Tax Newsletter

Spain

GARRIGUES

July – August – September 2023

Table of Contents

1. Judgments

1.1 Corporate income tax. - The EU General Court annuls the Third Decision of the European Commission on financial goodwill

1.2 Corporate income tax. – Directors' compensation is not a gratuity and the relationship absorption theory is not applicable

1.3 Corporate income tax. – Books of account are a valid means of demonstrating the existence of a debt in a year which has become statute-barred

1.4 Corporate income tax. – When determining the income of a permanent establishment, only management and general administrative expenses related to its activity can be allocated to it

1.5 Corporate income tax. – The monetization of a R&D&I tax credit is a tax mechanism and the provincial authorities must therefore assume the relevant payment to taxpayers which are taxed on a relative basis

1.6 Corporate income tax. - The limits for offsetting of tax losses are applicable to the absorbing entity in a merger between sister entities

1.7 Personal income tax. – Severance paid to senior executives who hold office as directors can benefit from the treatment provided for multi-year income

1.8 Personal income tax. – Calculating gains on real estate assets without taking inflation into account does not breach the ability-to-pay principle

1.9 Non-resident income tax. – Compensation paid by a company resident in Spain to its directors which is charged to a permanent establishment located abroad is not taxable in Spain

1.10 VAT. – The principle of proportionality established in EU Law must be observed in penalty proceedings

1.11 VAT – Collection procedure. – Although failure to include a charge for VAT on imports in a self-assessment may trigger the start of the enforced collection period, an order initiating enforced collection proceedings is not issued automatically

1.12 Transfer and stamp tax. – The valuation of real estate assets by the tax authorities based on the application of a multiplier to their cadastral value is not a formal defect allowing for a reversion of proceedings

1.13 Tax on increase in urban land value. – The Constitutional Court's judgment of October 26, 2021 takes effect on the date on which it was handed down and not on the date of its publication in the Official State Gazette

1.14 Local authority charges - Tax ordinances or the annexes published along with them must clearly determine the tax rate

1.15 Real estate tax. – The halting of a procedure challenging the cadastral valuation of a real estate asset by the cadastre does not alter the start date of the statute of limitations period after which the municipal council can no longer assess the tax

1.16 Real estate tax. – The Supreme Court holds that several articles of the tax ordinance regulating the Barcelona metropolitan tax are unlawful

1.17 Administrative procedure. – Taxpayers cannot be required to interact electronically with the tax authorities

1.18 Liability for tax. - A minor who has obtained no income cannot be jointly and severally liable for the family unit's personal income tax debt

1.19 Penalty procedure. - The statute-barring of a tax offense precludes the imposition of an administrative penalty based on the same set of facts

1.20 Review procedure. - If the judicial review court departs from the facts proven in a criminal judgment in relation to other fiscal years, it must give adequate reasons for doing so

1.21 Review procedure. – The ban on reviewing tax-related acts is not applicable when the substantive grounds were not examined in the final judgment

1.22 Entry and search. – Even where the entering and searching of a domicile have been authorized when the audit procedures have not yet commenced, the evidence obtained may be considered lawful

2. Decisions

2.1 Related-party transactions - Correlative adjustment. – The voiding of assessments issued against the company entails the voiding of assessments issued to its shareholders

2.2 Related-party transactions. – TEAC analyses how the ownership of shares under a community property system affects adjustments for controlled transactions

2.3 Corporate income tax. – The reduced tax rate for newly created entities can only be applied in the first year for which a positive tax base is obtained and in the following year, even if the tax base is negative in the second year

2.4 Personal income tax. – The extent to which gains generated by the donation of shares in family businesses are not taxable is proportionate to the assets utilized in the economic activity

2.5 Non-resident income tax. – The inability to deduct tax withheld at source in the country of residence does not in itself amount to discriminatory treatment

2.6 VAT. – The VAT on supplies relating to a property utilized in part for the purposes of the economic activity is partially deductible

2.7 Administrative procedure. – The fact of an enabled electronic address having been accessed is evidence that a notice has been validly served, even where it has not been proven that the taxpayer voluntarily accepted this system

2.8 Inspection procedure. – The unlawful omission of the case file review phase cannot be rectified by a reversion of proceedings if the allowing of that phase would have resulted in the statute-barring of the right to issue an assessment

2.9 Penalty procedure. - A penalty can be imposed where the notification of a request for information has been rejected due to the website not having been accessed

3. Resolutions

3.1 Corporate income tax. – The deferment of tax liability on underlying capital gains is not a tax advantage for the purpose of applying the neutrality regime

3.2 Corporate income tax. – A loss arising from the assumption of debt of a related entity in insolvency proceedings is deductible if it is recognized correctly

3.3 Corporate income tax. - A surcharge in respect of economic benefits resulting from an occupational accident or illness is not deductible

3.4 Corporate income tax. – The termination of foreign entities is considered to take place only where this is so provided in the applicable legislation, which must be proven

3.5 Corporate income tax. – Tax losses may be offset without any limit in all the fiscal years in which an entity's liquidation plan is implemented until its termination

3.6 Personal income tax. – The transfer value for personal income tax purposes is not the reference value allocated by the cadastre

3.7 Personal income tax. – A loss arising from leaving behind fitments in leased premises is included in the general component of income

4. Legislation

4.1 The effective annual interest rates for the fourth quarter of 2023, to be used to characterize certain financial assets for tax purposes, have been published

4.2 Amendment of the entry into force of form 604 for the tax on financial transactions

4.3 Various information return forms in relation to virtual currencies have been approved

4.4 Exempt amount for personal income tax purposes of per diems and allowances for traveling expenses has been raised

5. Miscellaneous

5.1 The Multilateral Competent Authority Agreement on automatic exchange of information on income derived through digital platforms has been published

5.2 The Multilateral Competent Authority Agreement on the automatic exchange regarding CRS avoidance arrangements and opaque offshore structures

5.3 The European Commission concludes that tax incentives to the audiovisual industry constitute aid compatible with the internal market

5.4 Russia partially suspends the application of tax treaties with non-friendly states

5.5 AEAT resumes its position in relation to the tax liability on the provision of vehicles to employees

1. Judgments

1.1 Corporate income tax. - The EU General Court annuls the Third Decision of the European Commission on financial goodwill

General Court. Judgment of September 27, 2023 (cases T-12/15, T-158/15 and T-258/15), among others

The General Court has concluded in various judgments, in relation to the Spanish financial goodwill amortization regime, that the European Commission cannot refuse to apply the principle of legitimate expectation to indirect acquisitions of foreign entities, given that this expectation has been recognized (depending on the date of acquisition) in relation to acquisitions of other types.

We summarize the court's conclusions in our publication dated September 27, 2023.

1.2 Corporate income tax. – Directors' compensation is not a gratuity and the relationship absorption theory is not applicable

Supreme Court. Judgment of June 27, 2023

The position maintained by the tax authorities for years has been that directors' compensation is not deductible in cases of total or partial non-compliance with the formal requirements established in corporate legislation.

The Supreme Court has rejected the idea that the deduction of this compensation can be disputed on the grounds that it is a gratuity and an expense precluded by law, provided that it has been correctly recorded for accounting purposes and the provision of services is not in question. Furthermore, it reiterated its rejection of the abuse of formal rules, particularly where the payer is a sole-shareholder entity. Finally, it rejected the tax effects of the relationship absorption theory based on the case law of the Court of Justice of the European Union (CJEU). See our publication dated July 6, 2023 in which we discuss this judgment briefly.

1.3 Corporate income tax. – Books of account are a valid means of demonstrating the existence of a debt in a year which has become statute-barred

Supreme Court. Judgment of July 25, 2023

The books of account of a company contained entries recording non-existent debts. The tax auditors therefore assessed an amount of income for the earliest of the fiscal years which had not yet become statute-barred. The company presented expert evidence to the National Appellate Court which showed that the debt had already been recorded in a statute-barred year.

The Supreme Court concluded that the books of account are sufficient evidence for these purposes and that, if it is proven that the fictitious liability was recorded in a year which has become statute-barred, there can be no adjustment.

1.4 Corporate income tax. – When determining the income of a permanent establishment, only management and general administrative expenses related to its activity can be allocated to it

Supreme Court. Judgments of July 17, 2023 (appeals 4128/2021 and 8008/2021), of July 18, 2023 (appeals 6532/2021 and 8015/2021), and of July 24, 2003 (appeal 1474/2020)

These judgments analyze how a company's management and general administrative expenses are to be allocated when calculating the income of its permanent establishments in order to determine the amount that is exempt at the head office (the income of the establishment) and the amount that it can deduct (expenses not allocated to the establishment).

The Supreme Court pointed out that there is no allocation principle in the Spanish rules. The applicable principle is contained in tax treaties, which refer to management and general administrative expenses incurred for the purposes of the establishment. When allocating expenses, it must therefore be considered, specifically, which of them have been incurred for the benefit of the establishment.

1.5 Corporate income tax. – The monetization of a R&D&I tax credit is a tax mechanism and the provincial authorities must therefore assume the relevant payment to taxpayers which are taxed on a relative basis

Supreme Court. Judgment of July 10, 2023

According to the Corporate Income Tax Law, a taxpayer can, when its tax liability is insufficient and provided that certain requirements are met, request that the tax authorities pay it the R&D&I tax credits which it has generated. In the case in question, a taxpayer subject to the tax legislation applicable in the "common territory" (i.e. Spain excluding Navarra and the Basque Country), but which was taxed jointly in that territory and in the Basque Country, requested monetization of this credit. The provincial authorities took the view that they were not required to pay the proportional amount relating to it; they argued that monetization is not a tax mechanism but a subsidy, grant, incentive or other such concept, and it is therefore not covered by the rules of the Economic Accord with the Basque Country.

The Supreme Court, however, concluded that the realization of the credit through its monetization does not alter the fact that this is a tax concept, albeit a special procedure and not the mechanism through which taxes are generally applied.

1.6 Corporate income tax. - The limits for offsetting of tax losses are applicable to the absorbing entity in a merger between sister entities

National Appellate Court. Judgment of May 3, 2023

Following the merger of two entities owned by a single shareholder, the absorbing entity continued to offset its own tax losses under the general offset regime, without heeding the limits imposed by article 90 of the Revised Corporate Income Tax Law (now article 84 of the law on this tax). According to this article, the transferring entity's unused tax losses may be offset by the acquiring entity, although certain limits apply where both entities form part of a group of companies.

Although these limits are regulated with respect to the tax losses of the transferred (absorbed) entity, the understanding of the tax auditors, based on a "purpose-based interpretation" of the rule, was that they should also apply to the tax losses of the acquiring (absorbing) entity. Departing from its earlier view (judgment of June 1, 2017), the National Appellate Court concluded that this "purpose-based and inclusive" interpretation is correct.

1.7 Personal income tax. – Severance paid to senior executives who hold office as directors can benefit from the treatment provided for multi-year income

Supreme Court. Judgment of July 25, 2023

The Supreme Court has concluded that severance payments received by senior executives who are also directors can benefit from the treatment provided for multi-year income (30% reduction), given that the rule refers, generally, to gross earned income, and this, according to legal provisions, includes directors' compensation. The relationship absorption theory does not change this, since the law establishes no exclusion for income obtained under a contract for services.

In reaching this conclusion, the court drew attention to its recent case law on the deduction of directors' compensation (publication dated July 6, 2023), which was based, among others, on the CJEU judgment dated May 5, 2022 (case JH, C-101/21), in which the court concluded that a worker cannot be denied the rights or protections afforded to workers by EU law on the grounds that they are members of the managing body.

1.8 Personal income tax. – Calculating gains on real estate assets without taking inflation into account does not breach the ability-to-pay principle

Constitutional Court. Judgment of June 6, 2023

Law 26/2014 of November 27, 2014 eliminated the option of adjusting the acquisition value of real estate assets (when calculating the income obtained from their transfer) by means of so-called indexation allowance multipliers (the purpose of which was to correct for inflation).

The Constitutional Court concluded that this amendment does not breach the ability-to-pay principle because this principle does not make it obligatory, in all cases and in any event, for lawmakers to provide for the updating of the acquisition value of real estate to reflect the effects of inflation for personal income tax purposes (as, indeed, was already the case with transfers of other assets for the purposes of the same tax, or for other taxes). This is a legitimate option which may be considered inopportune from a political or legislative standpoint but does not amount to a case of unconstitutionality by omission.

1.9 Non-resident income tax. – Compensation paid by a company resident in Spain to its directors which is charged to a permanent establishment located abroad is not taxable in Spain

National Appellate Court. Judgment of June 1, 2023

A company resident in Spain paid compensation to its Directors resident in the UK which was charged to its branch in that country, with no tax being withheld.

Article 13.1.e) of the revised Nonresident Income Tax Law - on which the tax auditors based their conclusion that withholding tax was payable - stipulates that compensation paid to directors and board members of an entity resident in Spanish territory is subject to this tax (the "taxable person rule"). Conversely, article 13.2.b) of the same revised law - on which the company based its decision to withhold no tax - provides that income paid to nonresidents by permanent establishments located abroad, which is charged to those establishments, is deemed not to have been obtained in Spain when it is linked to the activity of the permanent establishment abroad (the "non-taxable person rule").

The National Appellate Court ruled in the company's favor. According to the court, the special non-taxable person rule refers to a situation in which a payment is made by an entity resident in Spain and charged to a permanent establishment located abroad, provided that, in addition, the recipient is a nonresident individual or entity and the services for which the compensation is paid are linked to the activities of the permanent establishment (as happened in the examined case). Moreover, the non-taxable person rule is a special rule insofar as it excludes the general rule that income paid to directors by Spanish entities is taxable, and it must therefore take precedence.

1.10 VAT. – The principle of proportionality established in EU Law must be observed in penalty proceedings

Supreme Court. Judgments of July 25 and 26, 2023 (appeals 5234/2021 and 8620/2021)

Article 170.2. 4 of the VAT Law defines as a tax infringement the failure to report in a VAT self-assessment amounts relating to transactions in respect of which the recipient is the taxable person, owing to the application of the reverse-charge mechanism. According to article 171.1. 4 of the same law, the penalty in such cases is a proportional fine equal to 10% of the tax charge not reported.

The Supreme Court concluded that the application of this penalty rule in Spain's domestic legislation (even though it is clear and precise) breaches the principle of proportionality prevailing in European Union (EU) law (see the entry in our blog dated September 12) in cases in which no loss was caused to the Public Treasury or there is nothing to suggest that fraud has been committed.

1.11 VAT – Collection procedure. – Although failure to include a charge for VAT on imports in a self-assessment may trigger the start of the enforced collection period, an order initiating enforced collection proceedings is not issued automatically

Supreme Court. Judgment of July 13, 2023

In the examined case, the charges for VAT on imports had been paid in by filing a supplementary return which was submitted outside the time limit. However, no loss had arisen for the treasury, because there was no limit on the deduction of these charges by the company.

The Supreme Court concluded that the failure to include a charge for VAT on imports in a self-assessment can trigger the start of the enforced collection period, on the day following the expiry date of the voluntary payment period, but this does not automatically entail the issuance of an order initiating enforced collection proceedings and the imposition of the corresponding surcharge. If, as in the examined case, the supplementary return is filed and

the debt paid in before notification of an order initiating enforced collection proceedings, no such order can be issued, and no surcharge imposed.

1.12 Transfer and stamp tax. – The valuation of real estate assets by the tax authorities based on the application of a multiplier to their cadastral value is not a formal defect allowing for a reversion of proceedings

Supreme Court. Judgment of June 27, 2023

The Supreme Court recalled that valuations of real estate assets by the tax authorities for the purposes of transfer and stamp tax, or any other tax for which the taxable amount is calculated by reference to actual value, cannot be calculated by applying a multiplier to their cadastral value. This overly general method is valid only if the tax authorities supplement their valuation with an individual audit of the specific real estate asset concerned.

Moreover, the use of this method in a valuation by the authorities cannot be classed merely as a formal defect, which would make it possible to revert the proceedings and conduct a new audit.

1.13 Tax on increase in urban land value. – The Constitutional Court's judgment of October 26, 2021 takes effect on the date on which it was handed down and not on the date of its publication in the Official State Gazette

Supreme Court. Judgments of July 10 and 12, 2023 (appeals 5181/2022 and 4701/2022)

In a judgment dated October 26, 2021, the Constitutional Court held that certain provisions of the legislation on the tax on increase in urban land value were unconstitutional and null and void (see our publication of November 3, 2021). It was established in the judgment, however, that neither (i) circumstances which, as of the date on which the judgment was handed down (October 26, 2021), had been finally decided (in a judgment carrying the force of *res judicata* or in a final administrative decision), nor (ii) assessments or self-assessments of the tax which had not been challenged as of that same date, could be reviewed.

Since then, there have been various rulings by courts and regional high courts reflecting differing opinions as to whether the effects of the time limits in question are applicable from October 26, 2021 (the date on which the judgment was handed down) or from November 25, 2021 (the date on which it was published in the Official State Gazette (BOE)) (see our publication dated May 12, 2022). The Supreme Court has now concluded that the effects of the judgment do not extend to assessments (provisional or final) or self-assessments challenged on or after October 26, 2021, when the grounds on which the challenge is based is the declaration of unconstitutionality. It is nevertheless possible to challenge them (provided that the legally stipulated time limits applicable in each case have not been exceeded) on grounds other than the declaration of unconstitutionality.

1.14 Local authority charges - Tax ordinances or the annexes published along with them must clearly determine the tax rate

Supreme Court. [Judgment of July 14, 2023]

The Supreme Court has concluded that the tax rate used to calculate the liability in respect of a local charge must be clearly stated in the actual tax ordinance by which the charge is regulated or, at least, in the annexes published along with it (for example, in the technical-economic report that the local authority is required to adopt prior to approval of the ordinance).

In this case, the court added that the tax ordinance must include an express and unequivocal reference to those parts of the technical-economic report that set out the relevant elements used to determine the amount payable for the local charge.

1.15 Real estate tax. – The halting of a procedure challenging the cadastral valuation of a real estate asset by the cadastre does not alter the start date of the statute of limitations period after which the municipal council can no longer assess the tax

Supreme Court. [Judgment of July 5, 2023]

The cadastral value of a property was found, in an economic-administrative decision, to be incorrect. It took the cadaster longer than four years to implement the decision (by modifying the cadastral value). Throughout this entire period there was no correct cadastral value on which municipal council could base its assessment of the real estate tax and it continued to issue assessments based on the value which had been declared null and void.

The Supreme Court recalled that the statute of limitations period for the right to assess the real estate tax begins on the date of accrual of the tax (January 1 of each year), and this is still the case even if the cadastral valuation of the property is contested. The same conclusion applies even where the halting of the procedure is attributable to the cadaster rather than to the municipal council responsible for assessing the real estate tax. Therefore, in the analyzed case, the municipal council's right to assess the real estate tax had become statute-barred.

1.16 Real estate tax. – The Supreme Court holds that several articles of the tax ordinance regulating the Barcelona metropolitan tax are unlawful

Supreme Court. Judgments of June 16, 19 and 20, 2023 (appeals 8433/2021, 8741/2021 and 77/2022)

The revised Local Finances Law empowers metropolitan areas to establish, in a tax ordinance, a real estate tax surcharge applicable to properties located in their area (commonly known as the metropolitan tax). This surcharge consists of a single percentage applicable to the taxable amount for this tax, which cannot exceed 0.2%.

The Supreme Court analyzed several rules set out in the tax ordinance regulating the metropolitan tax for the Metropolitan Area of Barcelona and declared it null and void: (i) because the ordinance established an exemption from the surcharge for certain taxpayers (owners of rural properties) who were subject to and not exempt from real estate tax (infringing the law); and (ii) because it envisaged a reduction applicable to the gross tax

liability from which certain categories of properties could not benefit, as was the case with special-feature real estate assets.

Finally, the court confirmed that the metropolitan tax rate applicable to special-feature real estate assets cannot be higher than that applicable to urban properties, contrary to the provisions of the ordinance.

1.17 Administrative procedure. – Taxpayers cannot be required to interact electronically with the tax authorities

Supreme Court. Judgment of July 11, 2023

The Supreme Court recalled that the General Taxation Law ("LGT") grants the Minister of Finance the legal authority to determine the cases and conditions in which taxpayers can be required to submit tax-relevant documents electronically.

However, according to the court, this authorization must be interpreted in a manner which takes into account the general principle set out in article 96.2 of the LGT, according to which taxpayers have the right (not the obligation) to interact with the tax authorities in this way. In other words, the imposition of the obligation to use of electronic means should be understood as an exception. In order to demarcate the scope of this obligation, it is essential for there to be provisions establishing the characteristics and conditions that have to exist, in the case of certain taxpayers, for the imposition of this obligation to be justified, when for all other taxpayers it is merely a right.

1.18 Liability for tax. - A minor who has obtained no income cannot be jointly and severally liable for the family unit's personal income tax debt

Supreme Court. Judgment of July 13, 2023

Article 84.6 of the Personal Income Tax Law (article 73.5 of the Navarra provincial law applicable to the case and which is similar to the equivalent article of the law applicable in Spain generally) stipulates that, where joint taxation is elected, all the members of the family unit are jointly and severally liable for the tax, based on the portion of the taxable income relating to each of them.

In the case analyzed in this judgment, a minor who had obtained no income formed part of a family unit which had elected joint taxation. The Navarra tax authorities issued an attachment order against the child for a tax debt linked to the self-assessment of the tax. The Supreme Court concluded that the attachment order against the child was unlawful because the child had received no income and, given their age, neither had they been able to either agree or disagree with the parents' decision to elect joint taxation of the family unit. Moreover, the legislation does not envisage adequate means for protection of the minor from the situation resulting in joint and several liability. As the Constitutional Court concluded (in its judgment 45/1989), the joint and several liability inherent to taxation of the family unit cannot be imposed on a person who, by applying the logic of a personal and direct tax, would be under no obligation to make any payment, and whose non-existent income is, by definition, unnecessary in order to determine the income of the various members.

1.19 Penalty procedure. - The statute-barring of a tax offense precludes the imposition of an administrative penalty based on the same set of facts

Supreme Court. Judgment of July 27, 2023

Article 250 of the LGT provides that when the tax authorities suspect that an offense may have been committed against the Public Treasury and refer the proceedings to the Public Prosecutor's Office, they must refrain from initiating or continuing the associated penalty proceedings, although they can commence new penalty proceedings where the criminal proceedings come to end, and no offense has been established, based on the facts that the courts consider proven.

The case in question started with a review procedure in May 2003, in respect of an entity's 1999 VAT.

The proceedings were referred to the Public Prosecutor's Office, and the criminal court, in January 2015, handed down a judgment in which the company's director was convicted of several tax offenses. However, the offense related to VAT for 1999 was deemed to have become statute-barred under criminal law. In February 2016, the tax authorities continued with their review procedures in respect of VAT for 1999, which ended with an assessment decision and a penalty decision, of which notice was served in July 2016.

The Supreme Court ratified the general principle that the system determining a preliminary criminal issue with suspension of the administrative procedure (in relation to a possible liability for infringement of tax rules) is compatible with the tolling of the statute of limitations period. However, the court clarified that, in the analyzed case, the *non bis in idem* principle had been breached, given the substantially criminal nature of the imposed penalty and the existence of an unjustified and extraordinarily protracted delay in the exercising of the power to penalize. The court stressed that the coordination between the administrative procedure and the actions of the criminal court had not been effective and the interested party had been subjected to successive proceedings which had been overly burdensome.

1.20 Review procedure. - If the judicial review court departs from the facts proven in a criminal judgment in relation to other fiscal years, it must give adequate reasons for doing so

Supreme Court. Judgment of July 14, 2023

A taxpayer was acquitted in criminal proceedings for offenses against the Public Treasury in relation to personal income tax and wealth tax for 2006, because it was proven that they had not been resident in Spain from June 2000 through to March 2007.In relation to personal income tax for 2005, the National Appellate Court based its decision on the proven fact in question and upheld the taxpayer's appeal. However, in relation to wealth tax for 2005, the Catalan High Court of Justice deviated from the finding of proven facts in the criminal judgment on the grounds that this judgment referred to 2006 and the case analyzed by this court related to a different fiscal year (2005). A cassation appeal was lodged against this latter judgment and has now been decided upon by the Supreme Court.

The Supreme Court concluded that the facts held to be proven in a criminal judgment do not bind the judicial review courts when the two proceedings analyze different tax periods in relation to the same or different tax concepts. Nevertheless, the judge in the judicial review proceeding is required to give an adequate account of the reasons for the judgment handed

down if it contradicts the judgment in the criminal case, and no such account was given in the case in hand. Bearing in mind, moreover, that "the same set of facts cannot exist and cease to exist for the organs of government" (any affirmation to the contrary would run counter to the logics of law and more broadly and go against the principle of legal certainty), the taxpayer's appeal was upheld.

1.21 Review procedure. – The ban on reviewing tax-related acts is not applicable when the substantive grounds were not examined in the final judgment

Supreme Court. Judgment of July 4, 2023

In the case in question, TEAC refused to admit certain administrative appeals on the grounds that they had been filed late. The National Appellate Court confirmed TEAC's decision and stated expressly that an examination of the facts (related to corporate income tax assessments) was not called for. The entity, in response, requested that the assessment and penalty decisions be held null and void as a matter of law, on the grounds envisaged in article 217.1 e) of the LGT (referring, among others, to decisions handed down without the legally established procedure having been followed). The company argued that the same ground for setting aside that had led to the voiding (in a judicial review) of the assessment and penalty decisions in respect of VAT issued in the same proceeding should be applied to the decisions in question.

The petition for the decisions to be set aside was rejected by AEAT, which concluded that article 213.3 of the LGT was applicable. According to this article, neither acts for the application of taxes and imposition of penalties nor decisions in respect of economic-administrative claims are reviewable where they have been confirmed in a final judgment by the court (the National Appellate Court's judgment, in this case). The Supreme Court concluded, however, that the aforementioned ban preventing the review of tax-related acts is not applicable where a final judicial ruling exists which fails to examine the facts because it confirms the decision of the economic-administrative tribunal declaring that the time limit has been overstepped.

1.22 Entry and search. – Even where the entering and searching of a domicile have been authorized when the audit procedures have not yet commenced, the evidence obtained may be considered lawful

Supreme Court. Judgments of June 9, 2023 (appeals 2525/2022 and 2086/2022) and June 12, 2023 (appeal 2434/2022)

In the cases analyzed in these judgments, the domiciles of various companies had been entered and searched simultaneously with the notification of the commencement of audit procedures. The court order authorizing the entry and search became final after appeals in this connection were dismissed by the Catalan High Court of Justice.

In the appeals lodged against the assessments issued and penalties imposed during the audit, the taxpayers made a petition for the evidence used, which had been obtained during the entry and search procedure, to be held unlawful. The companies cited the supreme court judgment of October 1, 2020 (October 2020 Newsletter), which concluded that an order authorizing the entering and searching of a domicile cannot be issued either before the audit or at the point at which it commences.

The Supreme Court concluded, however, that in the cases being analyzed, the requirement for prior notification to the taxpayer of commencement of the audit was unnecessary at the point in time at which the order authorizing the entry and search was issued, since at that time the prevailing case law was different to that reflected in the judgment of October 1, 2020. According to the court, this interpretation must not affect any core element of the judgment of appropriateness, necessity and proportionality which the court order authorizing the entry and search is required to respect. In these cases, it therefore cannot be concluded that the evidence obtained has been rendered unlawful, or that the taxpayers' right to inviolability of the domicile has been breached.

The principle established by the Supreme Court in these judgments was applied by TEAC in its decisions of June 26, 2023 (RG 6875/2020), July 17, 2023 (RG 3790/2020) and July 24, 2023 (RG 10466/2022).

2. Decisions

2.1 Related-party transactions - Correlative adjustment. – The voiding of assessments issued against the company entails the voiding of assessments issued to its shareholders

Central Economic-Administrative Tribunal. Decisions of May 29, 2023 (3013/2021 and 5972/2021)

The assessments analyzed in these rulings derive from two separate audits initiated simultaneously in respect of two companies and their shareholders (individuals). The adjustment consisted, in both cases, of the restatement at market value of related-party transactions between shareholder and company, which resulted in an increase in the personal income tax liability of the shareholders and a correlative decrease in corporate income tax for the companies. The corporate tax assessments were set aside by the Madrid TEAR.

TEAC applied the principle established in its decision of February 2, 2021 (5109/2016/52) (February 2021 Newsletter) and concluded that, once the adjustment of the legal entity's position has been set aside, the adjustment applied to the shareholder in respect of the same item has to be set aside also, since this is the only way of respecting the bilaterality principle that must be applied in relation to adjustments for controlled transactions.

2.2 Related-party transactions. – TEAC analyses how the ownership of shares under a community property system affects adjustments for controlled transactions

Central Economic-Administrative Tribunal. Decisions of February 10, 2020 and April 25, 2023

When a related-party transaction is adjusted and the value of the services provided by the shareholder to the company is increased, thereby increasing the personal income tax liability and reducing the corporate income tax liability (primary adjustment), the understanding is that there has been a transfer of assets from the shareholder to the company, which must be classed accordingly in order to apply the correct tax treatment (secondary adjustment). In these decisions, TEAC analyzed the impact of the marital community property system in

relation to a secondary adjustment of this type, in a situation in which only one of the spouses provides services to the company. It concluded as follows:

(a) The community property system has no impact on the way in which the transfer of assets from the shareholder to the company is classed. Specifically, the difference between the market value and the agreed value is classed as follows: (i) the portion relating to the percentage of the company owned by the shareholder who provides the services: as a contribution of funds from the perspective of this shareholder (increasing the value of their shareholding) and as an increase in shareholders' equity for the company; and (ii) the portion not relating to that percentage ownership: as a donation or gratuity for the other shareholder, and as income for the company.

(b) The funds so transferred are returned to the shareholders when there is a subsequent distribution of earnings (or when the shares are transferred). It is at this point that we see the impact of the community property system. Specifically, a 50% portion of the dividends is classed as a refund of contributions; and the other 50%, due to having been classed as a donation or gratuity, must be classed as a distribution of dividends and allocated to the spouses in equal parts.

2.3 Corporate income tax. – The reduced tax rate for newly created entities can only be applied in the first year for which a positive tax base is obtained and in the following year, even if the tax base is negative in the second year

Central Economic-Administrative Tribunal. Decision of July 24, 2023

The Corporate Income Tax Law provides for a special 15% tax rate - as opposed to the standard 25% rate - for newly created entities which carry on economic activities. The rules stipulate that this reduced rate will be applicable in the first tax period for which the tax base is positive, and in the following period.

TEAC determined its final interpretation by clarifying that this reduced tax rate is applicable, solely and exclusively, in the first tax period in which a positive tax base is reported and in the following period, irrespective of the tax base obtained in that second period, i.e. even if it is negative.

2.4 Personal income tax. – The extent to which gains generated by the donation of shares in family businesses are not taxable is proportionate to the assets utilized in the economic activity

Central Economic-Administrative Tribunal. Decision of May 29, 2023

The Personal Income Tax Law stipulates that no capital gains or losses are obtained on transactions consisting of the transfer for no consideration of shares in family businesses, within the meaning of article 20.6 of the Inheritance and Gift Tax Law (ISD). The article in question refers to shares in businesses of this type that are exempt from wealth tax, and the Supreme Court’s position is that the exemption from wealth tax, and therefore the reduction in inheritance and gift tax, apply only to the proportion of the value of the shares relative to the percentage that the assets utilized in the conduct of the business activity (less the amount of debts deriving from the activity) bear to the entity’s net asset value.

The view held by TEAC is that this interpretation can also be applied for personal income tax purposes, meaning that the proportionality rule mentioned also limits the extent to which the gain can be considered not taxable.

2.5 Non-resident income tax. – The inability to deduct tax withheld at source in the country of residence does not in itself amount to discriminatory treatment

Central Economic-Administrative Tribunal. Decision of May 29, 2023

In the case being examined, the claimant (a French entity) alleged that it had not been able to recover the tax withheld on dividends received from Spain because it had been making losses continuously and its tax liability had therefore been insufficient. In the claimant's view, this amounted to discriminatory treatment which breached EU legislation. It cited the CJEU judgment dated November 22, 2018 (Case C-575/17) (December 2018 Newsletter), which declared that the French legislation breached the free movement of capital because it taxed dividends distributed by entities resident in France differently depending on the state of residence of the recipient.

TEAC has clarified that the principle established by the CJEU in that judgment is not applicable in this case because it requires, as a prior condition, that the national legislation in question must be discriminatory. In the case under analysis, there was no such prior discriminatory treatment, since the French claimant had not been subject in Spain to a withholding tax rate higher than that which would have been charged to resident entities in similar conditions, and it was therefore not entitled to a refund of the withholding tax borne.

2.6 VAT. – The VAT on supplies relating to a property utilized in part for the purposes of the economic activity is partially deductible

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

Article 95 of the VAT Law allows the partial deduction of input VAT on the acquisition of capital goods that are not used exclusively for the purposes of the business activity, provided that certain requirements are met. This partial deduction, however, is not envisaged in the law in the case of other transactions. For this reason, in the examined case, the auditors (basing their decision on the position adopted by the DGT) disallowed the deduction of input VAT on supplies relating to premises utilized partially in the business activity and which were also used as the taxable person's home.

TEAC confirmed the Madrid TEAR's view, by accepting the partial deduction of input VAT on certain supplies relating to the property in question, based on the principles set out in the VAT Directive. It also highlighted the fact that courts and tribunals are under the obligation to interpret domestic legislation in accordance with EU law.

2.7 Administrative procedure. – The fact of an enabled electronic address having been accessed is evidence that a notice has been validly served, even where it has not been proven that the taxpayer voluntarily accepted this system

Central Economic-Administrative Tribunal. Decision of July 17, 2023 (Principle 1 and Principle 2)

Individuals are not under obligation to accept the serving of notices by the Tax Agency through the inbox associated with the enabled electronic address. However, they can voluntarily elect to use this system.

In the case examined by TEAC, it could not be evidenced that this system had been elected voluntarily, but the taxpayer (an individual) had accessed the notice sent to them via the enabled electronic address. TEAC concluded that voluntary acceptance of the tax authorities' electronic notification service is evidenced by the acknowledgment of receipt or certificate of notification through the enabled electronic address of each specific act, provided that it contains information, sent by the electronic notifications service provider, relating to that voluntary acceptance. And, in any case, even if voluntary acceptance of the electronic notifications system is not evidenced in this way, the act in question is understood to have been validly notified if the party with tax obligations has accessed its content, either through their appearance via the Tax Agency's website, or by actually accessing the enabled electronic address.

2.8 Inspection procedure. – The unlawful omission of the case file review phase cannot be rectified by a reversion of proceedings if the allowing of that phase would have resulted in the statute-barring of the right to issue an assessment

Central Economic-Administrative Tribunal. Decision of March 23, 2021

This decision, handed down in 2021 but only recently published, analyzes an assessment that departed from the proposal contained in the preliminary assessment and was issued without the interested party being given the opportunity to file submissions through a case file review phase.

TEAC recalled that in these cases, the case file review phase is mandatory and its omission amounts to a procedural defect which renders the assessment void. That voiding should, in principle, entail the proceedings being reverted to the point in time at which the formal defect arose so that it can be rectified by the competent body.

The tribunal pointed out, however, that in this case there is a particular circumstance which prevents reversion, since had the tax authorities allowed the party with tax obligations a period in which to file submissions in response to their decision, the maximum period for completion of audit procedures would have been exceeded and the tax authorities' right to issue the relevant assessment would have become statute-barred. Therefore, had the reversion of proceedings been ordered, the tax authorities would have gained from what is an inexcusable omission of a procedural formality. It therefore set aside the contested assessment, affirming that the tax authorities' right to calculate the tax debt and draw up an assessment for the periods audited has become statute-barred.

2.9 Penalty procedure. - A penalty can be imposed where the notification of a request for information has been rejected due to the website not having been accessed

Central Economic-Administrative Tribunal. Decisions of June 21, 2023 (7867/2020 and 2394/2021)

TEAC examined the fines imposed on several taxpayers who ignored three requests for information sent through their enabled electronic addresses, which they failed to access within the maximum period stipulated by law (ten calendar days from the date on which they were made available). This led to the notifications (and therefore the requests too) being deemed rejected and that conduct was held to constitute an infringement consisting of resistance, obstruction, or refusal to cooperate in steps carried out by the tax authorities.

TEAC applied the principle established in its decision of May 21, 2021 (3869/2020) (June 2021 Newsletter), in which it affirmed that the fact of a taxpayer being unaware of the existence of requests because they have not accessed their enabled electronic address does not automatically rule out the possibility of a penalty being imposed for that conduct, and that the subjective element may be present when that action has led to failure to reply to the requests. Furthermore, in the analyzed cases, there is no ground for relieving the taxpayers from responsibility, because although they did not access the content of the electronic notifications relating to the requests, they did access the notifications regarding the decisions issued in the penalty proceeding and subsequently, which were also served through the enabled electronic address, without it having been evidenced that they were unable, in the case of the request notifications, to access them.

3. Resolutions

3.1 Corporate income tax. – The deferment of tax liability on underlying capital gains is not a tax advantage for the purpose of applying the neutrality regime

Directorate General for Taxes. Resolution V2214-23 of July 27, 2023

The request concerned the contribution by an individual of 60% of the capital of company A (held for more than ten years) to company B. Company A carries on an economic activity (it is not a holding company) and has accumulated reserves. Moreover, the shares in company A have significant underlying gains. Company B will record its shares in company A at their market value, including the value of retained earnings. It was mentioned, also, that within two years from the contribution, dividends will be paid by A to B, equal to the retained earnings at the point when the contribution was made.

In relation to application of the tax neutrality regime to the contribution and to the tax liability on the dividends, the DGT concluded as follows:

(i) Application of the regime: The described transaction is a share exchange for the purpose of applying the neutrality regime, and therefore in theory the regime may be applied. Under article 89.2 of the law, however, the regime is not applicable where the transaction is not carried out for valid economic reasons, but rather simply to obtain a tax advantage.

The rationale behind the neutrality regime lies in ensuring that tax is neither a deterrent nor an incentive in decision-making. For that reason, the existence of valid economic reasons is not a requirement to apply the regime, but rather their absence is an indication that a tax advantage might be sought. Only if it is confirmed (in each individual case) that the aim of the transaction is to obtain a tax advantage must the regime not be applied, although only the sought tax advantage must be eliminated.

The deferment of tax liability of and in itself cannot be characterized as a prohibited tax advantage, because it is inherent to the regime itself.

(ii) Tax treatment of future dividends: If the neutrality regime is applied, company B has to keep the same value and acquisition date at A as applied to the individual. Therefore, the dividends will be eligible for the exemption under article 21 of the law if all the other requirements are met.

3.2 Corporate income tax. – A loss arising from the assumption of debt of a related entity in insolvency proceedings is deductible if it is recognized correctly

Directorate General of Taxes. Resolution V1775-23 of June 20, 2023

An entity undertook the payment of various debts of another related company which was the subject of an insolvency order, with respect to which it was agreed to complete the special liquidation proceeding due to insufficient assets available to creditors. The entity considers it unlikely that the claim arisen against the company in insolvency will be recovered, because this company has insufficient assets and is not going to carry on any economic activity, and for this reason a loss arises equal to the amount of the assumed debts.

The Directorate General for Taxes ("DGT") explained that, if the accounting legislation requires a loss to be recognized rather than a claim against the entity in insolvency proceedings, then the expense for accounting purposes is deductible.

3.3 Corporate income tax. - A surcharge in respect of economic benefits resulting from an occupational accident or illness is not deductible

Directorate General of Taxes. Resolution V1693-23 of June 13, 2023

The analyzed case concerned a company that was held responsible for an occupational accident caused by a breach of health and safety measures at the workplace, and for this reason had to pay the worker a pension for total permanent incapacity and the relevant sick leave benefits, plus a 30% surcharge calculated on the amount of those benefits, under article 164 of the Revised General Social Security Law. The entity has an insurance policy covering these contingencies.

The DGT concluded that (i) any pension and benefit payments to be made to the worker will be deductible, as long as they are recognized for accounting purposes, and that ii) the surcharge will not be deductible due to resulting from a breach and having a sanctioning nature. Lastly, (iii) any indemnity that the entity receives under its civil liability insurance policy will be a computable revenue in the fiscal year it fell due.

3.4 Corporate income tax. – The termination of foreign entities is considered to take place only where this is so provided in the applicable legislation, which must be proven

Directorate General of Taxes. Resolution V1258-23 of May 12, 2023

Article 21.8 of the Corporate Income Tax Law states that losses caused by the termination of an investee are deductible, unless it is terminated as a result of a restructuring transaction.

The DGT recalled that Spanish entities are considered to be terminated on the date when the public deed of termination is registered at the commercial registry (date of the entry for its removal). For nonresident entities, it is their country's corporate legislation that determines the point when the company concerned is considered to be terminated; a termination that will have to be proven by any valid means of proof under the law.

3.5 Corporate income tax. – Tax losses may be offset without any limit in all the fiscal years in which an entity's liquidation plan is implemented until its termination

Directorate General for Taxes. Resolution V1255-23 of May 12, 2023

A real estate company filed a petition for a voluntary insolvency proceeding in 2011. Following final approval of the liquidation plan by the insolvency manager in 2015, it started selling its real estate assets. For reasons beyond its control (basically due to the difficulty with selling all its assets), the liquidation process ended years later. The company had high amount of unused tax losses and asked whether it could offset these losses against the income generated by transfers made over the liquidation period.

The DGT recalled that the limits for offsetting tax losses do not apply in the tax period in which termination of the entity took place, unless that termination takes place as a result of a restructuring subject to the special regime. In the analyzed case, it could be considered (in theory) that there will be amounts of income which, although they unequivocally come from the liquidation of the entity, might not be excluded from the limit on the offset of tax losses, due to the fact that the fiscal year in which the legal termination of the entity took place does not coincide in time with those in which the liquidation plan was implemented. However, this situation does not tally with the aim sought by the law, which is to exclude from the limit on the offset of tax losses all amounts of income arising from the liquidation and termination of the entity. Therefore, the limit will not be applicable in relation to the amounts of income generated in the period of liquidation in insolvency proceedings, even though termination of the company took place formally in a later tax period.

3.6 Personal income tax. – The transfer value for personal income tax purposes is not the reference value allocated by the cadastre

Directorate General for Taxes. Resolution V1512-23 of June 2, 2023

An individual intends to transfer a property at a price lower than the reference value allocated by the cadaster.

Under the personal income tax legislation, income arising from the transfer of properties must be calculated by reference to the transfer value, i.e. the price actually paid, provided it is not

lower than the normal market value, otherwise this value will prevail. Market value for these purposes does not have to be the same as the reference value of the property that is determined by the cadaster, even though this reference value must be taken into account to determine the taxable amount for transfer and stamp tax purposes.

3.7 Personal income tax. – A loss arising from leaving behind fitments in leased premises is included in the general component of income

Directorate General of Taxes. Resolution V1495-23 of June 1, 2023

An individual has been carrying on its business at leased premises in which they have made various investments. Following termination of the lease agreement, those investments remained at the premises. It was asked whether leaving the investments behind generates a loss for personal income tax purposes.

The DGT recalled that works on fitting out leased premises are depreciated over the length of the lease agreement, if shorter than the useful life of the asset. Therefore, if on termination of the lease agreement the works had not been depreciated in full, a capital loss will occur which must be included in the general component of taxable income for personal income tax purposes.

4. Legislation

4.1 The effective annual interest rates for the fourth quarter of 2023, to be used to characterize certain financial assets for tax purposes, have been published

On September 29, 2023, the Official State Gazette published the decision of September 26, 2023 of the Office of the General Secretary for the Treasury and International Finance, which sets out the effective annual interest rate for the fourth calendar quarter of 2023, to be used to characterize certain financial assets for tax purposes. The rates are as follows:

- Financial assets with a term equal to or shorter than four years: 2.822 percent.
- Assets with terms higher than four, but equal to or shorter than seven years: 2.741 percent.
- Assets with ten-year terms: 2.930 percent.
- Assets with fifteen-year terms: 2.981 percent.
- Assets with thirty-year terms: 3.350 percent.

4.2 Amendment of the entry into force of form 604 for the tax on financial transactions

On August 30, 2023, the Official State Gazette published Order HFP/999/2023 of August 28, 2023, delaying the entry into force of the new self-assessment form for the tax on financial transactions (approved by Order HFP/308/2023 of March 28, 2023) as of January 1, 2024. This form will apply for the first time to self-assessments of the tax on financial transactions relating to assessment periods beginning on or after January 1, 2024.

4.3 Various information return forms in relation to virtual currencies have been approved

Law 11/2021, of July 9, 2021, on measures to prevent and combat tax fraud, determined a new reporting obligation in relation to the holding of virtual currencies and to the transactions carried out in them, as well as in relation to the holding of virtual currencies located abroad (see our publication dated July 10, 2021). The implementing regulations for these reporting obligations are contained in Royal Decree 249/2023 of April 4, 2023 (see our April 2023 Newsletter).

In the July 29, 2023 edition of the Official State the following return forms were approved by Order HFP/886/2023 of July 26, 2023 and Order HFP/887/2023 of July 26, 2023:

- Form 721: Information return on virtual currencies located abroad. This form will apply for the first time to the 2023 return which will have to be filed between January 1 and March 31, 2024.

- Form 172: Information return on balances in virtual currencies, and Form 173: Information return on transactions in virtual currencies. These forms will have to be used for the first time for any 2023 returns filed in January 2024. Form 173 which will have to be filed in January 2024 will only include information on transactions performed on or after April 25, 2023.

4.4 Exempt amount for personal income tax purposes of per diems and allowances for traveling expenses has been raised

On July 17, 2023, the Official State Gazette published Order HFP/792/2023 of July 12, 2023, updating the amounts of per diems and allowances for traveling expenses for personal income tax purposes. Namely, the kilometrage allowance has been increased from €0.19 to €0.26 per kilometer run. We reported on this in our publication dated July 18, 2023. This order came into force on July 17, 2023.

5. Miscellaneous

5.1 The Multilateral Competent Authority Agreement on automatic exchange of information on income derived through digital platforms has been published

On September 19, 2023, the Official State Gazette published the declaration by which Spain agrees to comply with the Multilateral Competent Authority Agreement on automatic exchange of information on income derived through digital platforms.

The information agreed to be exchanged through this agreement is that obtained by the authorities of the signatories in line with DAC 7 (Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, and other tax rules).

You are reminded that Law 13/2023 (see our publication dated May 25, 2023) laid down, to take effect on January 1, 2023, new reporting and due diligence obligations for digital platform operators filing information reports within the scope of the mutual assistance legislation, as well as for individuals or entities who are considered sellers under that legislation.

5.2 The Multilateral Competent Authority Agreement on the automatic exchange regarding CRS avoidance arrangements and opaque offshore structures

On September 18, 2023, the Official State Gazette published the declaration by which Spain agrees to comply with the Multilateral Competent Authority Agreement on the automatic exchange regarding CRS avoidance arrangements and opaque offshore structures.

In relation to the obligation to report on cross-border tax-planning arrangements (under Council Directive (EU) 2018/822 of 25 May 2018 -DAC6-), Law 13/2023, of May 24, 2023 (see our publication dated May 25, 2023) had already amended the legal regime related to the reporting obligation on these cross-border arrangements (precisely as a result of Spain's signature of that Multilateral Agreement) with the aim to enable the Spanish tax authorities to have the necessary information for the exchange of information in relation to these arrangements.

5.3 The European Commission concludes that tax incentives to the audiovisual industry constitute aid compatible with the internal market

On September 15, 2023, the Official Journal published the European Commission's decision dated August 14, 2023 confirming that the modifications introduced by Law 38/2022 of December 27, 2022 (Commentary dated December 28, 2022) to the Spanish tax deductions regime for cinematographic and audio-visual productions is compatible with the internal market.

This decision brings to an end the review proceeding of the modifications to the deduction regime for investments in cinematographic productions and audiovisual series (article 36, points 1 and 2, of the Corporate Income Tax Law) and the regime on transferring the deductions to taxpayers participating in the funding (article 39.7). As a result of this, the condition precedent laid down in additional provision one of Law 38/2022 making the application of the law conditional on its compatibility with EU law on state aid has been lifted.

5.4 Russia partially suspends the application of tax treaties with non-friendly states

On August 8, 2023, the Russian president signed Decree 585, partially suspending tax treaties with 38 "unfriendly states", including Spain.

The decree took effect on August 8, 2023, and is not valid retroactively. For the time being, the suspension is indefinite.

This unilateral suspension affects, among other items, any dividends, interest, royalties payments and other similar passive income that are made from Russia, on which Russian payers will not be able to apply the reduced withholding rates under the treaties. In their place, the withholding rates determined in Russian law will apply, which could affect double taxation tax credits in Spain.

5.5 AEAT resumes its position in relation to the tax liability on the provision of vehicles to employees

AEAT has published a Notice on its website in which it resumes its position regarding the treatment for VAT and personal income tax purposes of the provision of vehicles to employees for professional and private use. The principles mentioned in the notice have already been applied in numerous audits, and are notably as follows:

(i) The treatment for the purposes of the two taxes will be based on the principle of availability for private use, so the income in kind for personal income tax purposes and the VAT charge to the worker or the ability to deduct input VAT will depend on that availability. This availability must be analyzed in each individual case, and the burden of proof lies with the taxpayer. It may be determined by reference to the provisions in the collective labor agreement and also the employee's particular circumstances which will depend on the characteristics of the job, the company's activities, the existence of employees without a workplace and other factors.

(ii) The treatment for VAT purposes will depend on whether the vehicle is provided as a benefit with or without consideration. A transfer for consideration will exist where the worker assumes the cost of the transfer, for example, by foregoing a portion of their salary, as occurs in flexible compensation systems. The transfer will be for no consideration, by contrast, for example, where use of the vehicle is voluntary for the worker and the fact of choosing or not choosing this option will not have any impact on their compensation.

- Where the transfer is considered to be for consideration, it will be taxable. In other words, the company will have to charge VAT to employees in respect of the portion of private use (based on the relevant recognition percentages, which are consistent with those used for personal income tax purposes) and all amounts of input VAT will be deductible (except where deductible proportion rules apply).

  The taxable amount for the transfer will take into account the specific related-party rule in article 79.5 of the VAT Law, and therefore it will be equal to its market value. In cases involving leased vehicles or similar arrangements, the taxable amount will be determined by the installment paid by the entity, adjusted in respect of the percentage of availability for private purposes.

- Where the transfer is considered to be for no consideration it must be concluded, as a general rule, that the transfer does not constitute the performance of any taxable transaction. In other words, the company will not have to charge VAT on the portion relating to private use, but input VAT paid in respect of the private use portion will not be deductible.

  If input VAT was deducted when the vehicle was acquired, the subsequent use for private purposes through a transfer for no consideration will entail, however, the existence of a taxable self-supply of services.

Tax Department

Follow us:

GARRIGUES

This publication contains general information and does
not constitute a professional opinion, or legal advice.

© J&A Garrigues, S.L.P., all rights reserved. This work may not be used, reproduced, distributed, publicly communicated or altered, in whole or in part, without the written permission of J&A Garrigues, S.L.P.

Hermosilla, 3

28001 Madrid, Spain.

T +34 91 514 52 00 F +34 91 399 24 08

garrigues.com