cadastral reference number from the Basque Country or from the Province of Navarra (hitherto included with the same code).

(b) **Form 198** (annual return for transactions with financial assets and other marketable securities): As a result of the agreement signed between AEAT and the General Council of Spanish Notaries on February 3, 2020, it has been specified that on or after 2022 the obligation to file this form will be deemed to be met by sending the equivalent electronic information contained in the unified notarial index.

(c) **Form 182** (information return for gifts, donations and contributions received). Various fields are updated to improve the automatic inclusion and transfer of information to the personal income tax return.

(d) **Form 189** (annual information return on securities, insurance and income). The "number of securities" field is amended to allow more than two decimals to be specified; and a new field is included for "nominal amount of the securities", to enhance the information needed for the taxpayer assistance tool for investment securities called "*Cartera de Valores*". However, this last amendment will enter into force when article 39 of Royal Decree 1065/2007, of July 27, 2007, has been amended.

(e) **Form 187** (information return for shares representing the capital or the equity of collective investment vehicles and annual summary of personal income tax, corporate income tax and nonresident income tax withholdings, in relation to income or capital gains obtained as a result of transfers or redemptions of those shares and subscription rights). A new field is included for "advance payment by shareholder/investor", to identify transactions in which no withholding obligation is applicable and an advance payment has to be made by the shareholder or investor (to be reported on form 117).

(f) **Form 289** (annual information return for financial accounts in the field of mutual assistance): The contents of annex I and annex II to the order on form 289 have been updated to reflect the current list of countries committed to exchange of information, and to include on the list the countries with which information will be exchanged in and after 2021.

This order came into force on December 30, 2020 and will apply for the first time to the annual returns for 2020 which will be filed in 2021.

5.9 Form 602 approved for self-assessment of government-run gambling fee

Royal Decree-Law 28/2020, of September 22, 2020, on distance working, specified that the powers related to managing and collecting the government-run gambling fee will be exercised by AEAT. As a result of this change of powers, a new form 602 has now been approved, for self-assessment of the government-run gambling fee, in Order HAC/1277/2020, of December 28, 2020 (published on December 30, 2020),

This form has to be filed electronically in all cases with an electronic certificate or PIN (Cl@ve PIN).

The order will enter into force on December 31, 2020 and apply to chargeable events giving rise to fees falling due on or after this date. Any fees that fell due before December 31, 2020 are subject to the Decision of June 20, 2014, specifying the procedure for electronic assessment and payment of fee 099, the government-run gambling fee.

5.10 New application form approved for refunds of the Canary Islands general indirect tax to parties not established in the Canary Islands

The Order of December 14, 2020, approving form 414 for applications for refunds of the Canary Islands general indirect tax by traders and professionals not established in the Canary Islands was published on December 29, 2020.

The form is required to be filed by:

(a) Traders or professionals not established in an EU member state who apply for a refund of Canary Islands general indirect tax and the implicit tax cost incurred, as long as they are not entitled to deduct the tax and, potentially, to a refund of tax on occasional self-assessments.

Before filing the refund application, they must send to the relevant body at the Canary Islands tax agency, by certified mail, the original power of attorney for the Spanish resident legal representative, executed before a public authenticating official.

(b) Any traders or professionals established in an EU member state who have not signed up to use the electronic portal for the electronic filing of refund applications.

The form has to be filed electronically and is available on the website of the Canary Islands tax agency (Agencia Tributaria Canaria). It also makes permission to use the electronic address system mandatory for notices to all refund applicants filing that form 414.

Moreover, if the taxable amount appearing on each invoice or import document to which the refund application relates exceeds €1,000, an electronic copy of those invoices or import documents has to be attached to the form.

The new form will come into effect on January 1, 2021 and must be filed for quarterly and annual refund applications for 2020 and thereafter.

5.11 The average selling prices for 2021 of certain modes of transport for the purpose of auditing values have been published

As happens every year, the government has approved the average selling prices applicable in the management of transfer and stamp tax, inheritance and gift tax and the special tax on certain modes of transport, this year in Order HAC/1275/2020, of December 28, 2020. The Order was published in the Official State Gazette (BOE) on December 30, 2020.

5.12 List of products subject to the fee on imports and supplies of goods in the Canary Islands has been amended

The December 28, 2020 edition of the Official State Gazette (BOE) published Royal Decree-Law 21/2020, of December 23, 2020, adapting the lists of products falling within the chargeable event for the fee on imports and supplies of goods in the Canary Islands (AIEM). See our **alert** published on the same date.

5.13 New tax measures approved to reduce the economic impact of the pandemic

The December 23, 2020 edition of the Official State Gazette (BOE) published Royal Decree-Law 35/2020, of December 22, 2020, which to reduce the economic impact of Covid-19 has (i) approved deferred tax payments for small and medium-sized companies and the self-employed, (ii) allowed reductions for objective assessment personal income tax regimes and simplified VAT and Canary Islands general indirect tax schemes and made the time periods related to those regimes more flexible as well as those related to the VAT scheme for agriculture, livestock and fishing; and, among other additional amendments, and (iii) specified that the personal income tax relief for meal vouchers applies to employees who are working from home.

This decree-law is analyzed in detail in our alert dated **December 23, 2020**.

5.14 Nomenclature of countries and territories in the intrastat system has been amended

The nomenclature of countries and territories in the intrastat system was adapted to the new EU nomenclature included in Annex I to Commission Implementing regulation (EU) 2020/1470 of 12 October 2020 in the Decision of December 15, 2020 by the Department of Customs and Excise and Special Taxes at AEAT published in the Official State Gazette (BOE) on December 23, 2020.

This amendment came into force on January 1, 2021.

5.15 Publication of the annual equivalent rate for first quarter of 2021, for the purpose of characterizing certain financial assets for tax purposes

The December 23, 2020 edition of the Official State Gazette (BOE) published the decision of December 21, 2020, by the Office of the General Secretary for the Treasury and International Finance, 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 first calendar quarter of 2021. The rates are as follows:

- Financial assets with terms longer than four years but equal to or shorter than seven: -0.331 percent.
- Assets with ten-year terms: -0.022 percent.

In all other cases, the reference rate for the period closest to the period when the issuance is made will be applicable.

5.16 Identification systems and procedures specified for tax formalities and procedures to be carried out by phone

The December 22, 2020 edition of the Official State Gazette (BOE) published the decision of December 15, 2020, by AEAT's Tax Management Department, enabling formalities and procedures to be carried out by phone, using given identification systems.

The identification systems required to be able to carry out formalities and procedures by phone are as follows:

- Identification systems based on qualified **electronic certificates**, including those incorporated in national identity cards.
- Signing system using an access password obtained in a prior registration (**Cl@ve PIN**).
- Secure verification code appearing on the measure or communication concerned.
- Other identification systems based on cross-check data (**reference or others**).

Where a formality is carried out that has legal effects, AEAT must provide a proof certificate.

AEAT's website will publish information on the updated formalities and procedures available by phone and on the gradual opening up of services to different sectors (individuals, legal entities and entities not having separate legal personality, attorneys-in-fact and approved tax agents (*colaboradores sociales*)).

This decision came into force on December 23, 2020.

5.17 The 2021 non-working day calendar of the central government civil service has been published

The December 14, 2020 edition of the Official State Gazette published the decision of December 4, 2020, by the Office of the Regional Territory and Civil Service Secretary, which establishes the calendar of non-business days in relation to the activities of the central government civil service for 2021, for the purposes of computing time periods.

5.18 Amendments made to form 233 and in relation to keeping personal income tax records

The December 4, 2020 edition of the Official State Gazette (BOE) published Order HAC/1154/2020, of October 27, 2020, which makes amendments to form 233 (the information return for costs at authorized nurseries or preschool education institutions) and to the obligation to keep personal income tax records:

(a) Form 233: Amendments are made to improve the quality of the information and be able to generate more accurate tax information on taxpayers who are entitled to the increased tax credit for birth or adoption. Among others, the form will allow each child to be associated with the authorized code belonging to the authorized nursery or preschool education institution. The amendments will apply to information returns relating to 2020 that are filed in 2021.

(b) Keeping of personal income tax records: It allows personal income tax records to be used in relation to the Canary Islands general indirect tax (instead of only in relation to VAT), where they meet the requirements specified in the management regulations for taxes under the Canary Island Tax and Economic Regime. This amendment came into force on January 1, 2021, and will apply to record entries for 2021 and thereafter.

5.19 Objective assessment method for personal income tax purposes and simplified VAT rules for 2021

In its December 4, 2020 edition the Official State Gazette (BOE) published Order HAC/1155/2020, of November 25, 2010, implementing for 2021 the objective assessment method for personal income tax purposes and the special simplified VAT scheme.

The order has retained the amounts of the signs, indexes, modules, reductions and instructions that were already applicable for 2020. Among others, it has retained the reduction allowed for economic activities carried on in Lorca.

The order came into force on December 5, 2020, and is effective for 2021.

6. Miscellaneous

6.1 OECD publishes guidance on the transfer pricing implications of the health crisis

As we announced in our **alert** dated December 18, 2020, the OECD published on that date its guidance on the transfer pricing implications of the health crisis.

The guidance is intended to provide both tax authorities and multinational groups with a number of guidelines on this subject, which will help them comply with transfer pricing legislation, focusing on four areas: (i) comparability analysis; (ii) losses and the allocation of COVID-19 specific costs; (iii) effects of government assistance programs, and; (iv) impact on advance pricing agreements. For a summary of this guidance, see our **comment dated December 29, 2020**.

More information:

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