# GARRIGUES

**TAX**

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# TAX NEWSLETTER

TEAC (Central Economic-Administrative Tribunal) issued an interesting decision on September 22, 2016 clarifying once and for all that the filing of an annual summary (in the decision, for Spanish VAT) does not stop the limitation period.

This tribunal flatly refused to allow annual summaries to be treated in the same way as (monthly or quarterly) self-assessment returns because unlike these returns they are not the instrument necessary to comply with the obligation to pay the tax debt. The main purpose of annual summaries is to assist with VAT management but their purpose is not for payment of the debt.

The fact that the annual summary contains information with undeniable relevance does not detract from this conclusion. Because:

a) they either provide cumulative annual economic data or tax percentages by territories (central and provincial tax offices) which are also annual, i.e., not broken down into assessment periods; or

b) they concern data already held by the tax authorities (such as activity and classification for the purposes of the tax on economic activity (IAE)) or which are useful for the following fiscal year (such as for example the deductible proportion percentages); or

c) if they concern useful data for the year to which the annual summary relates (such as specifying the definite deductible proportion for the year), they relate to corrections that the taxable person should have made in their latest self-assessment return for the year.

TEAC stressed in its decision that its view does not counter the Supreme Court's case law on this matter. Because, it recalls, the Supreme Court's case law relates to years in which, when filing the annual VAT summary return, the taxable person was required to attach a copy of the monthly or quarterly self-assessment returns, and so the annual summary was a kind of confirmation of the returns filed over the year.

In short, according to TEAC, the VAT limitation period must be computed independently and separately for each monthly or quarterly self-assessment return and cannot be considered to stop running when an annual summary is filed. The same principle will foreseeably apply for every tax requiring an annual summary to be filed

# 01 CASE LAW

## 1.1 Personal income tax .- On the exemption for work performed abroad (Galicia High Court. Judgment of June 3, 2015; Andalucía High Court. Judgment of February 26, 2016; and Madrid High Court of June 6, 2016)

There have been a number of enlightening judgments on the subject of the exemption for work performed abroad (article 7.p of the Personal Income Tax Law):

**a)** Galicia High Court examined the case of a worker at a Spanish company who had been providing services at a related Portuguese company. Since the employer had not allowed for the exemption for work performed abroad in its calculation of withholdings, the worker did not claim the exemption in his return but later applied for rectification of that self-assessment by requesting the relevant refund.

The tax authorities disallowed the exemption on the basis that the employer had not billed to the Portuguese company the cost of the employee's services for that company. This view was confirmed by the Galicia TEAR (Regional Economic-Administrative Tribunal).

Against this, Galicia High Court concluded that the absence of any rebilling for the services between related companies is irrelevant because the factor to be examined is whether the work performed for the foreign company is beneficial and indispensable.

**b)** Andalucía High Court reviewed the case of a taxpayer who had been denied the exemption because it had not been substantiated that in the periods he spent abroad he had performed actual work there (he had attended meetings). That reasoning was confirmed by Andalucía TEAR.

Andalucía High Court found in favor of the taxpayer by affirming that it is not tenable to argue that trips abroad to attend meetings do not necessarily imply work by the employee (transferring the burden of proof to the taxpayer). Compelling the taxable person to provide proof outside his possibilities (beyond proving the trips and attendance at meetings) cannot be allowed and entails, moreover, an incorrect restriction on the definition of work: work does not refer only to its physical performance (an element that is difficult to substantiate in work with a prevailing intellectual component), but any other task related to it.

**c)** c) Madrid High Court examined the case of a taxpayer who had been denied the exemption because by being the general manager of a Spanish company, he performed management and supervision activities concerning foreign subsidiaries, in other words, simply stewarding tasks which are not eligible for the exemption.

Madrid High Court disallowed this argument, on the basis that management and supervision tasks indubitably bring an advantage or benefit to subsidiaries, and cannot be characterized as simply stewarding tasks.

## 1.2 Transfer and stamp tax.- The taxable person in the provision of unilateral mortgages to the tax authorities is the tax authorities themselves (Supreme Court. Judgment of September 26, 2016)

At issue was who the taxable person is for transfer and stamp tax in the provision of unilateral mortgages to the tax authorities to secure tax debts.

The Supreme Court focused the debate on the interpretation of article 29 of the revised Transfer and Stamp Tax Law. This article confers taxable person status for stamp tax on the party acquiring the property or right and, on a secondary basis, the party applying for or requesting the notarized document or in whose favor it is issued. The court concluded from this that:

**a)** The provision of a unilateral mortgage is carried out by the decision and with the exclusive consent of the mortgage debtor, but the satisfaction of the condition of law (*conditio iuris*) which is acceptance by the mortgagee (i.e. the tax authorities) takes effect retroactively.

**b)** The tax authorities' acceptance must be construed to be given, implicitly at least, in the favorable decision on

the application concerned for split-payment or deferral of tax debts in the subsequent request made to the debtor to provide security, and therefore the express and official acceptance for that circumstance to be recorded in a note in the margin at the Property Registry is an appropriate act under the estoppel doctrine. This necessarily means that the tax authorities must be treated as the taxable person for stamp tax, with the resulting notification of exemption.

**1.3 Inheritance and gift tax.- Affinity ties do not disappear when the person serving as the connection dies (Supreme Court. Judgment of July 14, 2016)**

In relation to inheritance and gift tax the law provides certain reductions and relief which apply only to given family members, including relatives by affinity. In this case it was examined whether an affinity tie disappears when the person serving as the connection dies.

The Supreme Court concluded (from a repetition of its earlier reasoning) that this connection (in the examined case between the deceased and his nephew by affinity) remains even if the deceased's spouse (the person who was the connection) had died before the deceased.

**1.4 Inheritance and gift tax.- Expenses in respect of executor's fees are not deductible (Catalonia High Court. Judgment of February 1, 2016)**

It was examined whether expenses in respect of executor's fees are deductible from the value of the inherited estate.

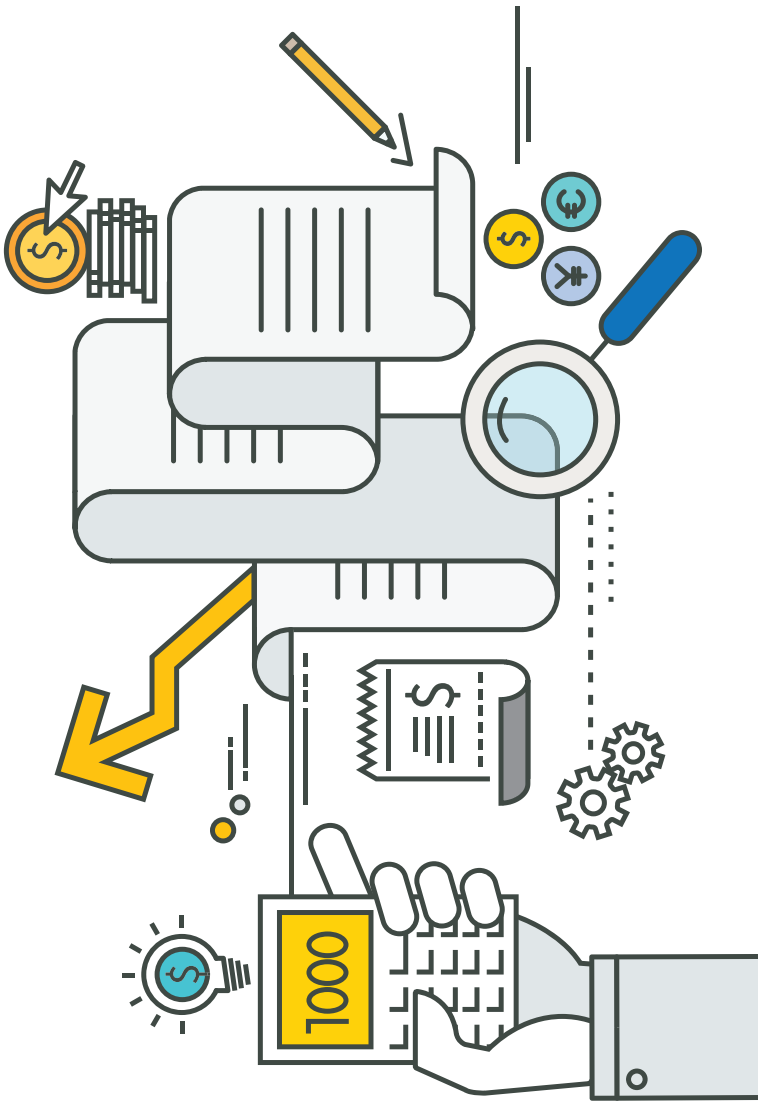
Catalonia High Court disallowed this because the law expressly bars the deduction of "*expenses arising from the administration of the estate*". Insofar as the executor's function is precisely to manage the estate, their fees cannot be deducted.

**1.5 Real estate tax.- Article in the local authority legislation for Alcalá de Henares determining a surcharge for vacant residential properties rendered null and void (Madrid High Court. Judgment of April 27, 2016)**

The Local Finances Law requires a 50% surcharge on the real estate tax liability for residential properties that are permanently vacant. That law provides that the definition of "residential property that is permanently vacant" will be provided in secondary legislation. Currently there are no regulations implementing the law for these purposes.

Despite this, the Alcalá de Henares local authority laid down in its municipal rules on the real estate tax a requirement for that surcharge on the tax liability for any residential properties that are vacant, and determined the necessary conditions for a property to be treated as such.

Madrid High Court concluded in this judgment that the article in the municipal rules determining that surcharge must be rendered null and void, insofar as the local authority did not have the jurisdiction to implement the definition of "residential property that is permanently vacant".



**1.6 Administrative procedure.- Remotely sent notifications containing blank pages held null and void due to misleading the taxpayer. (National Appellate Court. Judgment of July 7, 2016)**

An assessment decision containing blank pages was sent remotely. The taxpayer failed to make the payment requested in the decision because the person responsible for opening the remote notifications thought there had been a computer error because the assessment contained blank pages (due to which they did not correctly report receipt of the notification). As a result, an interlocutory enforced collection order was issued assessing a 20% enforced collection surcharge.

On the facts described above the National Appellate Court concluded that neither the tax authorities nor the taxpayer itself had acted with the required standard of care, and that the tax authorities' incorrect modus operandi should not cause a loss to the taxpayer, so the enforced collection order must be rendered invalid.


## 02 JUDGMENTS AND RULINGS

**2.1 Corporate income tax.- Deduction of goodwill arisen before January 1, 2002 (Directorate General for Taxes. Ruling V3508-16, of July 22, 2016)**

The Corporate Income Tax Law (LIS) now in force provides a transitional regime for goodwill differences arising from merger transactions subject to the tax neutrality rules and performed before January 1, 2015, for which one of the requirements is proof of taxation in the case of acquisitions made from nonresident entities or individuals and from Spanish resident individuals.

Its predecessor, the Revised Corporate Income Tax Law (TRLIS), included a transitional regime for goodwill differences arising from transactions registered before January 1, 2002, date on which that proof of taxation on acquisitions from nonresident entities or individuals and from Spanish resident individuals related to the transferee started to be required.

The DGT explained that, under a systematic and inclusionary interpretation of the law, the deduction of the merger difference arising from the transactions registered before January 1, 2002, will continue to be made in accordance with the requirements provided in Law 43/1995, in the wording in force before January 1, 2002.

**2.2 Corporate income tax.- A cross-border merger may be sheltered by the tax neutrality regime (Directorate General for Taxes. Ruling V3496-16, of July 22, 2016)**

Company A and company B, both family holding companies, own investments in Portuguese company C, are primarily engaged in holding securities and have as their main asset their shares in company D, the controlling company of a Spanish manufacturing group, in which it owns 36.64%.

The request concerned a cross-border downstream merger in which company D would absorb company C. The DGT concluded that:

**a)** The special regime applies to transactions involving non-Spanish resident companies after it has been

determined, by reference to the applicable tax treaty, that the transaction is taxable in Spain.

**b)** Valid economic reasons are considered to exist in the rationalization of the management of the family assets and the optimization of financial resources, such that advice under Portuguese law ceases to be necessary, along with compliance with the legal obligations, including accounting and tax obligations, in that country.

### 2.3 Corporate income tax.– Impairment losses on shares reversed following recovery of their value. Impairment losses deducted and not deducted (Directorate General for Taxes. Ruling V 3459-16, of July 20, 2016)

The request concerned the inclusion in a tax group of a company that sustained considerable losses and had never distributed dividends. In relation to its allowance for investment impairment losses, the tax group acted as follows:

**a)** In the period before fiscal year 2011, the tax group could not deduct any amounts because it did not meet the related requirements.

**b)** In 2011 and 2012 it applied article 12.3 of the Revised Corporate Income Tax Law (TRLIS), by deducting the provisions recorded in those years due to meeting the necessary requirements.

**c)** In 2013 and 2014 the subsidiary continued to sustain losses, which entailed a greater decrease in equity, although the tax group did not make any deduction as result of the repeal of article 12.3 TRLIS.

**d)** In fiscal year 2015 the subsidiary had positive earnings, which increased its equity, although that recovered amount was lower than the impairment losses deducted in earlier years.

The request concerned how the increases in an investee's equity must be recognized if they result from a rise in its share value, in cases where there are impairment losses which were recorded on those shares in prior years in which they had been both deductible and nondeductible.

The DGT concluded that under a coherent interpretation of the law the increase in the investee's equity must be applied, first, to the latest years in which a decrease in equity arose and in which the impairment losses on the value of the investment could not be deducted as a result of the repeal of article 12.3 TRLIS. After that value has been recovered, the provisions in transitional provision sixteen LIS will apply, according to which the recovery in value must be attributed first to the impairment losses that had been tax deductible.

### 2.4 Corporate income tax.- A valid economic reason held to exist in a restructuring process conducted to set up a Spanish REIT (SOCIMI) (Directorate General for Taxes. Ruling V3330-16, of July 15, 2016)

A family group was considering converting company A, having the conduct of business with real estate assets as its corporate purpose, into a Spanish REIT (SOCIMI, a listed real estate investment company), for which a merger by absorption and a spinoff of stock was required.

The economic reasons given for performing those transactions were to:

**a)** prepare the equity of the business to convert company A into a SOCIMI;

**b)** bring all the group's equity together in a single company so as then to separate the assets of company A which would become part of the equity of the SOCIMI from the other assets;

**c)** avoid the notarial and registration costs that would be involved in the transfer of all the real estate to another company and give continuity to company A with a view to altering its corporate form.

The DGT concluded that the reasons explained could be held valid.

### 2.5 Corporate income tax.– R&D&I tax credit and exercising the advanced payment option (Directorate General for Taxes. Ruling V3281-16, of July 13, 2016)

A number of requests were submitted in relation to claiming the R&D&I tax credit and to exercising the

advanced payment option contained in article 44.2.b) of the former Revised Corporate Income Tax Law (TRLIS) and in article 39.2 of the currently in force Corporate Income Tax Law (LIS):

**a)** The first question was how to calculate the base for the credit for projects in which expenses have been capitalized

The DGT explained that the base for the credit in this case will be composed of:

- Expenses related to the performance of R&D&I activities which are incurred in the taxable period regardless of whether they are capitalized for accounting purposes, which is optional (obviously, when the capitalized expenses are later amortized, the amortization cannot be included again in the base for the credit),

- less the subsidies received to cover those expenses, regardless of the taxable period in which the subsidies are recognized in income.

**b)** To benefit from the rule on advanced payment of R&D&I tax credits a reasoned report is required on the characterization of the activity as R&D&I. For projects lasting longer than a year, the existence of a reasoned report with an opinion on the overall characterization of the project will be sufficient to satisfy this requirement.

This conclusion is conditional on the project not undergoing any technical variance in how it is conducted and that absence of variance being certified, which must be substantiated in the reasoned monitoring reports requested in subsequent years.

Lastly, if the reasoned report is obtained after the return for a given taxable period has been filed, a rectification of the self-assessment may be requested.

**c)** In relation to the requirement to maintain personnel levels provided in article 44.2.b) TRLIS (now article 39.2 LIS), the DGT clarified the following points:

- Any working members involved in R&D&I activities and on the roll for the special social security regime for self-employed workers (RETA) may be included in the calculation of the average headcount, provided there is an employment contract between them and the company on the terms provided in labor and employment law, regardless of their social security contribution arrangement.

- In calculating the average headcount working on R&D&I activities any workers partially engaged in those activities may be included. The method for including those workers is a factual matter which must be evidenced by any means allowed by law.

- In relation to the comparison terms, the first term must be the average headcount for the taxable period in which the credit is generated. The second comparison term must be based on the average headcount for the whole maintaining period.

  That maintaining period must be computed from the end of the taxable period in which the tax credit was generated until the end of 24 months following the end of the taxable period in the return for which the provisions in article 44.2 TRLIS (now article 39.2 LIS) were applied.

### 2.6 Corporate income tax.– Not for profit entities: indirectly conducting activities in the public interest is valid (Directorate General for Taxes. Ruling V3277-16, of July 13, 2016)

The ruling concerned a foundation which, besides performing the activities in its foundational purpose directly, grants monetary aid to other foundations, institutions and not for profit entities for them to conduct the same type of activities.

Although the DGT considers (in accordance with the principle already accepted by TEAC) that, generally, the activities in the public interest must be conducted by the beneficiary foundation of the special regime itself, it added an exception to this principle by allowing the activity to be conducted indirectly if two requirements are satisfied:

**a)** the activity must be performed through other entities to which Law 49/2002 (on tax incentives for patronage) also applies; and

**b)** it must not simply transfer funds to the entities directly performing the activity, but rather actively oversee and monitor the performance of projects and the specific use of the contributed funds. For these purposes it will necessary for the contributing entity to have the necessary human and material resources to perform such overseeing and monitoring.

### 2.7 Corporate income tax.- Even if some of the employees are not transferred, there may still be a line of business (Directorate General for Taxes. Ruling V3150-16, of July 07, 2016)

La entidad A planea realizar una escisión de uno de sus negocios, si bien el equipo comercial (que se queda en A) continuará realizando las funciones comerciales del negocio transmitido. La DGT afirma que:

**a)** Insofar as the spun-off assets determine the existence of an economic operation at the transferring company determining a line of business, which is separated and transferred to the newly created transferee company, and another line of business is retained at the company performing the spinoff, the procedural requirements to elect the tax neutrality regime will be met.

**b)** The fact that certain employees are not transferred with the line of business does not *per se* prevent it from being characterized as a line of business.

### 2.8 Corporate income tax.– Deduction of late-payment interest, VAT charges and order to pay costs in connection with a tax offense (Directorate General for Taxes. Ruling V3145-16, of July 6, 2016)

The request concerned the deduction for corporate income tax purposes of late-payment interest, VAT charges and expenses in respect of an order to pay costs paid in enforcement of a judgment as result of the conviction of the director and the company (jointly and severally) of an offense against the public treasury.

The DGT gave the following reasoning:

**a)** Regarding the late-payment interest, under the principle adopted in earlier rulings, and bearing in mind that it is treated for accounting purposes as a finance cost and article 15 LIS contains no particular provisions on this interest, it must be treated as a deductible expense. In any event, having regard to its financial nature, that expense will be subject to the limits on the deduction of finance costs provided in article 16 LIS.

The late-payment interest relating to prior years will be deductible in the taxable period in which it is recorded for accounting purposes against reserves if this does not result in lower taxation (article 11.3 LIS).

**b)** On the subject of the VAT charges, the DGT explained that if they relate to corrected VAT charges on transactions subject and not exempt and they were not a deductible expense when the tax became chargeable, they cannot be deducted; whereas in the case of VAT which on becoming chargeable was treated as an expense for accounting purposes under the Spanish Chart of Accounts in Recognition and Measurement Standard (NRV) 12, deductible for corporate income tax purposes at the time of the correction it will remain deductible, and be recognized in the period determined by article 11.3 LIS

**c)** Lastly, the DGT concluded in relation to the deduction of sums paid in respect of the costs of the proceeding, that they do not relate to a criminal or administrative penalty or sanction, nor are they expenses resulting from steps contrary to the law, and therefore must be treated as a deductible expense.

### 2.9 Corporate income tax.– Eligibility for the exemption on the transfer of a holding company with an indirect investment in its subsidiaries higher than €20 million (Directorate General for Taxes. Ruling V3141-16, of July 6, 2016)

The requesting company directly owns a 23,80% interest in a holding company, this company owns a 7.75% interest in a third company (its only asset). Accordingly, the requesting company indirectly owns an interest in the latter company below 5%. The cost price (of the indirect acquisition) at this latter company is higher than €20 million. The requesting company has since made a direct

investment in the third company amounting to more than €20 million, although it still does not own 5%.

The DGT affirmed that in the event of a future transfer of the directly owned company, the exemption under article 21 LIS will be applicable.

**2.10 Corporate income tax.- The compensation for the sole director's senior management activities does not have to appear in the bylaws to be deductible (Directorate General for Taxes. Ruling V3104-16, of July 5, 2016)**

This ruling concerned a sole director and majority shareholder of a company where, besides carrying on the activities of sole director, which he performed for no consideration, he discharged other senior management activities which were compensated, though he did not have an employment contract with the company.

The DGT examined the tax treatment for this compensation at the company, and concluded that, under article 15.e) LIS, expenses in respect of compensation to the shareholder for senior management activities are tax deductible, provided they satisfy the conditions laid down in the law, in terms of being (i) recorded in the accounts, (ii) recognized on an accrual basis; and (iii) justified, insofar as those expenses are in return for the activities performed by the shareholders other than those of director. It is not necessary therefore for the compensation to appear in the Bylaws.

**2.11 Wealth tax.– Valuation of shares of Spanish corporation (sociedad anónima) in an insolvency proceeding (Directorate General for Taxes. Ruling V3614-16, of August 24, 2016)**

Under the Wealth Tax Law shares in unlisted companies must be stated at their underlying carrying amount according to the latest approved balance sheet if there is an auditor's report with a favorable opinion; and, failing that, at the higher of their face value and their underlying carrying amount according to the latest approved balance sheet and the result of capitalizing at 20% the average income for the latest three fiscal years ended before the tax became chargeable.

According to the DGT, if the investee is in an insolvency proceeding, the above rule must be applied in conjunction with the definition of "fair value" in article 94.5 of the Insolvency Law, of July 9, 2003. Letter c) of that subarticle defines that value as the amount determined by a "report issued by an independent expert in accordance with generally accepted valuation standards and principles for these assets".

In any event, the DGT recalled that it does not fall within its powers to set or determine valuations, insofar as the Management Offices for the tax have the power to audit the value reported by the interested parties, using the means mentioned in article 57 of the General Taxation Law.

**2.12 Inheritance and gift tax.- On the requirements for the reduction applicable to the transfer of a family business (Central Economic-Administrative Tribunal. Decision of September 15, 2016)**

Certain reductions for gift tax purposes may be claimed where a family business is transferred and a number of requirements are met. In relation to the satisfaction of these requirements:

**a)** TEAC concluded, firstly, that they have to be examined in the year of the deceased's death.

**b)** Regarding the specific requirement relating to the compensation for discharging management activities (which must be higher than 50% of income from salary and economic activities), TEAC affirmed that:

**a.** Once both the actual performance of management and coordination activities has been evidenced together with the receipt of an amount of compensation for discharging those activities, it is not relevant whether the

compensation is characterized as salary income or whether the bylaws determine the existence of compensation.

**b.** The amounts received through the mutual insurance company for incapacity must count as compensation, because from a tax standpoint they are salary income.

**c.** The relevant year for deeming this requirement to be satisfied is the year of the deceased's death. This marks a change by the TEAC from its reasoning to date, when it used to say that if the requirements were satisfied by any member of the family group, the relevant year was the latest year ended before the death.

**2.13 Inheritance and gift tax.- Exempt assets must be included to calculate the preexisting property and the family business must be included in personal items (Central Economic-Administrative Tribunal. Decision of September 15, 2016)**

This decision examined a number of issues related to inheritance and gift tax:

**a)** Firstly, whether the calculation of personal items must include the value of the shares or of the assets on which the family business reduction was claimed.

TEAC concluded that inheritance and gift tax legislation determines clearly which assets must be eliminated when quantifying personal items, and the family business does not appear among them, although its value is included in the tax base and a reduction is made.

**b)** Whether in the calculation of the preexisting property of the heir (taxable person) the assets exempt from wealth tax must be eliminated.

TEAC recognized that the inheritance tax legislation referred to the Wealth Tax Law, but recalled that this reference is made only for the purposes of the valuation of the assets. Meaning that other substantive elements provided in the Wealth Tax Law do not come into play, such as exempt and non-subject items for the purpose of determining the preexisting property.

**2.14 Inheritance and gift tax.- The capitalization of earnings cannot be used as a valuation method (Central Economic-Administrative Tribunal. Decision of September 15, 2016)**

In an appeal to TEAC at issue was whether the capitalization of earnings was a suitable valuation method to be used for inheritance and gift tax purposes for the shares in business companies that are not officially listed.

TEAC concluded (after reiterating its reasoning in earlier decisions) that the capitalization of earnings method is only valid (despite being included in the General Taxation Law among the various valuation methods) if it is expressly set out in the law on each tax. This is so, among other reasons, because the essential element for valuation by capitalization is the interest rate, and the election of the interest rate cannot be decided at the discretion of an expert (or the use of this method, generally).

Since the Inheritance and Gift Tax Law does not provide for this valuation system nor, therefore, is any cap rate specified, this system cannot be allowed to be used to make the valuation for the purposes of this tax.

**2.15 Inheritance and gift tax.- A report submitted by the taxable person on the value of personal items is sufficient to undermine the automatic presumed valuation mechanism contained in the law (Central Economic-Administrative Tribunal. Decision of September 15, 2016)**

The taxable person submitted a valuation report on the personal items prepared by a specialized appraisal company, which the authorities rejected outright, and used the legal presumption for valuation in the assessment concerned. In a subsequent claim, Madrid TEAR allowed the report and denied the rebuttable presumption.

TEAC confirmed Madrid TEAR's decision by holding that:

**a)** Although a report requested by a private person or entity cannot be given evidentiary force for the facts they are affirming, it is indeed sufficient at least to prevent the legal presumption automatically applying.

**b)** In these circumstances, the tax authorities must, at the very least, provide a reasoned reply on the probative value of the submitted document or on the valuation rules used in it, and all of this without limiting the authorities' auditing powers.


**2.16 VAT.- The filing of the annual summary does not stop the limitation period (TEAC. Decision of September 22, 2016)**

In this decision TEAC examined when the limitation period for VAT starts and, in particular, whether the filing of an annual summary (form 390) stops the limitation period for all the periods in the year to which the summary relates.

TEAC concluded by denying that the same treatment could be given to the annual summary as to the monthly or quarterly returns:

**a)** Whereas the filing of the periodical monthly or quarterly self-assessment return is a procedural obligation which is the necessary instrument to comply with the substantive obligation to pay the tax debt, the annual summary is filed to comply with an obligation assisting with VAT management, but its immediate aim is not the payment of the debt determined for each assessment period.

**b)** Accordingly, because the filing of form 390 is not an authenticated act by the person with tax obligations leading to the assessment or self-assessment of the tax debt (because no assessment occurs in the annual summary) the filing of that form does not have the effect of stopping the limitation period for the tax authorities' right to determine the tax debt.

**c)** According to this reasoning, every self-assessment period will end after four years have run from the end of the period for filing the self-assessment return for that period.No obsta a esta conclusión que en el resumen anual debe incluirse cierta información de trascendencia.

The fact that certain items of tax relevant information must be included in the annual summary does not detract from this conclusion.

**2.17 Tax on economic activities.– The net sales/revenues figure for the purposes of the exemption from the tax on economic activities will be that for the whole horizontal group with the same director (Directorate General for Taxes. Ruling V3053-16, of July 1, 2016)**

The DGT examined the case of a horizontal group of two

companies. Their shareholders are members of the same family and they share the same sole director who is also the majority shareholder in each.

The DGT held that in these cases to examine whether the exemption under article 82.1.c) of the Revised Local Finances Law applies, the net sales/revenues figures of each company must be added together, since it is presumed that a group of companies within the meaning of article 42.1.d) of the Commercial Code exists, because both companies share the same director and have exactly the same shareholders. Therefore, if the sum total of those figures is higher than one million euros, neither company will be exempt from the tax on economic activities on any of the economic activities they conduct.

In this case, both companies must report that combined sum on their corporate income tax or nonresident income tax return or otherwise by filing form 848. Additionally, both of them must file a return to be added to the roll for the tax on economic activities (form 840) in the December immediately before the year in which they are taxable. The return to be added to the roll must include all the information necessary to classify the activity, determine the group or caption and quantify the tax liability.

**2.18 Management procedure.- The party with the obligation to pay the debt of another debtor is validly entitled to apply for a refund of incorrect payments (Central Economic-Administrative Tribunal. Decision of September 29, 2016)**

The issue centered on determining whether the party with the obligation to pay a debt owned by another debtor, under a debt attachment order is validly entitled to apply for a refund of any incorrect payments they may have made by reason of that payment to the finance authority.

TEAC concluded that they were:

**(i)** The existence of procedural or payment obligations under a debt attachment order implies, correlatively, that the taxable person has all the rights attached to those obligations.

**(ii)** The payment made by a third party may not receive the same treatment as that made by a person required to comply with an attachment order. In the first case they are a voluntary contributor, whereas in the second case they are a "involuntary contributor" for whom the origin of their obligation lies in a legal provision.

**2.19 Economic-administrative procedure.- The lodging of an ordinary appeal to a higher administrative body does not automatically stay the enforceability of the economic-administrative claim (Central Economic-Administrative Tribunal. Decision of September 8, 2016)**

In the case at issue, an economic-administrative claim brought by the taxpayer was upheld, and the challenged assessment rendered null and void. The tax authorities lodged an ordinary appeal to a higher administrative body against that decision, and the appeal was upheld. Because the tax authorities did not issue a decision to reinstate the void debt, however, when TEAC's decision later found in favor of the tax authorities, the assessed debt no longer existed (because the enforcement of the decision appealed by the tax authorities had rendered the originally assessed debt null and void) and the tax authorities' right to make an assessment had expired.

The tax authorities asked whether the enforceability of a decision by a TEAR could be held to have been reversed by the lodging of an ordinary appeal against it to a higher administrative body. TEAC concluded that it could not: the lodging or an ordinary appeal to a higher administrative body does not automatically stay the enforcement of the economic-administrative claim against which it was lodged, because this is prevented by the principle of the enforceability of administrative decisions, which must apply also to economic-administrative claims. In this regard, the fact that the decision had been appealed, in other words, that it was not final and consented, did not mean it was not enforceable insofar as a stay of its enforcement had not been decided.

**2.20 Penalty procedure.- The *non bis in idem* principle does not prevent two rulings on the same facts (Central Economic-Administrative Tribunal. Decision of September 22, 2016)**

In relation to this economic-administrative claim consideration was given, among other issues, to the scope of the non bis in idem principle in tax matters.

It must be remembered that the *non bis in idem* principle means:

**a)** there cannot be two penalties, criminal and administrative, in respect of the same facts; and

**b)** in cases where jurisdiction exists for both types of liabilities, the criminal penalty takes precedence.

In relation to this principle, and in line with the reasoning set by the European Court of Human Rights in its Judgment of June 19, 2009 (case *Ruotsalainen* v *Finland*), TEAC concluded as follows:

**a)** A constitutional prohibition on commencing or resuming a penalty proceeding where a final penalty decision has been rendered in the criminal jurisdiction does not apply to any penalty proceeding; only to those which, by reference to both the characteristics of the proceeding (its degree of complexity) and those of the penalty that may be imposed in it (its nature and size) may be treated as a criminal proceeding.

**b)** The administrative tax assessment proceeding may be continued after an acquittal judgment has been rendered in the criminal jurisdiction, provided the facts that the criminal court had deemed to be proven are observed. And, with observance of this, the administrative proceeding determines a different characterization of the facts.

**c)** In short, the only element prevented by the *non bis in idem* principle is for there to be two penalties, not two decisions on the same facts.

### 2.21 Penalty procedure.- Failure to file form 240 within the time period must be penalized with €20 per item of information (Central Economic-Administrative Tribunal. Decision of September 22, 2016)

At issue was whether the failure to file within the correct time period form 340 (Information return. VAT, article 36 of the General Regulations on steps and tax management and procedures and for implementation of the common rules on procedures for application of taxes. Record books), must be penalized with the penalty provided generally (fixed monetary fine amounting to €200) or whether, conversely, it must be penalized with a penalty amounting to €20 per item of information, between a lower limit of €300 and an upper limit of €20,000.

TEAC concluded that the failure to file form 340 within the correct time period must be penalized with the penalty amounting to €20 per item of information insofar as it is an obligation to supply information, which is a procedural obligation (as distinguished from substantive or payment obligations).

### 2.22 Penalty procedure.- The base for the penalty for failure to make payment is the amount that was not paid even if it was later corrected (Central Economic-Administrative Tribunal. Decision of September 8, 2016)

In an audit proceeding on corporate income tax, the inspectors rectified the timing of recognition of an invoice issued in 2008 which related to services supplied in 2007. In this context, it was examined what base must be taken for calculating the penalty related to the infringement consisting of failing to pay over in the time period the whole or part of the tax debt which should have resulted from the correct self-assessment.

Canary Island TEAR held that, in a case such as the one described, the base for the penalty must consist of the economic loss caused to the finance authority, which is the delay in payment.

Against the decision handed down by Canary Island TEAR, the Spanish Tax Agency (AEAT) brought a special appeal to a higher administrative body for a ruling on a point of law. TEAC corrected the reasoning adopted by Canary Island TEAR and concluded that the base for the penalty in respect of that infringement is, in all cases, the amount not paid over with the self-assessment as a result of the commission of the infringement. This conclusion also applies to cases of failure to pay over in the correct time period any taxes or prepayments which had been included or corrected by the same party with tax obligations in a self-assessment filed subsequently, and regardless of whether such practices have been defined as a minor tax infringement.

## 03 LEGISLATION

### 3.1 Corporate income tax prepayments

The Official State Gazette (BOE) of October 22, 2016 published the Decision of October 20, 2016, by the Lower House of the Spanish Parliament, ordering publication of

the validation decision for Royal Decree Law 2/2016, of September 30, 2016 introducing tax measures aimed at reducing the national debt.

That royal decree, published on September 30, 2016 (together with Order HAP/1552/2016, of September 30, 2016 amending forms 202 and 222) introduced amendments to prepayments under the taxable income method for taxpayers whose net revenues/sales in the 12 months preceding the start date of the taxable period are at least €10 million (now in force for the October prepayment):

**a)** Minimum payment of 23%:

- The sum to be paid cannot, under any circumstances, be below 23% of the positive earnings on the income statement for the year in the first 3, 9 or 11 months of each calendar year or, for taxpayers whose taxable period is not the same as the calendar year, for the portion of the year that has elapsed from the start of taxable period until the day before the start of each payment period for the prepayment, determined in accordance with the Commercial Code and other implementing accounting legislation, reduced only by the prepayments made earlier, in respect of the same taxable period.

- For taxpayers subject to the 30% rate, the percentage will be 25%.

- Any amounts relating to debt recomposition or rescheduling arrangements under creditors' arrangements for the taxpayer will be eliminated from the positive earnings figure, and that earnings figure will include the portion of its amount that will be included in the tax base for the taxable period. Another sum that will be eliminated for these purposes is the amount of the positive earnings figure resulting from transactions to increase capital or shareholders' equity for the conversion of debt into equity which will not be added to the tax base under article 17.2 of the Corporate Income Tax Law.

- There are two special provisions::

  - In the case of partially exempt entities subject to the special tax regime under chapter XIV of title VII of the Corporate Income Tax Law, the positive earnings figure will be that relating only to non-exempt income.

  - In the case of entities eligible for the reduction for the provision of local public services, the positive earnings figure will be that relating only to income on which no reductions have been taken.

- This rule does not apply to entities that have elected the special tax regime under Law 49/2002, open-end investment companies (SICAV), investment funds and other entities taxed at 1%, pension funds and Spanish REITs (SOCIMIs).

**b)** Prepayment rate raised to 24%: the prepayment percentage will be obtained by multiplying the tax rate by 19 twentieth parts and rounded down. Therefore, for entities taxed at the standard 25% the prepayment rate will rise from 17% to 24%.

These new rules do not apply to prepayments for which the return period commenced before the entry into force of Royal Decree Law 2/2016, of September 30, 2016, namely, before September 30..

### 3.2 Amendments made to forms 190, 117 and 390

On October 11, 2016 the Official State Gazette (BOE) published Order HAP/1626/2016, of October 6, 2016, amending Order EHA/3127/2009, of November 10, 2009 approving form 190 for the annual summary return for personal income tax withholdings on salary income and income from economic activities, prizes and certain capital gains and imputed income; and also amending other tax laws.

In relation to form 117 (withholdings on income from the transfer or redemption of shares in collective investment vehicles) it must be noted that, effective January 1, 2017, there is a new obligation to *self-assess the withholdings made from capital gains on the transfer of securities traded on an official market* as defined in Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004.

Regarding form 390 (VAT annual summary) and in force for the return to be filed in January 2017 for fiscal year 2016, it is provided that the exemption from the obligation to file this return for certain classes of persons is not optional, so the taxable persons in those classes will have to complete the specific section reserved for taxable persons exempted from the VAT annual summary that is required in the VAT self-assessment for the last assessment period in the year.

### 3.3 Remote filing of documents and calendar of non-working days

Public Authorities' Common Administrative Procedure Law 39/2015, of October 1, 2015, published in the Official State Gazette (BOE) on October 2, 2015 entered into force on October 2, 2016.

It contains two particularly important pieces of new tax legislation:

**a)** Obligation for communications with the public authorities to be made electronically:

From October 2, 2016 legal entities and entities without a legal personality have the obligation to communicate with the public authorities remotely on electronic media, which includes the filing of any type of application, appeal or other formality in the context of administrative proceedings.

In connection with tax matters, this means that it has not only become compulsory to file economic-administrative claims in this way, but also appeals for reconsideration and any other document in any administrative tax proceeding.

This obligation applies also to anyone representing an interested party with an obligation to communicate electronically through the authorities.

It does not apply in relation to exceptions provided elsewhere in the legislation in force which make it compulsory to file documents on paper or on physical media (originals or guarantees, notarial documents, etc.).

Regarding the option for correction when the documents are filed on paper it must be kept in mind that the law provides that the public authorities will make a request to the interested party to correct the defect, but provides that the filing date for the document will be the date on which the correction was made (which could entail the late filing of numerous applications and appeals).

**b)** Computation of time periods:

From October 2, 2016, Saturdays will become non-working days for the purpose of computing administrative time periods,.

Simultaneously, as a result of the entry into force of this new Law 39/2015, on October 1, 2016 the Official Gazette published the Decision of September 28, 2016, by the Secretary of State for Public Authorities, establishing the calendar of non-working days for the purpose of computing time periods, in connection with general central government procedures for the period between October 2 and December 31 2016.

### 3.4 Revised cadaster values

The Official State Gazette of October 1, 2016 published Order HAP/1553/2016, of September 29, 2016 setting out a list of the municipalities in which the revised cadaster value rates determined in the General Budget Law for 2017 apply.

# 04 MISCELLANEOUS

## 4.1 Decision of September 19, 2016, by the Directorate-General for AEAT

In a decision rendered on September 19, 2016, published on October 13, 2016, new formalities were added to the list of formalities and steps for which a person may be authorized and notified to the tax agency to perform them online at the tax agency and an amendment was made to formalities set out in the decision of May 31, 2012.

## 4.2 Agreement between the European Union and Andorra on the automatic exchange of information

On October 1, 2016 the Official Journal Council Decision (EU) 2016/1751 of September 20, 2016 concerning the conclusion, on behalf of the European Union, of the Amending Protocol to the Agreement between the European Community and the Principality of Andorra, providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments.

This Directive authorizes the signature of that Amending Protocol, which will apply from January 1, 2017 and will allow the automatic exchange of financial account information regarding Andorran residents.

Protocols with very similar contents have recently been signed with Switzerland, Liechtenstein, San Marino and Monaco, all of which is to apply the OECD's standards on the automatic exchange of information.

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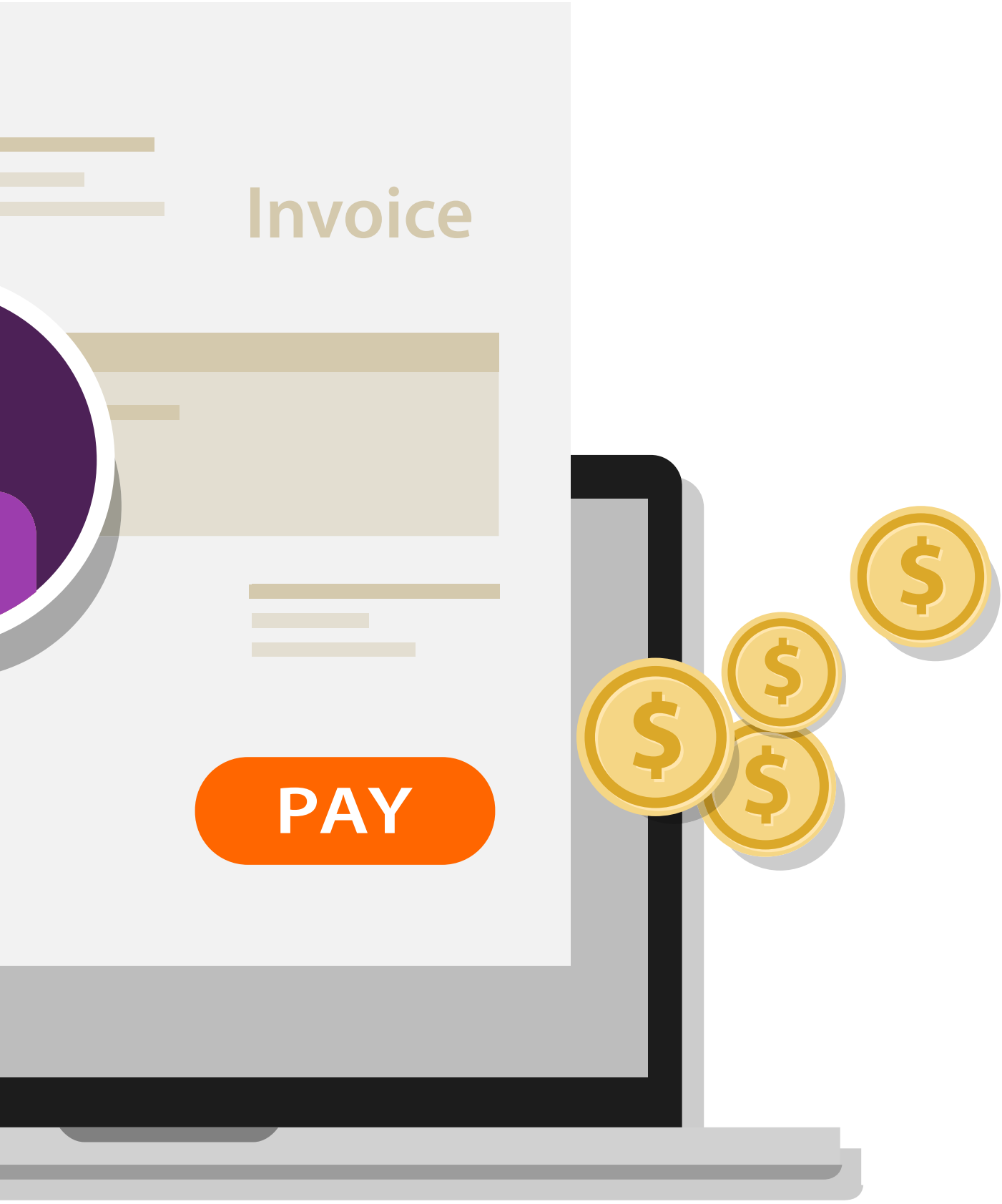
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