Tax Newsletter

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1. Judgments

1.1 Transfer pricing. – AEAT and provincial tax authorities for Basque Country and Navarra bound by valuation adjustments made and also have to give notification to each other by initiative

Supreme Court. Judgment of December 20, 2022

Following an examination of the market value of a few transactions between an entity resident in Spain (excluding Navarra and the Basque Country) and another entity in the same group resident in Guipúzcoa (Basque Country), AEAT made adjustments to the first company's corporate income tax base, which were documented in a report signed in agreement. The Guipúzcoa entity applied for correction of its corporate income tax self-assessment for a corresponding valuation adjustment to be applied to it. The Guipúzcoa provincial government denied the correction on the basis that the adjustment made by AEAT did not follow any of the methods set out in article 16 of the Revised Corporate Income Tax Law (TRLIS).

Taking into account its judgment delivered on September 17, 2020 (October 2020 newsletter), the Supreme Court concluded as follows:

(a) AEAT is required to notify Basque Country and Navarra provincial tax authorities (and vice versa) if they make a transfer pricing valuation.

(b) In the examined case, those provincial authorities are bound by and subject to any valuations made by AEAT. It is irrelevant in this respect whether the administrative act is adopted in the form of a report signed in agreement, and the same goes for whether the valuation procedures under article 16 of the Revised Corporate Income Tax Law were not followed.

(c) The reason for this requirement to be bound by a decision in a final act is not to protect adequate exercise of each authority's powers (which in this case has been doubly breached by the two competent authorities - either by failing to give notification to each other, or because one of them failed to apply the principle decided by the other -), but instead, to protect taxpayers, because "they cannot be made to bear the adverse consequences arising from incomprehensible disputes or misunderstandings between public authorities, which are severely unnecessary and impossible to control".

1.2 Corporate income tax. – Deductible goodwill is that arising only from absorbing company's ownership interest in absorbed company before merger

Supreme Court. Judgment of December 19, 2022

Company A absorbed various companies. In one of the absorbed companies (B) it held, before the merger, a direct ownership interest close to 50%. The other owners were two companies (C and D) which were also absorbed in the same merger and in which the absorbing company did not have any ownership interests. On canceling the ownership interest, goodwill emerged which was calculated by the absorbing company by reference to its ownership interest and those held by companies C and D in B and it was redeemed by the absorbing company (A). The tax auditors took the view that the goodwill was not deductible with respect to the portion arising from the ownership interest in B which, before the merger, belonged to companies C and D, because the absorbing company (A) did not hold any ownership interest in them (in other words, the 5% minimum holding requirement was not fulfilled).

The Supreme Court confirmed the tax authorities' principle and clarified that deductible goodwill is the amount relating to the ownership interest in the absorbed company (B) that was held by the absorbing company (A) before the merger, not the ownership interests held by other companies (C and D) in the absorbed company, even if they are all absorbed in the same transaction.

1.3 Corporate income tax. – Licensing of know-how embedded in piece of software or intangible asset gives entitlement to reduction under article 23 of Revised Corporate Income Tax Law (TRLIS)

National Appellate Court. **Judgment of October 27, 2022**

A company developed two technological intangible assets to be used in construction and works projects, and embedded certain types of know-how in them. Later it licensed those assets to several of its branches abroad. On the revenues received it applied the reduction under article 23 of the Revised Corporate Income Tax Law (currently defined in article 23 of the Corporate Income Tax Law), due to considering it was licensing a piece of know-how.

The tax authorities rejected the right to apply the reduction, because they concluded that there had not been a true licensing of know-how but rather a provision of technical support services with the know-how acquired after developing the intangible assets.

Taking the opposite view, the court concluded that there had been a licensing of the know-how created by the company's engineers and that it had been embedded in its new technological intangible assets.

The court underlined also that the licensing agreements expressly excluded the provision of technical support services. In other words, the licensing of the right to use the intangible assets developed by the company only involved an obligation for the company to transfer technology, but this did not carry any obligation for subsequent support.

1.4 Corporate income tax. – Keeping same pay when joining board of directors may be indication that director has employment relationship and another contract for services

National Appellate Court. **Judgment of October 11, 2022**

The tax auditors considered that a director's relationship with a company was purely and simply a contract for services, under the overriding contractual relationship theory. Among other matters, the tax authorities mentioned as indications supporting this conclusion that the director was chairman of the company's board, that his functions were those of an executive officer, and that he received a high level of pay compared with the company's other workers. Because, according to the tax auditors, the company was not in compliance with the corporate legislation on directors' compensation, this director's compensation was not deductible.

The National Appellate Court, however, allowed it to be deductible after finding that the proof produced by the company evidenced that the director had two relationships, an employment relationship and a contract for services, and it was the former relationship that was compensated. It reached that conclusion after considering several pieces of evidence contrary to those mentioned by the authorities:

(a) His career growth at the company.

(b) The performance of activities relating to his regular job which were kept separate from those attached to his directorship.

(c) The absence of any material changes to the director's compensation before and after joining the managing body.

1.5 Personal income tax. – Supreme Court changes principle and rules late-payment interest paid by tax authorities is taxed in general component of taxable income

Supreme Court. Judgment of January 12, 2023

As we summarized in our alert dated December 14, 2020, the Supreme Court concluded in a judgment delivered on December 3 of that year that late-payment interest on refunds by AEAT of tax paid incorrectly did not amount to capital gains subject to personal income tax. According to the court, where an amount of incorrectly paid tax was refunded to the taxpayer, and the taxpayer was compensated with late-payment interest, no capital gain existed, instead a rebalancing took place, by canceling out the loss caused previously. The court added that it made no sense to deny the deductible nature of interest incurred by the taxpayer and consider that the interest accompanying the refund of tax paid incorrectly is taxable and not exempt.

In a new judgment, however, the Supreme Court changed its opinion and took the view that there is indeed a capital gain which, moreover, must be taxed in the general component of taxable income, due to not arising from a transfer. According to the court, no other conclusion is possible, even if the tax authorities were the cause of the detriment to the taxpayer's rights, because the law is silent in this respect.

1.6 Personal income tax. – Reinvestment in principal residence is not exempt if only bare ownership was held for more than three years

Supreme Court. Judgment of December 12, 2022

The Personal Income Tax Law allows an exemption for capital gains obtained from the transfer of the taxpayer's principal residence, if the total amount obtained from the transfer is reinvested in buying a new principal residence. That law provides also that a residence where the taxpayer has lived continuously for three years will be considered their principal residence.

The Supreme Court held that this exemption does not apply in a case where the transferor owns the residence when the sale takes place, if, in an earlier period (within the three year period before the transfer) they only held bare ownership, even though they had lived there (with the usufruct holder) in those three years.

The court took into account an earlier judgment delivered on December 20, 2018 (January 2019 newsletter) reaching the same conclusion in a case where the transferred residence had been contributed by one of the spouses to the joint property entity fewer than three years before the transfer.

1.7 VAT. – Passport does not substantiate buyer's principal residence for exemption on export of goods under travelers' scheme, if it does not contain information on address

Supreme Court. Judgment of December 19, 2022

Eligibility for the exemption on supplies to travelers having their principal residence outside the EU requires that residence to be substantiated by producing a passport, identity document, or any other means of proof admitted by law.

The Supreme Court has clarified, however, that for the passport to be valid for these purposes, it must include information on the customer's principal residence or domicile.

The court also added that the exemption is subject to a complete invoice being issued.

1.8 VAT. - Enforced collection surcharges cannot be imposed in cases of deferred VAT on imports where debt paid before receipt of order initiating enforced collection proceeding

Supreme Court. Judgment of December 13, 2022

In this judgment, the Supreme Court pronounces on the need to impose an enforced collection surcharge in respect of failure or omission to include in the VAT self-assessment an amount of VAT on imports, where the deferred VAT on imports scheme under article VAT 167.2 of the VAT Law was elected.

The court affirmed that an omission or failure to include an amount of VAT on imports in the self-assessment may trigger the start of the enforced payment period, although this does not automatically mean that payment of the debt will be enforced. Namely, an order initiating enforced collection proceedings will not need to be issued if the taxpayer pays the debt fully after the start of the enforced payment period, but before notification of the order initiating enforced collection proceedings.

1.9 VAT. - Late-payment interest due to delayed payment of invoices by tax authorities must be calculated by reference to VAT

Supreme Court. Judgment of December 5, 2022

At issue in this judgment was the basis for calculating late-payment interest due to delayed payment by the tax authorities of invoices under a government contract.

On the basis of the CJEU's case law (judgment delivered on October 20, 2022, in case C-585/20), the Supreme Court changed the principle it had upheld until that point and concluded that the basis for calculating late-payment interest has to include the whole of the unpaid amount, including the VAT charged on the invoice, regardless of whether the issuer evidences that it has paid that VAT.

1.10 Energy taxation. - EU law precludes automatic denial of exemption applications submitted within assessment period, but outside period prescribed for filing them

Court of Justice of the European Union. Judgment of December 22, 2022. Case C-553/21

The German law that transposed the Energy Taxation Directive allows an exemption for certain products used as heating fuel for business purposes. This exemption must be applied for by interested parties until December 31 of the year following that in which the products were used. The assessment period is also one year, running from the end of the calendar year in which the tax liability arose. However, if a tax inspection has begun before the expiry of the period for assessment of the taxes, such a period is not to expire before any tax notices have become final.

On the basis of those provisions, the customs office in Germany denied the exemption for a company which, on account of fulfilling the requirements to apply it, had filed the application outside the time limit.

The CJEU concluded that national legislation that means that failure to comply with the period for submitting an application for tax relief entails automatically and without exception the rejection of that application is precluded by the principles of effectiveness and proportionality. The court observed that, in the examined case, the company filed the application in 2012, although the products in question had been used in 2010, but in 2011 the company had been the subject of an inspection proceeding relating precisely to 2010, and therefore the German authorities should have recognized the right to the exemption in that proceeding.

1.11 Transfer and stamp tax. – Partial termination of existence of condominium is taxable

Supreme Court. Judgment of December 19, 2022

Four individuals owned a property with undivided interests. Two of them assigned their interests in the jointly-owned property to the other two in exchange for these other two individuals agreeing to pay the outstanding mortgage.

The Supreme Court considered that in the examined case the existence of the condominium was only terminated in part, therefore the transfer is not exempt from transfer tax under the transfers for consideration heading (taking into account, among others, its earlier judgment on June 26, 2019, summarized in our July 2019 newsletter).

According to the court, the law does not exempt these transfers from tax including where there is a disproportion between what is transferred and what is received, as well as where indivisible assets are involved.

1.12 Inheritance and gift tax. – No gift exists in settlement agreement sanctioned by court, and allocating to one of heirs higher sum than that stated

Madrid High Court. Judgment of October 28, 2022

A father wrote a will leaving strict enforced heirship rights to two sons and the remaining assets to a third son. One of the sons that had lost out challenged the will in court. The court proceeding ended with a settlement agreement between the parties (sanctioned by a court), which stipulated allocation to the appellant of assets with a higher value than the amount resulting from strict application of the will.

The tax authorities assessed the excess distribution as a gift, and issued an inheritance and gift tax assessment.

The court considered, conversely, that the excess distribution under the settlement agreement signed between the heirs does not fulfill the requirements to be considered a gift for the purposes of the tax, because it was not intended as a gift. In the context of settlement agreements it is commonplace to make these types of compromises, in exchange for bringing an end to will-related costs and judicial proceedings, which evidences that this was not a gift but instead an exchange of interests.

This conclusion was reinforced by the court-sanctioning of the agreement, because it creates obligations binding on all the parties in relation to the distribution of the inheritance.

1.13 Tax on economic activities. – Sale of attached properties by financial institutions not subject to tax on economic activities as separate activity

Supreme Court. Judgment of January 11, 2023

It was examined in this judgment whether financial institutions have to be registered under caption 833.2 (property development) in the tax on economic activities classifications in respect of the transfer of any properties acquired from foreclosures of mortgages provided by the financial institutions themselves.

The Supreme Court held that in this case there is no organization for their own account of the means of production and human resources for conducting the activity of buying and selling properties. It is instead an ancillary activity to the main financial activity, which is carried on solely for the purpose of recovering the mortgages they had provided and as a result of their foreclosure, rather than with the intention of directly and actively participating in the real estate market. Therefore, this activity must be taxed under group 811 (Banking) and not under caption 833.2 in Section Two of the tax on economic activities classifications (property development).

The court clarified that, by contrast, any subsidiaries of the banking institution having as their purpose the sale of the properties and use of them for business purposes do have to be classified under caption 833.2.

1.14 Tax on economic activities. – Exemption from tax on economic activities may have retroactive effects, even if notified outside time limit

Balearic Islands High Court. Judgment of November 9, 2022

The legislation on the tax on economic activities states that cancellations of registration for the tax may have retroactive effects, even where the date of cessation of the activity is in year before that when the return is filed.

In this judgment, the Balearic Islands High Court held that the described provision for cancellations of registration also applies to cases of exemption, and recognized that an exemption may be applicable retroactively, even if notified outside the time limit.

The court added that, after the registration for the tax on economic activities has been corrected with retroactive effects, taxpayers may apply for a refund of any taxes paid incorrectly where they had been paid in the period for which the exemption was recognized, regardless of whether the assessments of the tax for those periods had become final on account of not being challenged within the time limit.

1.15 Cadastral values. – Creation of horizontal property system on property unilaterally and in private document may be valid for cadaster

National Appellate Court. **Judgment of November 22, 2022**

In this judgment, the National Appellate Court recognized for the only owner of a multiple-unit property, in which there are several lessees, the option of creating a horizontal property system for the property unilaterally and in a private document, which was valid for the purposes of the cadaster, on the basis of the provisions in the former Order EHA/3482/2006 of October 19, 2006 approving the forms for declaring cadastral alterations to properties.

The court reached this conclusion even after determining that the owner had not yet begun the sale of the apartments or premises that were going to result from the horizontal division of the property, or stated an intention to do so, although it specified that there must be lawful reasons for that horizontal division.

1.16 Enforcement of secondary liability. – Supreme Court pronounces on requirements for declaring main debtor in default, to enforce secondary liability

Supreme Court. **Judgment of December 22, 2022**

In relation to an enforcement of secondary liability, at issue was whether the declaration of default by the main debtor must specify whether it is a total or partial insolvency.

The Supreme Court held that the relevant factor is whether the act declaring liability is preceded by a declaration of default by the main debtor. In other words, whether the tax authorities have taken sufficient steps to determine the absence of assets or rights that may be attached to cover the whole of the claimed debt. It is not necessary, therefore, for it to include any quantitative expression as to the partial or total extent of the debtor’s insolvency. This information does have to be included, however, in the decision enforcing liability.

It was also asked whether, to declare default by the main debtor, AEAT needs to exhaust all the steps in the enforced payment period with respect to all the debts for the purpose of determining the debtor’s state of insolvency.

The court affirmed that the main debtor’s state of insolvency may be obtained from the outcome of enforcement and/or examination or investigation steps taken in relation to any of the debts. Therefore, once the debtor's insolvency has been substantiated sufficiently, the fact that a request is awaiting a reply from the debtor does not prevent a declaration of default from being made.

2. Decisions

2.1 Mutual agreement procedure. – Refunds arising from mutual agreement procedures cannot be classified as refunds of tax paid incorrectly

Central Economic-Administrative Tribunal. Decision of November 24, 2022 (Principle 1 and Principle 2)

A mutual agreement procedure that began in 2014 ended with recognition of the right to a refund in favor of a certain taxpayer. This refund was made without late-payment interest in respect of the length of time taken by the proceeding. For the remaining period, late-payment interest was only recognized on the portion of the refund that was considered to qualify as a refund of tax paid incorrectly, which is that related to amounts paid when the corporate income tax self-assessments were filed, in other words, late-payment interest was not paid in respect of the amounts classified as refunds under the legislation on the tax.

TEAC concluded, first, that Law 4/2008 of December 23, 2008, amended additional provision one of the Nonresident Income Tax Law and provided that no late-payment interest cannot accrue while mutual agreement procedures are in progress. This provision was further amended by Royal Decree-Law 3/2020 of February 4, 2020, which removed that rule, but only for mutual agreement procedures that began after its entry into force, in other words, on or after February 6, 2020. Therefore, because in this case the mutual agreement procedure began in 2014, no late-payment interest accrues while it is in progress, regardless of whether the interest benefits the taxpayer (as would have occurred in this case) or the tax authorities.

As for the late-payment interest in respect of the remaining period, TEAC confirmed that amounts paid with the self-assessment for the tax as a result of the tax liability exceeding prepayments will be classified as an incorrect payment and will be refunded with the late-payment interest that has accrued since their payment date.

By contrast, any amounts not paid with the self-assessment due to not exceeding prepayments will be classified as refunds under the legislation on the tax, and therefore late-payment interest will only accrue if a decision has not been delivered within six months after the end of the mutual agreement procedure. In relation to these facts, TEAC considered that the Supreme Court's case law finding in favor of late-payment interest accruing does not apply where the refunds (including those relating to prepayments) originate from an adjustment arising from tax audit activities in which the right to deductions is recognized which, under the legislation on the tax, cannot be applied when making prepayments.

According to TEAC, adjustments under a mutual agreement procedure do not warrant the same treatment. In these cases, it cannot be considered that the amounts to be refunded (paid over when the prepayments were made) were paid incorrectly, because the right for them to be refunded does not arise from an incorrect application of the law when making those payments, but instead from an agreement or arrangement reached with the competent authorities within a mutual agreement procedure conducted to avoid double taxation.

2.2 Corporate income tax. – Losses derived from the redemption of shares in a financial institution terminated as a result of enforced resolution are deductible

Central Economic-Administrative Tribunal. Decision of November 24, 2022

The Corporate Income Tax Law (LIS) provides, as a general rule, that losses from the transfer of an ownership interest in an entity are not tax deductible (article 21.6). As an exception, losses are allowed to be deducted if they arise from termination of the existence of an investee, unless it is the result of a restructuring transaction (article 21.8).

In the examined case, the taxpayer obtained a loss in 2017 from the enforced redemption, without any financial compensation, of shares owned in a bank. This transaction arose from the resolution of the financial institution, under a decision by the Governing Board of the Orderly Bank Restructuring Fund dated June 7, 2017, adopting the necessary measures for implementing the decision of the Single Resolution Board. The resolution mechanism consisted of selling the institution's business by transferring its shares to a buyer (another bank) for 1 euro, after redeeming and converting the relevant equity instruments, which determined absorption of the necessary losses by shareholders and creditors. After this transaction, in 2018, the merger by absorption took place of the bank in question by the bank buying its shares.

TEAC concluded that the special procedure for resolution of the bank had for shareholders the same effects as those of a termination without restructuring and that the fact of not having carried out an ordinary liquidation procedure on the banking institution (which could have caused irreparable damage to the country's financial system and economy) should not entail different tax treatment (which was worse in this case) for the shareholders concerned; all of this is regardless of whether the legal termination took place finally in 2018 through a restructuring transaction with the buyer bank.

It therefore held that, for the claimant company, that redemption entailed a total and permanent termination of its legal relationship with the bank, therefore article 21.8 of the Corporate Income Tax Law is considered to be applicable and, consequently, the loss originated in that transaction is deductible.

2.3 Reference value. – TEAC accepts validity of two Cadaster decisions determining 2022 reference values for urban and rural properties

Central Economic-Administrative Tribunal. Decisions of December 21, 2022 (08964/2021, 08965/2021, 08967/2021 and 08968/2021)

TEAC examined two decisions delivered on November 10, 2021, by the General Directorate for the Cadaster on the elements required to determine the 2022 reference values for urban and rural properties, and concluded, among other points, as follows:

(i) These decisions contain all the elements needed to determine the reference value for each property, and therefore they fulfill the mandate determined by the legislature.

(ii) The real estate market annual reports (for rural and urban properties) on which these two decisions are based are presumed to be truthful or reasonable. Although that presumption may be rebutted with evidence from taxpayers, any opinion taxpayers may have on the contents of those reports is not sufficient for these purposes.

2.4 Administrative procedure. – After time period for administrative proceeding has ended late-payment interest no longer accrues, if enforcement of debt is stayed or if debt paid

Central Economic-Administrative Tribunal. Decision of December 21, 2022

The General Taxation Law (LGT) states that late-payment interest stops accruing after the end of the maximum time period for the economic-administrative proceeding (one year) where a decision has not been notified, if it has been decided to stay the claimed act.

TEAC has changed its principle according to which that rule applied exclusively to assessments with stayed enforcement, and adopted that applied by Madrid High Court in numerous judgments (representing all of them: judgment of February 2, 2022, in appeal 138/2020), under which the limit on interest accruing in respect of a breach of the time period for the proceeding also includes cases where the debt resulting from the adjustment is paid by the interested party, and later, another separate debt arises as a result of the administrative and judicial appeals lodged, with the existence of assessments in favor of and against the taxpayer.

2.5 Collection procedure. – TEAC pronounces on several collection aspects in relation to joint and several liability of persons causing or cooperating in concealment of taxpayer's assets to prevent authorities from using them in their work

Central Economic-Administrative Tribunal. Decision of April 19, 2022 and decisions of December 13, 2022 (03257/2020) and (06421/2021)

TEAC has delivered several decisions in relation to the joint and several liability scenario under article 42.2.a) of the LGT, in other words, the liability incurred by anyone who causes or cooperates in the concealment of assets or rights of the person with the payment obligation for the purpose of preventing them from being used by the tax authorities in their work. In these decisions it changed its earlier principle.

(a) Surcharges for enforced payment period: accepting the principle determined by the Supreme Court in its judgment of December 10, 2020 (appeal 2189/2018), TEAC concluded that the tax authorities cannot demand the surcharge for the enforced payment period from each co-debtor, if that charge has already been paid by one of them. According to the court, there is only one tax debt and therefore when any of the co-debtors pays that debt (either the main debt or surcharges and interest) this payment releases the others. Finding otherwise would give rise to unjust enrichment for the public purse.

(b) Statute of limitations: taking into account the supreme court judgment of October 14, 2022 (appeal 6321/2021) (November 2022 newsletter), it concluded that the statute of limitations for the tax authorities' right to claim payment of tax debts from co-debtors starts to run when the facts giving rise to liability occur (in other words, when the transfer or concealment of assets or rights take place), and collection steps taken against the main debtor or other liable parties do not temporarily stop the clock running on that period, nor is it stayed by an insolvency order on that main debtor.

2.6 Penalty procedure. – Where penalty is challenged, related assessment may be examined, even if final

Central Economic-Administrative Tribunal. Decision of November 24, 2022

By reason of the transfer of a property, the tax authorities commenced a limited review after which they issued an assessment and imposed a penalty. The interested party lodged appeals for reconsideration against the two administrative decisions. The appeal against the assessment was not admitted for consideration due to being lodged outside the time limit, whereas the appeal against the penalty was admitted and later dismissed.

TEAC joined, examined and decided on the claims against the decisions and dismissed the respective appeals for reconsideration. After it had been confirmed that the appeal lodged against the assessment was outside the time limit, the issue centered on determining whether that assessment (which had become final) can be examined to assess the lawfulness of the penalty.

The tribunal applied the principle determined by the Supreme Court in its judgment delivered on September 23, 2020 (appeal 2839/2019) and concluded that, where a penalty is challenged, even if the assessment from which it stems is final, that assessment may be examined because the adjustment it contains underlies the infringement that is penalized, and additionally may be used to determine the base for the imposed penalty. As a result, examination of the assessment becomes necessary to verify the existence the factual element of the penalty.

3. Resolutions

3.1 Corporate income tax. – Income obtained from termination due to confusion for loan between two institutions that are merged, cannot benefit from tax neutrality regime

Directorate General of Taxes. Resolution V2437-22 of November 25, 2022

The issue concerned a merger between two entities that were not previously related parties. By reason of the merger, the loan provided by one to the other was terminated due to confusion (i.e. borrower and lender were the same person). The DGT noted that the merger is eligible for the tax neutrality regime, but with the following specific rules in relation to the loan:

(a) If the transfer of the debt by the absorbed company to the absorbing company gave rise to any income in the hands of the transferring institution, that income would be able to benefit from the tax neutrality regime.

(b) However, any income that might arise as a result of the subsequent extinguishment of the debt due to the same institution being borrower and lender would not be able to benefit from the tax neutrality regime, because this income does not result from the merger, instead from that combining of both positions in relation to the loan.

3.2 Corporate income tax. – Expense relating to excess withholdings abroad not deductible, if no activity conducted in territory where withholding made

Directorate General of Taxes. Resolution V2436-22 of November 25, 2022

A company owns shares in a number of listed non-Spanish resident companies (representing an ownership interest lower than 5% in each case) which have distributed dividends subject to withholdings at source. These dividends are from the conduct of economic activities abroad by the investees. The requesting company does not, however, conduct any economic activity abroad.

Under article 31 of the Corporate Income Tax Law, the company deducts the withholdings it has incurred from its gross tax liability, subject to a cap equal to the gross tax liability that would have to be paid in Spain in respect of the received dividend. Any excess withholdings incurred abroad which cannot be deducted are recognized as an expense.

The DGT noted (adopting a questionable principle) that this excess will be considered a deductible expense if it relates to the conduct of economic activities abroad, as provided in article 31.2 of the Corporate Income Tax Law, something that does not happen in the submitted case, considering that the entity does not conduct an economic activity abroad.

3.3 Corporate income tax. – Loss on ownership interest in insolvent company and which has no value is not deductible, unless company's existence terminated

Directorate General of Taxes. Resolution V2434-22 of November 24, 2022

A company owns 12.5% of the shares in another unrelated company, which were bought between 2009 and 2011. The investee has been insolvent since 2012, has had its taxpayer identification number withdrawn, has had its page at the commercial registry closed, and has no assets. The company cannot be liquidated or have its existence terminated because no corporate decision has been adopted to do so and it has debts. Therefore, the ownership interest does not have any value.

The DGT considered in this ruling that:

(a) The impairment loss recorded by a shareholder on an ownership interest is not deductible (article 15 k) of the Corporate Income Tax Law).

(b) The transfer of the ownership interest will not allow that loss to be deducted (article 21.6 of the Corporate Income Tax Law).

(c) The loss will, however, be able to be deducted in the event of termination of the investee's existence (article 21.8 of the Corporate Income Tax Law), on condition that it does not occur as the result of a restructuring transaction.

3.4 Corporate income tax. – Effects analyzed of downstream merger of companies in tax group

Directorate General of Taxes. Resolution V2316-22 of November 3, 2022

A downstream merger was analyzed in which a subsidiary in a tax group absorbed the group's parent company. Assuming that the tax neutrality regime will be applied, something that the DGT did not question, the DGT concluded as follows in relation to the merger's effects on the group:

(a) The absorption of the group's parent company determines the end of the taxable period of that company and of the group itself, which ceases to exist.

(b) The termination of the group's existence takes place on the date of registration of the merger at the commercial registry, and is effective from the date when the filing entry is submitted.

(c) However, on applying the neutrality regime, the absorbing and former parent company takes over the position of the absorbed and former subsidiary company, which starts to take effect on the effective date of that registration at the Commercial Registry. Therefore, the absorbing company will become the parent company of a tax group formed by that company and the subsidiaries that have not been absorbed, and its first taxable period will run between the date of termination of the former group's existence and the end date of the taxable period of the new parent company. In short, the companies in the group will be taxed as members of a consolidated tax group uninterruptedly, although in two different groups.

(d) It will not be necessary for the companies in the new tax group to adopt new resolutions to be included in the group, because they were part of the previous group. By contrast, it will be necessary, on making the first prepayment affected by the situation, to notify of the changes that have occurred with respect to the previous period.

3.5 Corporate income tax. – Treatment analyzed of sale & lease-back transaction in which lessee is not company that sold property

Directorate General of Taxes. Resolution V2306-22 of November 2, 2022

A company in a tax group is considering transferring the property where it carries on its activity to a financial institution outside the group, which will subsequently lease it (under a finance lease agreement) to a real estate company in the group, with there being no reasonable doubts that the call option will be exercised. The lessee will lease the building under an operating lease to the group company that sold the building.

In a report requested from it, the Spanish Accounting and Audit Institute (ICAC) recalled that for accounting purposes transactions have to be recorded according to their economic substance rather than their legal form. Therefore, assuming it is correctly classified as an operating lease between the two group companies, the accounting treatment for the transaction would be as follows:

(a) Separate financial statements:

Because the risks and rewards related to the property remain within the group, the transaction must be treated in separate financial statements as an intra-group transaction:

(i) The company transferring the property to the financial institution must record a gain or loss on disposal of the building.

(ii) The company entering into the finance lease with the financial institution must recognize the asset and the related debt.

(b) Consolidated financial statements: according to the economic substance of the transaction, it must be treated as an internal transaction, therefore the gain recorded in separate financial statements will have to be eliminated.

Its tax treatment will have to be based on the accounting principle:

(a) On the consolidated return the gain on the sale will have to be eliminated, due to relating to an internal transfer between two group companies.

(b) The eliminated income must be included in the tax base under the principles set out in the rules for the preparation of consolidated financial statements.

Moreover, by reference to the combined circumstances for the transaction, insofar as it is an internal transfer of an asset between two group companies, even though the transferee is financed under a finance lease with a third party, in the group the special regime for finance lease agreements cannot be applied, and therefore the buyer will have to recognize depreciation of the asset under the ordinary regime.

3.6 Personal income tax. – Absence of child during term time in academic year does not prevent application of descendants' allowance

Directorate General of Taxes. Resolution V2473-22 of November 30, 2022

The requesting individual and her spouse have two financially dependent children under 25 who are studying and reside at a different address to their parents for reasons related to their education.

Reiterating the principle in resolution V1136-09, the DGT concluded that sporadic absences of a child from the principal residence during term time in the academic year does not breach the cohabitation requirement laid down for the taxpayer to be able to apply the descendants' allowance.

3.7 Personal income tax and corporate income tax. - Amounts received by heirs of laid off employee are taxable for inheritance and gift tax purposes and not subject to withholdings

Directorate General of Taxes. Resolution V2455-22 of November 30, 2022

In a collective layoff the payment of severance in installments was agreed. The concluded agreement stated that, if the employee dies before the installments fall due, the company will continue paying the full monthly amounts to that employee's legal heirs. The employee died before all of the installment payments had been delivered.

The tax treatment applicable to the payments is as follows:

(a) The monthly amounts received until the employee's death are classed as salary income for personal income tax purposes and are subject to withholdings.

(b) The monthly or lump sums to be paid to the heirs following the employee's death are subject to inheritance and gift tax. These amounts are not subject to withholdings.

3.8 Personal income tax. - Nonresident employee working remotely from Portugal is taxable only in that country

Directorate General of Taxes. Resolution V2440-22 of November 25, 2022

A Spanish national is tax resident in Portugal and had been working for a Portuguese company until April 2020. In April 2020 they were hired by a Spanish company to work remotely. In September 2020, the employee moved to Spain where they would continue working for the same Spanish company. The worker's domicile (where they worked until they moved to Spain) was a rented property in Portugal. Additionally, in that period the worker owned a residential property in Spain, leased to a third party. A certificate of tax residence was issued for the worker by the Portuguese authorities for 2020.

It was asked where that individual's tax residence will be in 2020 and where they must be taxable. The DGT noted the following:

(a) The tax residence of an individual in Spain is determined by reference to two principles: the time spent in the country (more than 183 days in the calendar year), and where they have their center of economic activities or interests.

(b) A certificate of tax residence issued by the tax authorities of another country (Portugal, in this case) only substantiates the time spent in the country. Analysis of the principle relating to the taxpayer's economic activities or interests is done by the tax agency's management and audit bodies.

(c) Therefore, the worker could be considered, in principle, to be resident in Spain if it is concluded that they have their center of economic activities or interests in Spain, even if they have substantiated with a Portuguese certificate of residence that they spent more than 183 days in Portugal.

(d) In the analyzed case, under the Portugal-Spain tax treaty, since the requesting individual substantiated that they spent more than 183 days in the year in Portugal (with the certificate of residence) and that they lived in Portugal (although in a rented property), in addition to the fact that the property they own in Spain is leased to a third party, the residence conflict may be resolved in favor of Portugal.

(e) In that case, the worker would be able to be taxable in Spain only on Spanish source income. Consequently:

  (i) The income received in respect of work performed for the Spanish company remotely from Portugal is only taxable in Portugal, because the work is performed exclusively in that country.

  (ii) If the worker subsequently came to live in Spain (from September 2020), but kept their tax residence in Portugal, their income obtained in respect of work for the Spanish company may be taxable in Spain (where the work was performed) or in Portugal (state of residence), and it is Portugal, as the state of residence, that has to eliminate any double taxation that may arise.

3.9 Personal income tax. – Subsidy received by owners' association must be attributed to person who is owner when collected

Directorate General of Taxes. Resolution V2365-22 of November 16, 2022

The requesting party belongs to an owners' association that has received a subsidy for works on the building, related to renovation, accessibility and energy efficiency. The personal income tax treatment of the subsidy is as follows:

(a) The subsidy must be attributed to each owner according to their share of ownership of the building.

(b) Assuming that the subsidy is not exempt and does not relate to the conduct of an economic activity, it must be attributed as a capital gain in the taxable period in which it is collected. As a result, the subsidy must be attributed for personal income tax purposes to the person who is owner of each apartment or premises when the subsidies are collected.

(c) If, following a breach of certain requirements, the received subsidy has to be refunded, the taxpayer may adjust their tax position, by applying for correction of the self-assessment in which the subsidy was reported.

3.10 Transfer and stamp tax. – Capital reductions to increase reserves not subject to transfer and stamp tax

Directorate General of Taxes. Resolution V2445-22 of November 28, 2022

A sole-shareholder company is considering reducing its capital with a payment to voluntary reserves. It will later distribute the reserves to the shareholder in the form of dividends. The DGT noted the following:

(a) The capital reduction is subject to transfer tax under the corporate transactions heading, but the taxable amount will be equal to zero, because no assets and rights are delivered to the shareholder.

(b) If the transaction is subject to transfer tax it cannot be subject to stamp tax, even if the taxable amount for transfer tax purposes was zero.

The DGT recalled, however, that when analyzed as a whole, the transaction could be reclassified and become taxable according to its true legal nature, for which purposes the name given by the parties to the transaction or agreement concerned is irrelevant; although the DGT did not say whether, in their opinion, that reclassification was needed.

3.11 Transfer and stamp tax. – Tax liability on non-monetary contribution of properties with debts to company

Directorate General of Taxes. Resolution V2327-22 of November 7, 2022

A company is going to make a contribution of real estate assets under construction, together with the associated debt, to various newly created companies. According to the DGT:

(a) The transaction involves two taxable steps subject to transfer and stamp tax: (i) a formation or capital increase and (ii) a transfer of an asset in payment of a debt.

(b) The capital increase or formation of the new companies will be subject to but exempt from transfer tax under the corporate transactions heading.

(c) The transfer of assets in payment for taking on the debt, on account of being taxable and not exempt from VAT, is not subject to transfer tax under the transfers for consideration heading, although it will be subject to ad valorem stamp tax, on the portion of the value of the properties that is not subject to transfer tax under the transfers for consideration heading.

3.12 Collection procedure. – DGT clarifies how to calculate garnishment limit where bonus or nonregular payment is received

Directorate General of Taxes. Resolution V2304-22 of November 2, 2022

In this resolution, the DGT adopts the principle determined by TEAC in a decision dated May 17, 2022 on the calculation method for the garnishment limit in months when the workers subject to garnishment receive, with their ordinary monthly wage, salary or pension payment, a bonus or nonregular payment (the full amount or a proportional part) and concludes that, in these cases:

(a) The garnishment limit (article 607.1 of the Civil Procedure Law) is double the monthly national wage.

(b) If the monthly wage includes the proportional part of nonregular payments or bonuses, the garnishment limit will consist of the national minimum wage calculated over a year (monthly minimum wage multiplied by 14) and divided into 12 months.

In both cases, the scale set out in article 607.2 of the Civil Procedure Law will be applied to any sums received over and above that amount.

4. Legislation

4.1 Amendments introduced to Personal Income Tax Regulations in relation to artistes

On January 25, 2023 the Official State Gazette (BOE) published Royal Decree 31/2023 of January 24, 2023, amending the Personal Income Tax Regulations to comply with the measures contained in the Artistes' Statute regarding withholdings. The following amendments have been introduced:

(a) The minimum withholding tax rate has been reduced from 15% to 2% for salary income under a special employment relationship of artistes engaging in performing, audiovisual and musical arts and of persons carrying out the technical or ancillary activities needed for those activities.

(b) The withholding tax rate has been reduced from 15% to 7% for economic activities carried on by artistes who (i) fall within groups 851, 852, 853, 861, 862, 864 and 869 of section two and in classes 01, 02, 03 and 05 of section three, of the tax on economic activities classifications; and also (ii) in cases where the consideration for professional activities is in respect of services provided which, due to their nature, if they were performed for an employer, would fall within the scope of the special employment relationship of artistes engaging in performing, audiovisual and musical arts, and of persons carrying out the technical or ancillary activities needed for those activities.

The following requirements have to be fulfilled to apply the new withholding tax rate:

- The volume of gross revenues from all of those activities as a whole relating to the immediately preceding year must be below €15,000, and

- That volume must represent more than 75% of the sum of all gross revenues from economic activities and from work obtained by the taxpayer in that year.

Taxpayers must notify the payer of the fulfillment of those tests, and the payer must keep that duly signed notification.

These amendments came into force on January 26, 2023.

4.2 Compensatory charge modified and new events of exceptional public interest declared

On January 11, 2023, the Official State Gazette (BOE) published Royal Decree-law 1/2023 of January 10, 2023, on urgent measures on incentives for employment contracts and enhancement to the social protection system for artistes. The new tax legislation is summarized below:

(a) Effective since January 1, 2023 the compensatory charge has been reduced from 0.625% to 0.62% for transactions subject to 5% VAT under Royal Decree-Law 20/2022 of December 27, 2022 (December 2022 newsletter) related to the following assets:

- Natural gas, briquettes and pellets made from biomass and firewood.

- Olive and seed oils and pastas.

This is a technical amendment to prevent the surcharge with three decimal points causing problems in invoicing systems.

(b) The holding of the "Bienal Manifesta 15 Barcelona" has been declared an event of exceptional public interest for the purposes of article 27 of Law 49/2002, of December 23, 2002, on the tax regime of non-profit entities and on tax incentives for patronage. The support program for this event will start on January 1, 2023 and end on December 31, 2024.

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