TAXAND

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1. Judgments

1.1 Personal income tax/provincial tax legislation/overriding relationship doctrine. – If the bylaws do not provide for directors' compensation, their withholding tax must be paid over in Navarra or to the authorities in the general tax area under the rules on salary income rather than those relating to directors' compensation

Supreme Court. **Judgment of December 23, 2022**

Under the economic accord with Navarra, withholdings from salary income have to be paid over at the place where the work is performed. However, withholdings from directors' compensation, where a certain level of revenues has been obtained, must be paid over to both the Navarra and the central government authorities, depending on the operations performed in each area.

A company resident in Navarra paid over to the Navarra provincial tax authorities the withholdings made from compensation paid to two members of its board of directors located in Navarra, because it was concluded that those amounts of compensation were paid in respect of their respective employment relationships as manager and sales director. By contrast, the Spanish Tax Agency (AEAT) found that the withholdings should have been paid over in both areas, because they were made from directors' compensation (under the overriding relationship doctrine) and the company had gone above the level of revenues established in the Economic Accord to be taxable in both areas.

Both directors had powers of attorney granted by the board of directors, on a par with those of a chief executive officer, although the chief executive officer role was not defined in the entity's bylaws.

The Supreme Court held that it was correct to pay over the withholdings exclusively in Navarra. According to its findings:

(a) The company's bylaws did not provide for directors' compensation, and therefore their services had to be considered not to be compensated. Moreover, the directors each had an employment contract with the entity for manager, and sales and marketing director roles, based at the workplace in Navarra, and were neither shareholders nor chief executive officers at the company.

(b) Therefore, although their powers of attorney had the characteristics of those belonging to a chief executive officer (which could trigger the overriding relationship doctrine), their compensation could not be considered to be received in respect of their "director status", because it related instead to their employment contracts, for the purposes of applying the rules in the accord with Navarra.

(c) Consequently, the withholdings had to be paid over to the Navarra provincial tax authorities.

1.2 Personal income tax. – The acquisition cost of assets used in a pharmacy business and acquired for no consideration is calculated under the inheritance and gift tax rules

Supreme Court. Judgment of February 6, 2023

It was examined how to calculate the income obtained from the transfer of a pharmacy acquired by inheritance or gift. The tax authorities considered that the acquisition cost for these purposes was the carrying amount (totaling zero euros) whereas the taxpayer argued that the value for inheritance and gift tax purposes had to be used.

The Supreme Court concluded that to quantify the capital gains or losses arising on a transfer of elements used in economic activities acquired for no consideration, a distinction has to be made between the following cases:

(a) Where the elements are not able to be recorded as itemized and separate assets in the accounting records. In these cases, the acquisition cost must be the value of those elements determined under the inheritance and gift tax rules, capped at their market value (article 36 of the Personal Income Tax Law).

(b) Where the elements can be itemized and are able to be recorded separately in the accounting records. In these cases, the acquisition cost must be the carrying amount of those elements (article 37.1.n) of the Personal Income Tax Law).

Where a pharmacy is transferred, according to the court, we have an element that cannot be itemized or recorded under assets in the accounting records belonging to the pharmacy business, and therefore the first of these measurement rules applies.

1.3 Nonresident income tax. – The withholding base amount for royalty payments to European Union residents must be reduced by expenses related to the business

National Appellate Court. Judgment of October 12, 2022

The National Appellate Court confirmed that income paid by a Spanish company to a nonresident entity and obtained from the sale of a certain type of software has to be classed as a royalty payment not as business profits, where it does not relate to standard software. For these purposes, the chamber recalled that for the income not to be classed as a royalty payment, the standardization must be absolute; and that the fact that the source code for the software is not accessible making it impossible to modify (as the appellant submitted) is not relevant. The determining factor is the ability to adapt the software to other computer environments, which does not mean modifying the source code.

However, once it had been concluded that the income relates to a royalty payment subject to nonresident income tax, the court held that the withholding had to be calculated by subtracting the expenses directly related to the business carried on in Spain, because the recipient is resident in the European Union (EU). To reach this conclusion, the National Appellate Court recalled that the European Commission, in its October 2021 infringements package, notified its intention to start infringement proceedings against Spain due to not having established this option in the withholding tax rules (although it did do so in the definitive tax rules). According to the court, although these proceedings have not ended, it has an obligation to reach this conclusion, in view of the primacy of European Union Law.

1.4 Community property. – A severance payment received by a spouse while married is community property

Supreme Court (civil chamber). Judgment of December 23, 2022

Under the Personal Income Tax Law, amounts of salary income must be attributed exclusively to the person who created the right to receive them, and amounts of income from economic activities, to the person who organizes for their own account the means of production and human resources used in the business. Whereas amounts of income from movable capital and of capital gains and losses are considered to be obtained by the person who owns the assets and rights from which theses amounts of income are obtained. For wealth tax purposes (and therefore also for the purpose of the new solidarity tax), the assets and rights must be attributed to taxable persons by applying the applicable ownership rules in each case. In short, the rules on the ownership of assets and rights are essential for determining the person to whom the amounts of income or property has to be attributed for tax purposes.

In this judgment by the civil chamber of the Supreme Court, it was examined whether the severance payment received by a person married under the community property system is community or separate property. In the examined case, the severance payment was received after the spouses had actually stopped living together. The Supreme Court gave the following reasoning:

(a) Firstly, it made a distinction between (i) the right to work which allows an individual to obtain a job on the labor market and to develop their work skills, and (ii) the benefit that is obtained by exercising the right to work. In the first case we have a "person's inherent right" (article 1346.5 of the Civil Code), whereas in the second case we will have an item of community property (article 1347.1).

(b) A severance payment is an amount of indemnity arising from breach of contract, and is therefore treated in the same way as other income received under the contract, as long as the community property system was valid when the dismissal took place (regardless of when the indemnity is received).

(c) Therefore, the severance payment received by a spouse in respect of dismissal from the company where they worked is community property, because it has its cause in an employment contract which was in effect throughout the term of the marriage.

(d) The amount that is community property depends, however, on the number of years worked while the marriage was valid.

1.5 Collective layoff procedure. – It is not discriminatory for a collective layoff agreement to determine lower severance for older workers

Supreme Court (Labor Chamber). Judgment of January 24, 2023

The Supreme Court examined whether a collective layoff agreement reached in a court conciliation hearing between a company and the workers' statutory representatives is discriminatory based on age, due to providing a lower amount of severance for workers over 60 (although it guaranteed payment of the statutory amount of severance in all cases). The severance payment for those workers happened to be calculated by reference to the period remaining until their retirement.

The court (in a judgment by the labor chamber which may serve for tax purposes) held that it is reasonable and proportionate to provide a lower amount of severance for individuals aged 60 or over, because they are close to being eligible to receive a pension and it is easier for them to benefit from the option of a special social security agreement; whereas younger workers have more uncertain career and future prospects.

These conclusions may be of interest in relation to the personal income tax liability on severance payments, namely in relation to application of the exemption under the personal income tax legislation.

1.6 Wealth tax. – Nonresident taxpayers are allowed to deduct mortgage debts contracted to buy or invest in the mortgaged assets

Supreme Court. Judgment of February 13, 2023

A nonresident bought a property in Spain and three years later took out a mortgage on that property to secure a loan.

The Supreme Court held that nonresident wealth taxpayers (in other words taxpayers who are only taxed on their assets and rights located in Spain) may deduct from their taxable base the charges and other encumbrances that affect those assets and rights, and the debts relating to capital invested in those assets. Therefore, any debts not related to buying or investing in the asset that triggered the taxable event are not deductible, as occurred in the examined case.

1.7 Inheritance and gift tax. - The tax authorities may use the measurement rules under the wealth tax legislation to measure shares in entities for inheritance and gift tax purposes

Andalusia High Court. Judgment of November 29, 2022

In a limited review relating to inheritance and gift tax, the reported values of certain shares in unlisted companies were audited, using the method based on an expert opinion. This involved the tax auditor, as expert, measuring the shares by reference to their carrying amount as disclosed in the investees' latest balance sheets, which is the measurement method contained in the Wealth Tax Law (although not in the Inheritance and Gift Tax Law) for this type of shares.

The court recalled that, under the applicable legislation, audits of reported values do not consist of obtaining asset values directly by applying a law or a set of regulations. As a result

of the inheritance and gift tax legislation not stating how to determine the values of shares in unlisted companies, the tax authorities are free to apply the wealth tax legislation, which by contrast does contain a specific measurement rule for this type of shares. According to the court, this measurement method for shares is not a genuine audit of reported values, because the expert does not use personal findings based on his experience and qualifications to make the measurement, instead the expert simply applies one of the methods determined in a law.

The court censured the tax authorities, however, over the fact that the assessment did not contain the measurement method used; namely, that it did not expressly state that the legislation that supplied the basis for the measurement was the Wealth Tax Law. For this reason, it concluded that the tax authorities failed to comply with their obligation to give reasons for their administrative acts and set aside the assessment.

1.8 VAT. – The National Appellate Court issues several contradictory pronouncements in relation to the ticket price compensatory payments for transport services

National Appellate Court. Judgments of January 13 and January 25, 2023 (appeals 1320/2020 and 1313/2020

Consistently with the Public Sector Contracts Law (Law 9/2017 of November 8, 2017), the VAT Law (Law 37/1992 of December 28, 1992) was amended to state clearly that certain transactions performed by public entities were not taxable and to clarify the definition of price-related subsidy for the purpose of its inclusion in the taxable amount for VAT purposes. In other words, new wording was given to article 78. Two.3 of the VAT Law and it was stated that any monetary contributions that the public authorities make to fund the management of public services or services for promoting culture are not considered to be price-related, as long as they do not distort competition.

The National Appellate Court has recently made differing pronouncements on the inclusion or otherwise in the VAT taxable amount of the sums paid by public authorities in respect of ticket price compensatory payments related to transport services, in fiscal years before the entry into force of Law 9/2017. Here are the details:

(a) In a judgment delivered on January 13, 2023, panel six of the judicial review chamber reiterated its customary principle that they are price-related subsidies which therefore are part of the taxable amount. According to the court, this conclusion is not changed by the amendment to the VAT Law made by Law 9/2017, because this law was not in force at the time to which the judgment relates.

(b) In judgments delivered on January 25, 2023, however, also relating to periods before the entry into force of Law 9/2017, panel five took into account the amendment to the law in 2017, because it considered that the scope of the law is for interpretation and clarification of the definition of “price-related subsidy”. Therefore, it held that the examined subsidies are not part of the taxable amount.

1.9 VAT. – The taxable amount may be modified where, following an insolvency order on the debtor, the collateral securing payment of the claim is terminated

National Appellate Court. Judgment of January 17, 2023

An insolvency order was issued on a debtor. At the time the order was issued there was a security interest securing payment of the debt. This security interest was later terminated and rendered invalid, however. The court examined whether in this case the creditor has the right to modify the taxable amount for VAT purposes.

Both the tax authorities and TEAC considered this modification not to be allowed because, on the date of the insolvency order, the claim had collateral. The National Appellate Court concluded, based on the neutrality principle, that, in a case such as that described, the creditor's right to modify the taxable amount must be recognized, to bring it into line with the substance of the transaction.

1.10 Real estate tax. – The Madrid real estate tax rules are partially null and void because they provide separate rates for uses not defined in the cadaster legislation

Supreme Court. Judgment of January 31, 2023

In this judgment, regarding a case handled by Garrigues, the Supreme Court concluded that the separate real estate tax rate cannot be applied to properties with “storage-parking” use in the cadaster, thereby confirming the nullity of article 8.3 of Madrid City Council’s real estate tax rules (challenged indirectly) with respect to this point.

For further details on the content of the judgment, see our alert dated February 27, 2023.

1.11 Real estate tax. – The usufruct holder for part of a property must pay the tax in proportion to their ownership share

Supreme Court. Judgment of December 12, 2022

A taxpayer owned 20% of a usufruct (real right) in real estate. The city council nevertheless claimed payment of the real estate tax liability for the whole building.

The Supreme Court concluded that, for real estate tax purposes, and under the principle of economic capacity, the usufruct holder is only liable for the portion of the tax liability relating to their share in the usufruct.

1.12 Local authority fees. – Failure to conduct the public consultation procedure before the drafting and approval of local tax rules is not a valid ground for holding them null and void

Supreme Court. Judgment of January 31, 2023

In this judgment the Supreme Court concluded that the public consultation procedure defined in the Common Administrative Procedure Law, as a prior procedure before the drafting and approval of local tax laws, is not mandatory for declaring them null and void.

According to the court, in the case of local tax rules the provisions in the revised Local Finances Law are applicable, on account of these being specific legislation which prevails over the general legislation by reason of the subject-matter. This legislation on local finances does not contain any specific provisions on that procedure.

1.13 Local authority fees. – Examination of the effects of a decision rendering a local tax rule null and void on final acts issued by applying that rule

Supreme Court. Judgment of November 15, 2022

The court dealt with a case concerning the effects of a decision holding to be null and void a local tax rule in relation to a local authority fee for final decisions issued under that rule. In the specific case examined, the local tax rule was set aside due to the absence of the mandatory technical economic report. The Supreme Court concluded as follows:

(a) The setting aside of a local tax rule (one contained in any general provision, for example) takes effect generally from when the decision is published in the relevant official gazette.

(b) The extension of the decision to include consented acts of application affects the parties to the proceeding in which the local tax rule was held null and void.

(c) The extended content of the judgment and the option of restarting proceedings that ended with a final judgment would allow, if applicable, any of the challenge gproceedings defined in the law and relating to final acts to be brought against the parties targeted by the rules, regardless of whether they are parties to this dispute.

1.14 Debtor list. – The tax authorities may only publish information on individuals or legal entities with final tax debts

Supreme Court. Judgments of January 20, January 25 and February 2, 2023 (appeals 5225/2020 and 7918/2020)

Article 95 of the General Taxation Law (LGT) states that the tax authorities have to publish tax debtor lists periodically, which must include anyone considered a debtor due to having been held secondarily liable for tax debts or penalties, where (i) the total amount of the debt or penalty is higher than €600,000, and (ii) the debts or penalties have not been paid after the end of the original period for payment in the voluntary period.

The Supreme Court concluded in this judgment that the described list can only include individuals or legal entities who owe amounts to the national revenue authority in respect of final tax debts or penalties. Finding otherwise could cause reputational damage for persons who are finally determined (following administrative or judicial proceedings) not to be debtors.

Lastly, debts resulting from assessments related to an offense cannot be included on the list, until a criminal judgment exists, containing a conviction for an offense against the public purse, because finding otherwise would go against the principle of the presumption of innocence.

1.15 Tax management and audit procedures. - Review work conducted on the withholding agent does not toll the statute of limitations for the right to apply for a refund of incorrectly incurred withholdings

National Appellate Court. Judgment of December 7, 2022

The National Appellate Court recalled in this judgment that the obligations of the withholding agent and of the person required to incur the withholding are different and separate. Therefore, in this case the rule under article 68.8 LGT is not applicable, according to which the effects of the tolling of the statute of limitations for a person with tax obligations pass to the other persons with tax obligations.

Accordingly, any review work conducted on the withholding agent does not toll the statute of limitations for the recipient's right (a nonresident in this case) to apply for a refund of the withholdings incurred.

1.16 Review procedure. – Notices of the start of audits of reported values must give reasons for the review

Supreme Court. Judgment of January 23, 2023

Article 108.4 LGT states that the information included in self-assessments is presumed to be true.

Therefore, according to the Supreme Court, although the tax authorities have the power to start an audit of the values reported in a self-assessment, they must (before starting the audit) give the reasons why something should be audited. This obligation to give reasons does not depend on the auditing method used, because it arises from the presumption of truth for tax self-assessments.

1.17 Liability for tax. – The Supreme Court completes it case law on the standing of the person liable for tax to challenge the main debtor's assessments

Supreme Court. Judgments of January 19, 2023 (appeals 1693/2020 and 3904/2020)

Article 174.5 LGT states that the person liable for tax may challenge the facts enabling the enforcement of liability and the assessments affected by those facts, in the appeal or claim against the decision enforcing liability.

In these judgments, the Supreme Court completed its case law on the guarantee offered by that article to the person held liable for tax as a result of any of the causes under article 42.1 LGT, and concluded as follows:

(a) The LGT allows the person held liable for tax to appeal, on substantive or procedural grounds, against any assessments and penalties enforced on them, even if a decision has already been delivered on them in a final judgment applied for by the main debtors.

(b) A decision potentially upholding those grounds for challenge could never affect the validity and enforceability of acts on which a decision has already been made in a final judgment, although the decision enforcing liability may be held invalid.

2. Decisions

2.1 Corporate income tax. - Application to receive payment of the R&D&I tax credit due to insufficient tax liability (monetization) may be made, even if it has been calculated based on the increased rates under the Canary Islands regime

Central Economic-Administrative Tribunal. Decision of January 23, 2023

An entity was entitled to R&D&I tax credits, which were calculated by applying the increased rate set out in the legislation on the Canary Islands Economic and Tax Regime. Years later, as a result of insufficient tax liability, it applied for payment in respect of the tax credits ("monetization"). The tax authorities rejected their monetization because they considered that the tax credits belonged to the Canary Islands regime rather than the general legislation on the tax, which contains that monetization mechanism.

TEAC concluded, against this decision, that the Canary Islands legislation does not set out any tax credit that differs from or adds to the R&D&I tax credits under the general regime, instead it simply allows an increased rate to be applied to calculate those tax credits. Moreover, the monetization option resulting from insufficient tax liability as defined in the law on the tax makes no distinction based on the percentage applied to quantify the tax credit concerned.

2.2 Personal income tax. – A joint or individual election of a tax option may be modified if a defect in the decision when the self-assessment is filed is substantiated

Extremadura Regional Economic-Administrative Tribunal. Decision of July 27, 2022

Taxpayers elected to file joint personal income tax returns. Their self-assessment included imputed income from real estate, which is calculated by reference to the cadastral value of the properties. After filing the self-assessment, adjustments lowering the cadastral values of those properties were made by the cadaster management office with retroactive effect. The new lower values made it more beneficial to file individual tax returns. For this reason, the claimants applied for correction of their self-assessment so as to be able to elect to file individual returns.

Although, as a general rule, the election of a personal income tax option (individual or joint returns) cannot be changed after the stipulated filing period for the self-assessment has ended, the Extremadura TEAR recalled that for this to apply the original option must have been stated freely, something that does not occur if the basis for the decision was defective for reasons not attributable to the interested parties. The tribunal therefore accepted the taxpayers' application.

2.3 Personal income tax. – Capital losses from the redemption of shares are included in the savings component of taxable income

Castilla y León Regional Economic-Administrative Tribunal. Decision of April 29, 2022

FROB delivered a decision ordering the share capital of a financial institution to be reduced to zero by redeeming shares, with no indemnity or compensation for the shareholders.

According to the Castilla y León TEAR, this (contrarily to the claimant's allegations) is a capital loss resulting from a transfer, even if nothing is received in return, because the shares come out of the shareholders' assets.

The tribunal recalled that, in any share redemption transaction with a capital reduction, it is not the shareholders who redeem their shares, but the company instead, or FROB, in this case, who adopted the decision to reduce the share capital to zero. For this to occur there must be a prior transfer, to ensure that there are no shareholders after the redemption (in other words, the shareholders forfeit their status as such because they transfer their shares so that it is FROB that reduces the share capital to zero).

In short, the loss will have to be included in the savings component of taxable income for personal income tax purposes.

2.4 Nonresident income tax. – Real estate income must be imputed for real estate assets that do not have a certificate of occupancy, if there is proof that they may be used

Valencian Regional Economic-Administrative Tribunal. Decision of September 27, 2022

The Personal Income Tax Law (which is taken into account by the Nonresident Income Tax Law) states that real estate income does not have to be imputed, among other cases, where the real estate assets cannot be used.

On that basis, a taxpayer submitted that it was not necessary to impute real estate income on a nonresident income tax return in relation to a real estate asset that did not have a certificate of occupancy. The Valencian TEAR considered, conversely, that the absence of a certificate of occupancy does not necessarily imply that the real estate asset cannot be used. If, as happened in the examined case, there is evidence that the real estate assets may be used, income has to be imputed.

2.5 VAT. - Work connected with a renovation project must be computed as such if its cost is lower than the cost relating to the other structural or similar work

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

The VAT Law states (article 20.one.22.b) that supplies of buildings for renovation are not exempt. The main purpose of renovation work on buildings is their reconstruction, and this is met, as has been confirmed by TEAC in this new decision, where (among other requirements) more than 50% of the total cost of the renovation project relates to work to strengthen or treat structural elements, façades or roofs or to work similar or related to renovation work.

TEAC added that, the cost of the related work must be lower than the cost of the strengthening or treatment work on structural elements, façades or similar work; and it must be related to those types of work. Otherwise, the amount in respect of the related work will not be taken into account to examine fulfillment of the requirement for the sum of all items of structural and similar work to be higher than 50% of the total cost of the project.

2.6 Audit procedure. - The late production of documents after the end of the period granted in the third request will automatically give rise to a three-month extension of the maximum period for completion of audit work

Central Economic-Administrative Tribunal. Decision of December 19, 2022

The LGT states that, where the taxpayer has to produce information or documents requested by the auditors within the period granted in the third request, producing them at a later date will extend the maximum period for completion of audit work for a further three months, provided they are produced after at least nine months have run since the start of the procedure.

In this decision, TEAC clarifies that this rule will apply (i) regardless of the reasons for the late production of the requested documents by the interested party, and (ii) automatically, meaning that the auditors will not have to substantiate either than this fact caused a delay in the decision on the audit procedure.

2.7 Collection procedure. - An order initiating enforced collection proceedings cannot be made in relation to pre-insolvency order debts, even if the conditions for issuing them were satisfied before the insolvency order

Central Economic-Administrative Tribunal. Decision of January 19, 2023

The LGT takes into account the provisions in the insolvency legislation and the limits it contains on the coexistence of administrative enforced collection proceedings and insolvency proceedings. This implies, among other matters, that after the insolvency order has been issued, no individual enforcements may be initiated against the assets and rights available to creditors. However, the LGT states that an order initiating enforced collection proceedings may be issued (with the relevant enforcement period surcharge) where the conditions for doing so arise before the date of the insolvency order, or in the case of post-insolvency claims.

In the case examined in this decision, the debts enforced by the tax authorities constituted pre-insolvency order claims (rather than post-insolvency claims) because they had fallen due before the insolvency order. Moreover, the requirements stipulated in the LGT for issuing an order initiating enforced collection proceedings had been fulfilled, because by the date of the insolvency order the voluntary payment period for those debts had already ended.

TEAC nevertheless applied the principle determined by the National Appellate Court in its judgment of April 12, 2019 (appeal 305/2017) and concluded that both the LGT and the insolvency legislation must be interpreted to mean that an order initiating enforced collection proceedings cannot be issued in relation to pre-insolvency order debts, even if the necessary conditions for issuing that order had arisen before the insolvency order.

3. Resolutions

3.1 Corporate income tax. – The existence of valid economic reasons may be questioned in total spinoffs performed to allow new shareholders in or sell shares in the beneficiary entities

Directorate General for Taxes. Resolutions V2597-22 of December 21, 2022 and V2676-22 of December 29, 2022

Several spinoffs were analyzed which were performed to allow new shareholders into one of the spun-off lines of business and which might later be followed by transfers of the shares in any of the spinoff's beneficiary entities.

The DGT recalled that, if what was actually sought was to transfer the line of business by selling shares in the beneficiary entity, it could be considered that the real goal of the spinoff is to favor this transfer, and therefore the existence of valid economic reasons enabling the special tax neutrality regime to be applied may be questioned.

3.2 Corporate income tax. - The monetization of R&D&I and motion picture production tax credits is compatible with the minimum tax rate

Directorate General for Taxes. Resolutions V0308-23 and V0309-23 of February 16, 2023

It was asked whether it was possible to apply for payment of the tax credits under article 35 (R&D&I) and article 36.2 (motion picture productions) of the Corporate Income Tax Law (LIS), under article 39.2 and article 39.3 LIS, respectively, even if the minimum tax rate set out in article 30 bis of the same law is applicable.

The DGT concluded that, after the minimum net tax payable has been determined, the remaining amount of the tax credit arising as defined in article 35 (R&D&I) and article 36.2 (motion picture productions) LIS will be used and an application has be filed with the tax authorities for payment of the amount that could not be deducted by reason of an insufficient amount of tax payable subject to the terms and conditions stated in article 39.2 and article 39.3 LIS. In other words, the minimum tax rate and tax credit monetization procedures are compatible with each other.

3.3 Corporate income tax. - Clarification is given of the rules on offsetting tax losses in a group where they arose before the consolidated tax group was formed

Directorate General for Taxes. Resolutions V2590-22, V2592-22, V2594-22, V2595-22 of December 21, 2022

The DGT recalled that, under the tax group rules, the offsetting of tax losses incurred by the group or by the entities within it (before becoming part of the group) requires the existence of a prior positive taxable base for the tax group. If a company has unused tax losses when it becomes part of a tax group, the applicable limit for offsetting those losses must be the lower of:

(a) 70%, 50% or 25% (by reference to the individual company's net revenues) of that individual company's prior positive taxable base, after making the necessary eliminations and inclusions for the intra-group transactions in which it has taken part; and

(b) 70%, 50% or 25% (by reference to the group's net revenues) of the group's positive taxable base before applying the capitalization reserve and offsetting the unused tax loss.

In relation to the offset limit of up to 1 million euros:

(a) Tax losses amounting to up to €1 million incurred in the group may be offset in all cases.

(b) According to a systematic and reasonable interpretation of the law, that unlimited offset of up to €1 million is allowed for both determining the tax loss that may be offset by the tax group and was incurred by the entity that had become part of the group, and for determining the tax loss that the tax group may offset in total by reference to the unused tax losses of the entity that has become part of the group and the group's own unused tax losses. That offset can never result in taxable income being converted into tax losses.

3.4 Corporate income tax. - A client list acquired for consideration must be amortized over its useful life

Directorate General for Taxes. Resolution V2568-22 of December 19, 2022

An entity acquired a client list. On the basis of a report requested from the Spanish Accounting and Audit Institute, the DGT concluded as follows:

(a) The client list must be recorded as an intangible asset if it fulfills the accounting requirements do so.

(b) The intangible asset must be amortized over its useful life, meaning the period in which the company reasonably expects that the economic income inherent to the asset will produce revenues. The amortization expenses so recorded will be deductible.

(c) If its useful life cannot be reliably estimated, the client list must be amortized for accounting purposes over 10 years. For tax purposes, this amortization expense is deductible subject to a maximum annual limit equal to five percent of the carrying amount of the asset. The resulting amount must be increased by 150% for enterprises of a reduced size.

3.5 Corporate income tax. - Expenses incurred in statute-barred years are not deductible

Directorate General for Taxes. Resolution V2489-22 of December 01, 2022

An entity that did not record expenses in the fiscal years they were incurred decided to record them in a later year against voluntary reserves.

According to the DGT, the portion of an expense for accounting purposes relating to expenses incurred in statute-barred years cannot ever be deducted, because allowing its

deduction would determine a lower amount of tax than would be the case under the general recognition rules. By contrast, the portion of the expense relating to expenses incurred in non-statute barred years can be deducted, if proof is provided that this does not result in a lower amount of tax than would have been the case under the general recognition rules.

Lastly, the charge to reserves will lower the shareholders' equity amount at the end of the period in which the expenses are recorded, for the purposes of determining fulfillment of the requirement to maintain the increase in equity in relation to the capitalization reserve.

3.6 Nonresident income tax. - Expenses incurred by the taxpayer cannot be subtracted from the withholding tax base amount

Directorate General for Taxes. Resolution V2632-22 of December 27, 2022

An individual resident in Spain hires nonresident performers. The performers submit invoices to that individual, containing amounts in respect of social security taxes, which they have to pay their countries of origin. It was asked whether those social security taxes may be subtracted from the withholding tax base amount.

The DGT concluded that the withholding tax base must consist of the whole amount, in other words, it must include the total amounts paid to the nonresident performers, without taking expenses into account. Therefore, to make withholdings, the withholding agent cannot subtract the performers' social security taxes from the withholding tax base amount, even if they appear as separate amounts on the invoice, although the nonresident performers may later be able to recover any excess withholding, based on their final tax liability in Spain. This conclusion seems contrary to the comments made above in relation to withholdings from royalties under the National Appellate Court judgment of October 12, 2022.

3.7 Personal income tax. - A delayed retirement supplement may benefit from the 30% reduction

Directorate General for Taxes. Resolution V2577-22 of December 21, 2022

Since January 1, 2022, anyone who is going to start receiving a contributory retirement pension at a higher age than the normal retirement age has been able to elect to receive any of the following supplement amounts (article 210.2 of the revised General Social Security Law):

(a) An additional percentage of their pension for each complete year of contributions made between reaching the normal retirement age and the event triggering payment of the benefit.

(b) A lump sum for each complete year of contributions made between reaching the normal retirement age and the event triggering payment of the benefit.

(c) A combination of the additional percentage and the lump sum as will be determined in secondary legislation.

Based on the characterization of pensions as salary income, the DGT explained that if more than two years have run since the first contribution, the 30% reduction provided for benefits received in the form of a lump sum will be applicable on the delayed retirement supplement

in both case b) (lump sum), and in respect of the amount received in the form of a lump sum under the option in letter c) above.

3.8 Reporting obligations. – Currently crypto coin transactions cannot be reported because there are no implementing regulations on this obligation

Directorate General for Taxes. Resolution V2616-22 of December 23, 2022

The DGT analyzed the reporting obligations and personal income tax obligations in relation to the acquisition of crypto coins for their subsequent sale and concluded as follows:

(a) Virtual or crypto coins are intangible assets.

(b) Exchange transactions between virtual coins and sale transactions in exchange for euros performed outside an economic activity will give rise to capital losses or gains which will have to be included on the personal income tax return for the taxable period in which those transactions were performed.

(c) Information must be supplied to the tax authorities on virtual coins located abroad, subject to the terms that will be implemented by secondary legislation, and in the manner that will be specified on the information return form. On the date of the reply to the request for resolution, however, that secondary legislation had not been approved.

4. Legislation

4.1 Approval of the trading values in the fourth quarter of 2022 for traded securities and modification of form 179

The February 28, 2023 edition of the Official State Gazette (BOE) published Order HFP/188/2023 of February 27, 2023, approving the list of securities traded at trading venues, with their average trading values for the fourth quarter of 2022, for the purposes of (i) the 2022 wealth tax return and (ii) the annual information return on securities, insurance and income (form 189).

Additionally, modifications have been made to form 179 for information returns on transfers of rights to use homes as tourist accommodation, which will have to be filed annually between January 1 and January 31 each year, in relation to the information and transactions relating to the immediately preceding calendar year (the previous filing period was quarterly). The new filing period will be applicable, for the first time, for information returns relating to 2023, which will have to be filed in January 2024.

4.2 Approval of the Annual Tax and Customs Control Plan for 2023

On February 27, 2023, the Official State Gazette (BOE) published the decision of February 6, 2023 by the Directorate-General of the State Tax Agency, approving the general guidelines for the 2023 Annual Tax and Customs Control Plan. The following published guidelines are worth noting:

(a) In relation to **tax information and assistance** it charts, among other elements, an increase in the information offered to taxpayers in their tax data, in particular on the

corporate income tax form, including an automatic uploading of data on unused tax assets and prior years' adjustments.

(b) In relation to **tax audit work on multinational groups, large companies and tax groups**, (i) joint audits and mutual agreement resolution procedures will be fostered, (ii) particular attention will be paid to nonresident income tax and specifically to the withholdings made by large companies from dividends, interest and royalty payments to nonresidents without a permanent establishment in Spain (they will focus on the concept of beneficial owner); and (iii) structures and behavior patterns will be identified which benefit unfairly from low tax in certain territories, tax regimes or structures and which may be replicated or standardized for use by multiple taxpayers.

Additionally, in relation to tax groups, they will examine (iv) the correct offsetting of tax losses and fulfillment of the legal requirements laid down for the inclusion of entities in the tax group; or (v) the fact that the potential location in one territory or another by the entity representing the group may artificially condition the powers that the tax authorities have.

(c) In the field of **net worth and corporate analysis**, (i) sham activities to determine tax residence outside Spain or between autonomous communities will be controlled, and (ii) the classic transactions associated with any capital company (formation, capital increase and reduction, winding up and liquidation, withdrawal of members, among others) will be specifically analyzed to prevent them being used to cover up the economic capacities of their owners for personal income tax purposes, or serving as a safe haven for opaque amounts of income.

(d) In relation to the **concealment of business or professional activities and fraudulent use of companies**, work will carried out to (i) prevent fraudulent use of a legal personality to funnel income or unfairly divert individuals' personal expenses, and (ii) monitor taxpayers with respect to which irregular or unusual patterns have been observed in their inventories which are inconsistent with their reported activity or their sales.

(e) In the field of **corporate income tax control**, (i) the use of partnership structures such as economic interest groupings (as a vehicle to funnel tax credits and other tax benefits) will be reviewed; and (ii) the monitoring of SOCIMIs (Spanish real estate investment trusts) and their shareholders will be fostered. Plus, regarding **VAT control**, (i) adequate fulfillment of the obligations related to the information sharing system will be verified, (ii) use of legal entities to be eligible for the right to deduct input VAT will be examined, where they are related directly or indirectly to other entities with activities that do not create that right, (iii) preventive control measures will be carried out in relation to the Intra-Community Operators Register or VAT fraud in intra-Community transactions or transactions related to first and subsequent supplies following imports relating to electronic materials and components not eligible for the reverse charge mechanism; and (iv) control measures will be carried out on intra-Community VAT fraud schemes operating in the vehicle industry.

(f) In the **taxpayer register** department, work will continue on cleaning up the non-business entity register to remove any that should not be there, and perform a preventive control process to identify register-related risks associated with the entry of new taxpayers on the register, in particular potential inclusions of entities effectively controlled by taxpayers who have had censurable tax practices in the past.

(g) Lastly, among their **other work**, notably emphasis will be placed on transactions performed using cash and virtual coins, and on the control of new forms of artificial divisions of economic activities for personal income tax and corporate income tax purposes.

4.3 Measures approved to protect people reporting infringements of the law and to combat corruption

Law 2/2023 of February 20, 2023, on the protection of people who report breaches of the law and on combating corruption, was published in the Official State Gazette on February 21, 2023. See our alert dated February 21, 2023 for a summary.

This law transposes Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019, known as the Whistleblowing Directive, and is targeted at providing protection for people who report certain infringements.

In the tax field, the law includes within its scope:

(a) Acts or omissions that may amount to infringements of European Union law which may affect the internal market, and infringements relating to the internal market in relation to acts infringing corporate income tax rules or to practices aimed at obtaining a tax advantage that defeats the object or purpose of the legislation applicable to that tax.

(b) Acts or omissions that may amount to serious criminal or administrative infringements implying a financial loss for the Spanish revenue authority and for the social security system.

4.4 New list of non-cooperative jurisdictions published

On February 10, 2023, the Official State Gazette published Order HFP/115/2023 of February 9, 2023, determining the countries and territories, as well as the harmful tax regimes, which are considered non-cooperative jurisdictions. The new list has kept countries and territories that were already on the previous list, approved by Royal Decree 1080/1991 of July 5, 1991, and added Barbados, Guam, Palau, American Samoa, Trinidad and Tobago and Samoa (this last jurisdiction, with respect to offshore business, its harmful preferential tax regime).

The order came into force on February 11, 2023 and will apply to taxes without a taxable period that fall due on or after that date and to other taxes for which their taxable periods start on or after that date. For any taxes with taxable periods that have not ended on February 11, 2023, the countries or territories that will be considered non-cooperative jurisdiction in these taxable periods will be those on the previous list.

For the countries or territories appearing on the new list which were not on the previous one, the order will come into force on August 11, 2023 and will be applicable to (i) taxes without taxable periods which fall due on or after that date and (ii) other taxes with taxable periods starting on or after that date.

On February 14, 2023, the Council of the European Union also reached a set of conclusions on the revised EU list of countries and territories deemed to be non-cooperative for tax purposes. It was decided to add Russia, Costa Rica, the British Virgin Islands and the Marshall Islands to the list of non-cooperative countries and territories (see Annex I to the Conclusions).

Tax Department

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