Tax Newsletter

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Catalan High Court. Judgment of February 11, 2022 Valencia Judicial Review Court no 3. Judgment of April 5, 2022. Directorate General for Taxes. Resolution of February 14, 2022

Directorate General for Taxes and courts examine timing effects of constitutional court judgment of October 26, 2021 and entry into force of Royal Decree-Law 26/2021 of November 8, 2021 amending the legislation to adapt it to the Constitutional Court's decision.

A constitutional court judgment delivered on October 26, 2021 held to be unconstitutional and rendered null and void certain provisions in the legislation on the tax on increase in urban land value (see our alert dated November 3, 2021). The court determined, however, that any assessments or self-assessments that had not been challenged on the delivery date of the judgment could not be reviewed. The judgment was delivered on October 26, although not published in the Official State Gazette (BOE) until November 25, 2021.

Royal Decree-Law 26/2021 of November 8, 2021 amended the legislation on the tax to adapt it to the Constitutional Court's case law (see our alert dated November 9, 2021). This decree-law, which was published in the Official State Gazette (BOE) on November 9, 2021 and entered into force on November 10, 2021, did not give any retroactive effect to the amendment of the legislation.

A raft of questions have since been emerging in relation to the restriction on the timing effects of that judgment and the entry into force of the new royal decree-law, which are now being answered by the courts and the Directorate General for Taxes (DGT). We discussed a few of the determinations on this subject in our 2022 February Newsletter. Recently, new determinations have been issued with the following findings:

(i) **New legislation is not retroactive**

- The Catalan High Court has rejected the ability to replace assessments issued under the rules on determining the taxable amount in effect before the new legislation, with others calculated under the new legislation. In other words, the new royal decree-law cannot be applied retroactively to taxable events that occurred before its entry into force.

- The DGT, for its part, has analyzed a case in which the taxpayer had not filed the necessary return for a taxable event that occurred in June 2021 (in other words, before the Constitutional Court's judgment) because it had requested a one-year deferral for filing it, which had been accepted by the tax authorities.

  The DGT recalled that the Constitutional Court prohibits the tax from being charged under articles held unconstitutional. Therefore, although the taxpayer will be required to file a return, the tax will not have to be paid.

(ii) **Effective date of the constitutional court judgment**

Valencia Judicial Review Court no 3 concluded in a judgment delivered on April 5, 2022 that the limit on the timing effects contained in the constitutional court judgment must be interpreted in line with article 164.1 of the Constitution.

Its effects may therefore only start from the publication date of the judgment in the Official State Gazette (November 25, 2021) not from the date formally appearing in the judgment as the date when the decision was adopted by the court (October 26, 2021).

This interpretation could allow assessments or self-assessments of the tax to be reviewed if they were challenged between October 26 (when the judgment was issued) and November 9, 2021 (the day before the entry into force of the new legislation).

2. Judgments

2.1 Related-party transactions.- Form 232 respects the principles of prevalence of rule of law, matters reserved for legislation by statute, proportionality, need for fulfillment of definition and non-retroactivity governing unfavorable penalty provisions

Supreme Court. Judgment of March 16, 2022

Form 232 is an information return on which information has to be provided to the tax authorities in relation to transactions conducted with related individuals or entities. Before the approval of this form, that information had to be provided on the corporate income tax return. At issue in this judgment was whether the form is lawful or otherwise and whether it observes the principles underlying Spanish law.

The Supreme Court concluded that Form 232 observes the principles of prevalence of rule of law and matters reserved for legislation by statute alone, of proportionality and of the need for fulfillment of definition in relation to penalties. According to the court:

(i) The order approving the form did not create a new obligation or define its essential elements, instead it simply stated that the information on related-party transactions that formerly had to be included on the corporate income tax return had to be provided on that form. Therefore, the principle of matters reserved for legislation by statute was not breached.

(ii) The principle of proportionality is not absolute, but rather has to be assessed in each specific case. In this case, it is necessary to measure the tax burden entailed by completing Form 232, and again, after determining that the information that must be supplied on this form was formerly required on Form 200 (the corporate income tax return), it cannot be concluded that the principle has been breached.

(iii) Moreover, the order approving Form 232 is not a penalty order, instead it simply lays down a procedural obligation, even if retroactively, for transactions conducted before approval of the form. Therefore, the principles of fulfillment of definition and non-retroactivity governing penalty provisions have not been broken either.

2.2 Personal income tax.- Even if the taxpayer has elected the cash basis, it is still necessary to recognize capital subsidies as the purchased assets are depreciated

Supreme Court. Judgments of March 29, March 30 and April 4 2022

Personal income taxpayers carrying on economic activities are allowed to elect the cash basis for recognizing their revenues and expenses. In relation to capital subsidies, however, Recognition Standard 18 in the Spanish Chart of Accounts allows a gradual or successive recognition rule which makes no distinction between the accrual basis or the cash basis.

In the case examined in this judgment, the taxpayer, who had elected the cash basis for recognizing revenues and expenses, recognized a capital subsidy to be used to purchase capital equipment in the depreciation periods for those items of equipment rather than on the dates the subsidy was received. The tax authorities concluded that the subsidy should have been recognized on a cash basis.

The Supreme Court found in favor of the taxpayer.

(i) Recognition in income of subsidies, gifts or bequeaths for personal income tax purposes must be done under Recognition Standard 18 in the Spanish Chart of Accounts. This is not prevented by the taxpayer having elected the cash basis for recognizing expenses and revenues.

(ii) The application of this recognition standard in the chart of accounts cannot be regarded as revoking election of the cash basis, but rather the priority application of a special law.

2.3 Personal income tax.- Even if the taxpayer does not prove the acquisition value of an asset, the tax authorities cannot assume without further verification that the value is zero

Valencia High Court. Judgment of December 22, 2021

A taxpayer transferred shares in a listed company, and reported in the personal income tax self-assessment an acquisition value identical to their transfer value, in other words, a capital gain equal to zero.

In the subsequent examination process, the tax authorities asked to see supporting documents for the acquisition value. In view of the absence of proof for that value, they assumed that the acquisition value was zero, and attributed to the taxpayer a capital gain equal to the transfer price.

Although the Valencia High Court held that the taxpayer should have complied with the tax authorities' repeated requests, it concluded that the tax authorities cannot consider without further verification that the acquisition value of the shares is zero. The court found fault with the tax auditors for not making further verifications with the banking institution through which the shares were purchased and transferred to ascertain their acquisition cost. For that reason, the court voided the assessment.

2.4 Nonresident income tax.- EU law precludes an exemption being applied to investment funds created by contract, with exclusion of those constituted as a company

Court of Justice of the European Union. Judgment of April 7, 2022. Case C-342/20.

Finnish law allows, for resident investment funds, an exemption for rental income and other income received from the transfer of real estate and of shares in companies owning real estate obtained in that state. That exemption is applicable to comparable foreign investment funds if they are open-ended and are constituted by contract, and is not applicable if they are constituted with the form of a company and under statute.

The Court of Justice of the European Union (CJEU) concluded that EU law precludes national legislation under which only foreign open-ended investment funds constituted by contract can be regarded as equivalent to resident investment funds exempt from income tax, meaning that foreign investment funds established under statute are subject to withholding tax.

2.5 Nonresident income tax.- EU law precludes requiring tax to be withheld from dividends distributed to a nonresident collective investment vehicle, whereas equivalent dividends paid to a resident investment vehicle are exempt

Court of Justice of the European Union. Judgment of March 17, 2022. Case C- 545/19

The CJEU has held that the free movement of capital precludes Portuguese legislation under which the dividends received from Portuguese resident companies by a collective investment vehicle (OIC) tax resident in Germany are taxed in that country by means of a final 25% withholding at source (15% after applying the limit set in the tax treaty), whereas a comparable entity resident in Portugal would have been exempt from tax on its dividends.

According to the CJEU, national legislation such as that described creates unfavorable treatment for dividends paid to nonresident collective investment vehicles. This difference in treatment with respect to resident collective investment vehicles concerns objectively comparable situations, and is not justified by an overriding reason in the public interest.

2.6 VAT.- A subsidiary providing services to its parent company does not amount to a fixed establishment for that company

Court of Justice of the European Union. Judgment of April 7, 2022. Case C-333/20

A company having its registered office in Germany engaged in the marketing of pharmaceutical products. The company signed a contract with its Romanian subsidiary for this company to supply advertising, and representation services in Romania. The Romanian tax authorities concluded that, for this reason, the subsidiary amounted to a fixed establishment for VAT purposes of the parent company, and as a result, the place of supply of the services was Romania.

After examining this transaction, the CJEU concluded as follows:

(i) First it recalled that the existence, in a member state, of a fixed establishment of a company established in another member state may not be deduced from the fact that that company has a subsidiary there.

(ii) Moreover, a legal entity, even if it has only one customer, may be assumed to use the technical and human resources at its disposal for its own needs. Accordingly, it is only if the German company had the technical and human resources of the Romanian subsidiary at its disposal as if they were its own that it could be concluded the German company had a fixed establishment.

(iii) Lastly, a fixed establishment is characterized by a sufficient degree of permanence and a suitable structure, in terms of human and technical resources, which is capable of enabling it to receive the services supplied to it and use them for its own business needs. Accordingly, it cannot be concluded that the human and technical resources placed at the disposal of the German company by the Romanian company, are the same resources as those through which the Romanian company supplies the services to the German company.

2.7 VAT.- A notarial record of documents sent to demand payment of a debt fulfills the condition required in the legislation for modifying the taxable amount in relation to uncollectible debts

National Appellate Court. Judgment of March 16, 2022

One of the requirements for modifying the VAT taxable amount in relation to uncollectible debts is that the taxable person must have sought to collect the debt by filing a claim with the courts or by sending a notarial demand. This judgment examines the validity of sending that demand through a notarial record of sent documents.

The National Appellate Court concluded as follows:

(i) Although article 80.4 of the VAT Law states that the collection must be sought by filing a claim with the courts or by sending a notarial demand, it does not require an answer to the claim or notarial demand or determine any time period between the demand or claim and modification of the taxable amount.

(ii) Therefore, the notarial demand and the notarial record of sent documents must be regarded as fulfilling the same function, which is to request payment of the debt.

(iii) Additionally, the VAT neutrality principle requires the taxable amount to be modified in these cases, because the notarial record of the letter sent by mail shows the taxable person’s wish to collect and the claim sent to the debtor via notary, and a restrictive interpretation of the legislation is not justified by the purpose of avoiding tax evasion or fraud.

This issue is also awaiting examination by the Supreme Court, in cassation appeal 3441/2020 (admission decision dated February 11, 2021).

2.8 Administrative procedure.- If an application for nullity as a matter of law is formally and procedurally correct, it cannot fail to be admitted without justification or analysis of the merits of the case

Supreme Court. Judgment of April 6, 2022

A taxpayer resident in the United States applied for correction of an inheritance and gift tax self-assessment so as to benefit (along with his brothers resident in Madrid) from the 99% reduction to tax liability allowed in the Madrid autonomous community legislation. The correction was rejected because the applicant was not resident either in an EU member state or in the European Economic Area. The decision was not appealed and became final.

Later the taxpayer applied for nullity as a matter of law of the decision denying the application, relying on article 217.1.a) of the General Taxation Law (LGT), which refers to cases where the act has damaged rights and freedoms protected by the Constitution. The exact contention was that the CJEU's interpretation should be applied as contained in its judgment of September 3, 2014, Commission v Spain (case C-127/12).

The tax authorities failed to admit for consideration an application for nullity as a matter of law, stating simply that "the arguments used to defend its existence are manifestly unfounded". That decision was appealed to the courts, which did not enter into examining the merits of the case either, arguing that a debate could not be reopened after it had been closed due to inaction by the appellant.

The Supreme Court concluded that the appellant's application fulfilled all the eligibility requirements, because (i) the administrative act was final, (ii) the applicant had formulated the appeal on the basis of article 217.1.a) of the LGT; and (iii) the tax authorities had not taken into account the dismissal, in relation to the merits, of other substantially identical applications.

Therefore, although the CJEU's judgment does not provide in or of itself a sufficient ground for nullity of any act contrary to the decision in that judgment, in this specific case the application should have been admitted for consideration. As a result, the court ordered reversion of procedure to the point before the decision not to admit the application, for the tax authorities to conduct and decide on the proceeding for nullity as a matter of law, as expressly mentioned in the judgment, "with the shortest delay and with specific consideration of the Supreme Court's case law in this respect".

The court recalled that it had already applied the principle in that CJEU judgment to cases where the person was resident in a third country (judgments of November 19, 2020 (rec. 6314/2018) and of November 30, 2020 (rec. 4456/2018)).

2.9 Administrative procedure.- Legitimate expectations principle not breached by issuing assessments in relation to taxable periods occurring before new principle was adopted by TEAC

Supreme Court. Judgment of March 1, 2022

A taxpayer received an assessment in relation to personal income tax for 2011, 2012 and 2013. The assessment was based on a change of principle by TEAC as reflected in a decision rendered in 2015.

The Supreme Court concluded that that assessment does not breach the legitimate expectations principle. According to the court, even if an administrative principle favorable to the taxpayer's conduct had previously existed, that does not, in and of itself, prevent a change of principle by the tax authorities.

The change of principle does, however, have to be sufficiently supported, with express reference to the principle from which it departed and under subsequent and final judicial control. All of which is subject to the estoppel doctrine where it applies.

2.10 Administrative procedure.- The DGT's findings that are favorable to taxpayers amount to own acts that are binding on tax authorities

National Appellate Court. Judgment of February 23, 2022

The appellant submitted an issue for resolution to the DGT, in relation to the tax treatment of a loss due to seizure of shares in a subsidiary resident in Bolivia. In the absence of a reply from the DGT, the company recorded the tax loss via a negative tax adjustment on its 2012 corporate income tax return. After receiving an answer to the request, the company requested correction of its self-assessment because, under the DGT's principle, the tax loss would have been much greater than the amount recorded in the return. The tax auditors rejected the request. In their opinion, the documents produced to the DGT when making the request for resolution showed a few inconsistencies, and therefore the principle in the non-binding resolution was not binding on the tax authorities.

The National Appellate Court underlined that the inconsistencies alleged by AEAT for refusing to accept the binding nature of the resolutions only related to the accuracy of figures, on which the DGT did not make any determinations in its reply to the request for resolution. In particular, the DGT only stated its principle in relation to interpretation of the applicable legislation, so the presumed inconsistencies detected by AEAT should not be able to impair the binding nature of the resolution.

Therefore, adopting the principle determined by the Supreme Court (in judgments delivered on May 6 and May 10, 2021 and October 21, 2020), the chamber held that, although the DGT's resolutions are not a source of law, where the principle adopted by the DGT is favorable for the taxpayer, it amounts to an own act by the authorities which must be observed in all cases, under the principles of good faith and good administration.

2.11 Management procedure.- Authorities' acts that are voidable and not null and void as a matter of law toll the statute of limitations for the right to assess

Supreme Court. Judgment of March 21, 2022

The La Rioja tax agency initiated audit and verification work in relation to the personal income tax of a deceased person, and issued a contested assessment. TEAC voided the subsequent assessment after finding that the La Rioja tax agency was not authorized to carry out audit and verification work in relation to a person domiciled for tax purposes in another region. It held, however, that nullity was not absolute because the observed lack of authority was not "manifest". Later, new work was initiated on the same tax and period and in relation to the same taxpayer (the deceased person).

The Supreme Court, in line with its own case law, concluded that the acts of a tax authority which have been voided in a final economic-administrative decision due to being simply voidable and not null and void as a matter of law, toll the statute of limitations for the right to assess.

2.12 Liability for tax.- Enforceability of penalties is not stayed automatically in all cases of extended liability

Supreme Court. Judgment of March 15, 2022

Under article 212.3 LGT, the filing of appeals or claims against penalties imposed on infringing or liable parties will automatically stay enforcement without the need to provide security, until they become final in the administrative jurisdiction.

That same article states, however, that liability for payment of debts under article 42.2 of the law is not stayed. That article 42.2 defines joint and several liability in relation to the tax debt, and the penalties and late-payment interest in the enforcement period, of certain individuals or entities, such as any that have caused or participated in concealment or transfer of the main debtor’s assets for the purpose of preventing the authorities from using them in their work.

The Supreme Court explained that it is evident simply by reading article 212.3 that the automatic stay of enforceability of the penalties does not apply to penalties relating to an extension of liability under article 42.2 of the law; although such a stay may be requested under the general rules.

2.13 Penalty procedure.- Penalties for failing to comply with requests for information must be graduated not only against revenues, but also against severity and culpability

Supreme Court. Judgment of March 8 and judgment of March 16, 2022

Article 203.5.c) LGT defines a penalty for failure to comply with requests for information in relation to data that is relevant to such a degree that failure to produce those data hinders the authorities’ work. More specifically, the penalty may amount to 2% of the revenues of the infringing party subject to upper and lower limits amounting to €10,000 and €400,000.

At issue in these judgments was whether or not the penalty could be graded proportionally according to an examination of conduct and to the culpability of the infringing party (within the specified upper and lower limits).

The Supreme Court replied that it could. According to the court:

(i) The mentioned article allows the authority issuing the penalty and the courts of justice to graduate the penalty not only against revenues, but also against the severity and culpability of the breach.

(ii) Where there are no specific grounds in relation to the severity of the conduct or the particular culpability, the least severe penalty has to be imposed.

(iii) The infringing party's revenues figure is not the only element determining the amount of the penalty but rather, at most, one of several graduation factors, which must be linked to conduct (the defined acts) and intent (degree of culpability, whether by fault or negligence, and within them, the intensity with which they occurred).

The court also examined the concept of tax relevance for the purposes of this penalty and concluded that that tax relevance must be related to information that affects the application of taxes in its general expression and that brings a benefit, even if indirect or hypothetical, which will have to be substantiated in the penalty decision.

2.14 Enforcement procedure.- A penalty does not have to be voided as a result of the authorities enforcing a decision by the economic-administrative tribunal after the end of a month

Supreme Court. Judgment of April 6, 2022

In the enforcement process of a decision by an economic-administrative tribunal, the authorities rendered a penalty decision for a lower amount than the figure originally issued. The interested party pleaded that the second penalty decision had to be voided because the tribunal's decision was enforced outside the one-month time period granted to the authorities for enforcement of economic-administrative decisions.

The Supreme Court concluded that the time period for enforcing a decision by an economic-administrative tribunal voiding a penalty on substantive grounds is, indeed, one month, but enforcement outside that period does not have a voiding effect because it is an irregularity that is not an invalidating factor. It also recalled, however, that late-payment interest does not have to be charged from when the tax authorities fail to fulfill that one-month period.

The court added that this conclusion does not breach legal certainty, in that the statute of limitations for the infringement will continue running in the taxpayer’s favor until the enforcement decision is adopted.

3. Decisions

3.1 Corporate income tax.- International double taxation credits generated in the year covered by the tax return have to be used before other tax credits

Central Economic-Administrative Tribunal. Decision of October 25, 2021 and decision of February 25, 2022

It was examined whether there is an order of priority for using the international double taxation tax credits defined in article 31 of the Corporate Income Tax Law, after which TEAC concluded as follows:

(i) If an international double taxation tax credit generated in the year covered by the tax return coexists with tax credits carried forward, those generated in the year covered by the tax return have to be used first. This tax mechanism requires this to be so, since, if the amount paid abroad in a specific taxable period is higher than the amount that may be deducted from the tax liability, the excess will be a deductible expense in that period (only in the wording of the current law, which, according to the tribunal, is clear and obvious in this respect).

(ii) For these purposes, the tribunal affirmed that this is not the election of any of the tax options contained in article 119.3 LGT, or the use of a voluntary tax benefit, but is rather a mechanism for the avoidance of double taxation which the Spanish tax authorities absolutely do not want to occur, and to this end do not place any time limit on use of these tax credits.

3.2 Corporate income tax.- Expense in respect of withholdings required in assessment notice by auditors is not deductible

Central Economic-Administrative Tribunal. Decision of January 25, 2022

TEAC concluded in this decision that the liability determined in assessments of personal income tax withholdings (salary income in cash and in kind) for employers is not deductible insofar as employers are entitled to claim those withholdings from workers who received higher amounts of net income than they should have done.

Therefore, if the employer fails to charge the expense to the employee, that employer will be bearing an expense that is not required of it and will be treated as a gift, which is not deductible for corporate income tax purposes. This conclusion does not change if the employer can no longer exercise its right to claim the amount from its employees because it has become statute-barred. To reach that conclusion, TEAC referred to the principle determined by the Supreme Court in a judgment delivered on October 28, 2015 (rec. 2547/2013).

3.3 Corporate income tax / Audit procedure.- Omitting a non-essential step in an audit of entities taxed under consolidated tax group rules is not an invalidating factor

Central Economic-Administrative Tribunal. Decision of January 25, 2022 (Principle 1 and Principle 2)

In the case examined by TEAC, the auditors had incurred an irregularity consisting of including in the notice of assessment issued to the tax group adjustments relating to several companies in the group, as opposed to those on which no specific work had been performed.

TEAC acknowledged that at each subsidiary being audited a single procedure must be carried out including examination of the obligations under the individual tax regime. The result of these examination processes ultimately has to be reflected in the consolidated notice of findings that is issued to each company. These consolidated notices of findings have to be included in the corporate income tax file for the tax group, which has to be provided to the parent company for examination (or to its representative, if the group has a nonresident parent company). Lastly, the contents of all these notices of findings have to be included in the notice of assessment for the audit.

TEAC considered however that the step omitted in the case under examination was not essential and therefore did not invalidate the adjustment made. In the tribunal's view, the tax group had acted in the procedure through the parent company's representative (who was familiar with the subsidiaries' individual tax bases) and that representative had had the chance to submit all the comments he saw fit in the various periods for comments. In other words, the taxpayer's right to defend itself had not been impaired in any way and the ground for absolute nullity had to be set aside.

3.4 Corporate income tax.- The 10% limit on the tax credit for gifts has to be calculated on the reported taxable amount after offsetting tax loss carryforwards

Central Economic-Administrative Tribunal. Decision of January 25, 2022

The Patronage Law allows a corporate income tax credit for gifts, although it specifies that the base for the tax credit cannot exceed 10% of the tax base for the taxable period.

In this decision, TEAC clarified that the tax base that must be taken to calculate that limit is the amount left over after offsetting tax loss carryforwards.

3.5 Corporate income tax.- Finance costs on purchase of treasury shares for subsequent redemption are not gifts or gratuities

Central Economic-Administrative Tribunal. Decision of January 25, 2022 (Principle 1)

TEAC concluded in this decision, in line with the Supreme Court's findings in a judgment delivered on March 30, 2021 (rec. 3454/2019), that the tax authorities cannot reject the right to deduct on corporate income tax returns finance costs on a purchase of treasury shares by a company for their subsequent redemption (even if the shareholder was the only party that benefited from the transaction), on the basis of article 14.1.e) of the Revised Corporate Income Tax Law -TRLIS- (article 15.e) of the current law), relating to gifts and gratuities.

As the Supreme Court stated, finance costs are for consideration and therefore cannot be characterized as gifts or gratuities.

Despite this, TEAC pointed to the ability to question the right to deduct this type of finance costs based on their treatment as return on equity, the deduction of which is prohibited by article 14.1.a) of the Revised Corporate Income Tax Law -TRLIS- (now article 15 a) of the Corporate Income Tax Law -LIS-).

3.6 Corporate income tax.- While TRLIS was in force, the portion of a foreign tax that could not be included in the double taxation tax credit was not a deductible expense

Central Economic-Administrative Tribunal. Decision of January 25, 2022 (Principle 2)

TEAC examined the ability to treat as a deductible expense (in 2012) the amount of a foreign tax not able to be deducted as a double taxation credit after applying the limit set out in the law (the gross tax liability that would have to be paid in Spain in respect of the income if it had been obtained in Spain).

The tribunal recalled that this ability was written into Spanish law by the current Corporate Income Tax Law, which came into force on January 1, 2015, and therefore the deduction of expenses from earlier years cannot be accepted.

As a reminder, the National Appellate Court, in a judgment delivered on September 24, 2020 (rec. 288/2017), conversely, allowed the expense to be deducted for taxable periods in which the TRLIS applied. A cassation appeal has been lodged against this judgment to the Supreme Court, however, on which judgment has yet to be entered. TEAC mentioned this fact in its decision and therefore did not feel bound by the National Appellate Court's conclusion.

3.7 Personal income tax.- For the unjustified capital gain rules not to apply, the taxpayer has to prove the origin of the assets

Central Economic-Administrative Tribunal. Decision of January 25, 2022 (2931/2018 and Decision of 6396/2017)

TEAC concluded in this decision (in line with the principle set by the National Appellate Court in its judgment on October 27, 2021 -rec. 371/2019-), that where the tax authorities discover the potential existence of unreported capital and intend to apply the unjustified capital gains rules in article 39 of the Personal Income Tax Law, the taxpayer is responsible for providing evidence of the facts disproving the existence of that gain.

For these purposes, it is not sufficient simply to substantiate the immediate origin of the discovered capital, instead the tax authorities need to be able to know the real origin or cause of the discovered funds, in other words, the underlying transaction or economic relationship from which those assets were obtained which will enable them to be included in another source of income for personal income tax purposes, in the taxable event for another tax, or in another non-taxable item.

3.8 Nonresident income tax.- Real estate income obtained by a nonresident joint owner are included in taxable income without deducting expenses, in principle

Central Economic-Administrative Tribunal. Decision of January 25, 2022 and decision of February 22 2021

A United States resident is member of a joint property entity created in Spain which rents out properties located in Spain. This rental is not characterized as an economic activity.

According to TEAC, the rental income has to be included in its taxable income for nonresident income tax purposes by that joint owner (in proportion to the owner's share in joint ownership), without deducting expenses. This deduction is only allowed for residents in Spain and in other member states of the European Union or of the European Economic Area.

The tribunal clarified, furthermore, that in this case the Spain-United States tax treaty is applicable, according to which the state of source is allowed to tax that real estate income as provided in its domestic legislation, and any potential double taxation has to be neutralized by the state of residence.

3.9 Collection procedure.- TEAC determines new principles in relation to events triggering ability to enforce joint and several or secondary liability

Central Economic-Administrative Tribunal. Decisions of February 17, 2022 (620/2019, 679/2019 and 1490/2019)

TEAC has rendered a number of decisions examining cases of enforcement of joint and several and secondary liability, concluding as follows:

(i) Case of joint and several liability defined in article 42.1 c) LGT (applicable to people who receive ownership or economic activities, in respect of the tax obligations incurred by the previous owner and arising from conducting the activity):

TEAC concluded that the debt arising from the sale of the premises where the economic activity was carried on before the transfer of an undertaking is a debt arising from the activity, and therefore the transferee has to be declared jointly and severally liable for that debt.

(ii) Directors' secondary liability for the tax debts of companies that have ceased operating (article 43.1 b) LGT):

According to TEAC, a necessary event for liability to be enforceable on the director is that after (not before) the company ceased operating, the director simply consented to bringing the company to a halt and stopping its operations without settling its outstanding debts.

In other words, if in the period in which the company ceases operating, the directors call a shareholders' meeting which adopts the decision to petition for an insolvency order on the company, and after the petition has been made, the court decides to issue an insolvency order and simultaneously orders the winding up of the company, this is sufficient to enforce liability on the director under the mentioned article.

(iii) Declaration of default by the main debtor in a procedure for a statement of secondary liability under article 43 LGT:

TEAC set as a principle that, when determining whether or not the debtor's assets are sufficient to cover the tax claim, it is necessary both to specify the encumbrances that each asset covers, and to estimate its value, so as to obtain the net value of the asset by calculating the difference between the value allocated to it and the encumbrances levied on it.

This does not mean, the tribunal added, that the tax authorities are expected to appraise every asset, although they do have to determine a threshold value evidencing that the asset does not have to be attached for it to be transferred because it is assumed that the cost of realizing it may be higher than the amount that could be obtained from selling it.

3.10 Penalty procedure.- Where decisions partially upholding claims set aside a penalty, reductions for acceptance and prompt payment must be applied to any new penalty that is imposed

Central Economic-Administrative Tribunal. Decision of February 25, 2022

In the examined case, the taxpayer challenged an assessment and the claim was partially upheld. For that reason, the penalty also had to be modified.

TEAC stated that where a taxpayer challenges an assessment or a penalty stemming from that assessment and the taxpayer's appeal or claim is partially upheld:

(i) A new assessment will need to be issued.

(ii) The penalty will also need to be modified to adjust it to the new assessment or to the outcome of the appeal or claim against the penalty.

(iii) The reductions under the LGT for acceptance of the assessment (30%) and prompt payment (40%) will have to be applied to the new penalty as long as (i) the taxpayer does not appeal against the decision partially upholding the claim and does not challenge the assessment or the penalty rendered in enforcement of the decision, and (ii) pays over within the voluntary period the amount of the new penalty assessed as a result of the decision partially upholding the claim.

In TEAC's judgment, citizens cannot see their finances damaged by inconsistencies with the law contained in assessments or penalties issued by the tax authorities which are subsequently fully or partially overturned.

3.11 Review procedure.- Economic-administrative tribunals must refuse to examine the merits of the case where they set aside an act challenged on the ground of a procedural defect and must order reversion of procedure to an earlier point in time

Central Economic-Administrative Tribunal. Decision of February 28, 2022

In the claim filed with TEAC a number of procedural and substantive issues were submitted. Among the procedural issues, the taxpayer submitted that an audit of reported values had to be set aside because the auditors had not visited the properties.

TEAC found in favor of the taxpayer and concluded that the appraisal of a number of properties made by the tax authorities' experts as part of an audit had to be set aside on the ground of being unsubstantiated if no visual inspection of the properties had been made. For that reason, it set aside the challenged assessment and ordered reversion of procedure.

Following this conclusion, however, TEAC refused to issue a decision on the other issues that were submitted. According to the tribunal:

(i) It has to follow the principle of the logical priority of procedural issues that are invalidating factors for substantive issues.

(ii) Under this principle, where an economic-administrative tribunal finds a procedural defect in a challenged act, such the absence of substantiation, and as a result of that defect sets that act aside and orders reversion of procedure, the tribunal must refuse to render a decision on the merits of the case. Acting otherwise, according to the tribunal, would be an encroachment by the review bodies on the powers granted to the bodies responsible for the application of taxes.

4. Resolutions

4.1 Corporate income tax.- Absorption of the entity representing the tax group by another entity in the group does not entail the disappearance of this group where the parent company is a nonresident entity

Directorate General for Taxes. Resolution V0359-22 of February 24, 2022

A Norwegian resident company is the parent company of a Spanish tax group which includes companies A, B and C. Company A is the entity representing the group.

Company A partially invested the reserve for investments in the Canary Islands (the "RIC") by subscribing to shares created in various capital increases by company B. Moreover, company B invested in the proper time and form part of the RIC recorded by company A in the construction and bringing into operation of a hotel.

It is intended to carry out a downstream merger in which company B will absorb company A and the issue submitted for resolution concerns the impact of that transaction on both the RIC and the consolidated tax group regime.

The DGT concluded as follows:

(i) The acquiring company (B) will acquire the rights and obligations of A in relation to the RIC including any outstanding obligations relating to investment of the RIC and to the holding period of the elements in which the reserved funds have been reinvested.

(ii) The absorption of company A, the group's representative, will bring the taxable period of the tax group to an end although the tax group will not disappear and will retain the same number. The nonresident parent company will have to appoint a new company to represent it in Spain and notify its decision to the tax authorities.

4.2 Corporate income tax.- Application of the tax neutrality regime to an exchange of shares requires the majority interest to be obtained directly

Directorate General for Taxes. Resolution V0171-22 of February 3, 2022

A family group owns 95.97% of company A and 17.24% of company B (in which company A owns an 81.76% interest). Company A is also sole shareholder of an entity resident in the United States. Company B, for its part, is sole shareholder of company C, engaged in property leasing.

The individuals holding investments in companies A and B intend to contribute their shares in these companies to a newly created company (Newco) through a share exchange.

For a share exchange to be eligible for the tax neutrality regime, the entity making the exchange (the entity increasing its capital) needs to acquire an interest in the share capital of another or other entities, which will enable it to obtain a majority of its or their voting rights (or, if it already holds that majority, to increase its interest).

Accordingly, the DGT concluded as follows:

(i) Newco will acquire more than 50% of company A, and therefore the neutrality regime could be applied to the contribution of A's shares to Newco, as a share exchange, if the other requirements for the regime are met.

(ii) However, the share exchange regime would not be able to be applied to the contribution of the family's shares in company B, because the beneficiary company (Newco) would not obtain as a result of that contribution the majority of the voting rights in B. The DGT noted that only voting rights acquired directly would count for these purposes.

4.3 Personal income tax.- Analysis of reduction for multi-year income as a tax option

Directorate General for Taxes. Resolution V0379-22 of February 25, 2022

The Personal Income Tax Law allows a 30% reduction to be applied to income generated over more than two years, where in the previous five taxable periods the same taxpayer has not applied the reduction to an amount of income which was also generated over more than two years.

The requesting party received in 2017 salary income generated over more than two years to which they applied the reduction for multi-year income. In 2022 they are going to receive an incentive which will also have had a generation period longer than two years. In view of the amounts involved, the taxpayer wants to apply the reduction to the income to be received in 2022 and waive the reduction applied in 2017.

The DGT concluded as follows:

(i) In principle, the reduction would not be able to be applied to the incentive to be received in 2022 because in 2017, in other words, within the five taxable periods before 2022, the reduction was applied to another incentive.

(ii) However, the taxpayer has the option of filing an additional return to correct the reduction applied in 2017, so as to be entitled to the reduction in 2022.

Although application of the reduction is a tax option within the meaning of article 119.3 LGT, it was not until the 2022 incentive was received that the taxpayer was able to have all the elements needed to make a decision. No option exists where the taxpayer does not have two alternatives available, as occurred in 2017, when the taxpayer could not have known what would occur in the following years.

(iii) Having said that, after electing the option to apply the reduction to the 2022 incentive (by returning the tax not paid in 2017), the taxpayer would no longer be able to modify their election in the future outside the statutory period for filing the 2022 return.

4.4 Personal income tax.- DGT interprets new quantitative limits relating to contributions to pension plans and clarifies that those made under flexible compensation systems are individual contributions

Directorate General for Taxes. Resolutions V0299-22 and V0300-22 of February 17, 2022

Starting on January 1, 2022, the maximum amount to be deducted from net taxable income in respect of contributions to pension plans is €1,500 (subject to a limit equal to 30% of the sum of all net salary income and net income from economic activities). However, this limit is increased by €8,500 if that increase comes from the employer's contributions or employee's contributions to the same welfare and pension program in an amount equal to or higher than the respective contribution by the employer. For these purposes, any amounts contributed by the employer that stem from a decision by the employee will be treated as contributions by the employee.

In these decisions, the DGT clarifies certain elements of the new rules on reductions and contributions to pension plans:

(i) **Quantitative limits**. The new absolute limits on the reduction to net taxable income in respect of contributions to employee welfare and pension programs must be interpreted as follows:

(a) The €1,500 annual limit which includes (i) individual contributions to individual programs and to occupational programs, and (ii) employers' contributions to occupational programs.

Therefore, that overall limit may only include workers' contributions to their occupational welfare and pension programs, and do not need to be conditional on contributions made by the employer.

In other words, the worker could contribute up to €1,500 in a year and stay within this overall limit.

(b) The increase to that limit by €8,500 per year is an additional limit that relates to both (i) employer contributions to an occupational program and (ii) employee contributions to the same occupational program in an amount matching or lower than those employer contributions. Therefore, that additional limit includes workers' contributions to their occupational welfare and pension programs, although this is conditional on the employer making contributions in, at least, the same amount, and on the amounts contributed by the employer not stemming from a decision by the worker (in which case they would be treated as contributions by the worker and not able to be included in this limit).

Therefore, the worker would be able to contribute up to €4,250 in a year to be included in this limit (half of the increase in the limit) as long as employer contributions are made amounting to a further €4,250.

(c) Accordingly, if the employer makes employer contributions (characterized as such) amounting to €4,250 over a year, the worker could make contributions to the same welfare and pension program amounting to €5,750 over a year, of which €1,500 would be included in the overall limit and €4,250 in the additional limit.

(ii) **Scope of the reference to amounts contributed by the employer not stemming from a decision by the worker**

As has been explained, contributions stemming from a decision by the worker are not treated as employer contributions even if they are made by the employer. The DGT has clarified in this respect that contributions made by the employer under flexible compensation programs are not employer contributions because in these programs it is the worker who decides on the composition of their compensation.

Whereas employer contributions do indeed exist in a case of the type described in the issue submitted for resolution, in which the amounts contributed by the employer to an occupational pension plan arise from collective bargaining between the companies and the workers, as reflected in the collective labor agreement; or, in the case of workers and subsidiaries not included in the collective labor agreement, where the employers do not recognize employee's rights to alter the terms provided in the rules applicable to the plan, or the calculation method for the contributions to be made.

4.5 Nonresident income tax.- Income paid to student on work placement is subject to tax withholding

Directorate General for Taxes. Resolution V0249-22 of February 14, 2022

A Spanish resident company is going to hire a French resident student over several months on a work placement as part of a course. The student's compensation amounts to €500 a month.

The France-Spain tax treaty determines that a resident in France may be taxed in Spain if their compensation is paid by a Spanish company. Accordingly, in this case the income is taxable in Spain, and the Spanish company is required to make withholdings. The withholding rate has to be 19% because the student is a taxpayer resident in another EU member state.

4.6 Nonresident income tax.- Rural properties with built structures do not give rise to the recognition of real estate for nonresident income tax purposes

Directorate General for Taxes. Resolution V0250-22 of February 14, 2022

A nonresident individual is the absolute owner of a rural property located in Spain, which has a built structure consisting of a basin with a cadastral value for its construction. The taxpayer does not obtain any income from capital or income from economic activities on that property.

Under the Nonresident Income Tax law, income is treated as obtained in Spain where it is "attributed to taxpayer individuals owning urban real estate assets located in Spain not used for economic activities". The taxable income to be recognized must be determined in accordance with the provisions in the personal income tax legislation.

By reference to this rule on charging the tax and determining taxable income, the DGT concluded as follows:

(i) The Personal Income Tax Law contains a rule on the recognition of real estate for urban properties and for rural properties with built structures which are not necessary elements for performing agricultural, livestock or forestry operations.

(ii) However, the Nonresident Income Tax Law only refers to urban properties and the reference in the law to the personal income tax legislation is only made in relation to determining the taxable amount.

(iii) Therefore, nonresident income taxpayers do not have to recognize income in respect of their rural properties, even if they have built structures.

5. Legislation

5.1 New tax measures published in Law on waste and contaminated land for a circular economy

Law 7/2022 of April 8, 2022 on waste and contaminated land for a circular economy was published in the Official State Gazette (BOE) on April 9, 2022.

A range of tax measures were introduced in this law which were summarized in our commentary dated April 10, 2022.

5.2 Changes to instructions for SADs published

On April 6, the Official State Gazette published the Decision of March 29, 2022 by the Department of Customs Excise and Other Special Taxes of the State Tax Agency, amending the Decision of July 11, 2014, setting out the instructions for completion of the single administrative document (SAD).

Alongside other technical changes and modifications, this new decision contains the following new provisions:

(i) Changes are introduced relating to release into free circulation of consignments of negligible value (declaration H7), aimed at simplifying the application of customs elements to the new e-commerce rules introduced in the VAT legislation. The instructions for declarations of small consignments have also been updated, to specify, among other elements, in cases of imports, the form of filing the declaration based on the system used for payment of VAT (IOSS, special agreements with customs representative or the standard payment system).

(ii) In relation to guarantees, as a general rule, the amount of import VAT is excluded from the amount used as reference for the comprehensive guarantee to secure the fulfillment of special arrangements. It also provides that the guarantee for those arrangements may be provided by a direct representative.

(iii) Other key amendments involve the introduction of a new declaration for placement under customs warehousing arrangements and the inclusion of the movement of products subject to excise taxes which, after having being exported, are carried under the goods in transit rules.

5.3 Rules adopted on the requirements and procedure for granting real estate tax exemption on rural properties in fiscal year 2022

On April 1, 2022 the Official State Gazette (BOE) published the Decision of March 24, 2022, by the General Secretary for Autonomous Community and Local Government Finance, determining, among other subjects, the requirements and procedure for granting the real estate tax exemption on rural properties in 2022.

The decision states that the exemption must be expressly requested by the potential beneficiaries, who will have to substantiate fulfillment of the following requirements:

(i) The properties must be used for the performance of agricultural or livestock operations.

(ii) The property owners registered in the cadaster must also be the owners of the agricultural or livestock operations.

(iii) The owners of the operations must have experienced in 2021 losses of revenues equal to at least 20% with respect to the average for 2018, 2019 and 2020 (30% if the operations are not in areas with natural limitations or other specific limitations under article 31 of Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013).

6. Miscellaneous

6.1 Publication of Council Directive (EU) 2022/542 of 5 April 2022 amending Directives 2006/112/EC and (EU) 2020/285 as regards rates of value added tax

On April 6, 2022 Council Directive (EU) 2022/542 of 5 April 2022 was published amending Directives 2006/112/EC and (EU) 2020/285 as regards rates of value added tax. This directive is aimed at guaranteeing that member states have equal access to applying reduced rates and granting more flexibility to the member states in the setting of rates.

The specific way in which it seeks to achieve equal treatment between member states is by enabling them to apply to the eligible goods and services, within defined limits, a maximum of two reduced rates of a minimum of 5%, a reduced rate lower than the minimum of 5 % and an exemption with the right to deduct input VAT. It specifies derogations, however, allowing certain states to apply lower rates.

The list of goods and services that the member states are able to select for reduced rates is modernized and updated to benefit the final consumer and achieve objectives of general interest.

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