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# Tax Law Newsletter

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# CORPORATE INCOME TAX ("CIT")

## Effects of Constitutional Court ruling declaring RDL 2/2016, regulating installment payments, to be unconstitutional and void

The Constitutional Court, in judgment 78/2020, of July 1, 2020, declared Royal Decree-Law 2/2016 ("RDL 2/2016") to be unconstitutional. The latter introduced two measures, effective from October 2016, affecting payments on account of CIT for taxpayers with a net revenue exceeding €10 million: (i) it introduced a minimum payment on account, based on the accounting profit; and (ii) it increased the tax rate applicable to the current taxable base. RDL 2/2016 also introduced Additional Provision Fourteen in Act 27/2014, the CIT Act.

The tax authorities state, in the resolutions resulting from taxpayers' requests to amend CIT payments on account, that the declaration of unconstitutionality and nullity affects payments on account corresponding to 2016 and 2017 and, therefore, they do not affect subsequent years (from 2018 onwards). The Central Economic and Administrative Tribunal reached a similar conclusion in its resolutions dated February 11, 2021 and February 22, 2021, taking the view that as Act 6/2018, on the Budget for 2018, reworded Additional Provision Fourteen of the CIT Act (excluding venture capital firms from the minimum payment on account), it rectified the situation and reintroduced Additional Provision Fourteen of the CIT Act in the legal system through legislative means.

Our firm believes there are arguments to oppose the tax authorities' and the Central Economic and Administrative Tribunal's criteria.

Also, it should be noted that taxpayers' general right to claim late payment interest on the payments on account corresponding to April 2017 resulting from these measures will soon expire. In principle, and as long as the effects of suspending the statute of limitations periods approved under Royal Decree 463/2020 and Royal Decree-Law 11/2020 are not restricted, claims for this interest can be filed until July 2021 through an application for the rectification of the tax statement submitted in April 2017.

Finally, it should also be noted that the measures adopted under RDL 2/2016 were added to those approved some weeks later under RDL 3/2016—such as the restriction on offsetting negative tax bases from previous years, the automatic reversal by one-fifth of the impairment losses on the value of investments recognized in previous years, the restriction on applying double taxation deductions and the non-deductibility of losses resulting from the transfer of shares in entities—affecting CIT payable from 2016. The Constitutional Court's case law set out in this judgment and in previous judgments gives us reason to think that it may also declare RDL 3/2016 to be unconstitutional in the future. It is also worth bearing in mind that taxpayers' right to request the rectification of the 2016 financial year CIT declaration will soon expire, generally speaking, unless the statute of limitations period has been interrupted by a legal action.

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## Supreme Court judgment on the deductibility of late payment interest charged by the tax authorities as tax deductible expenses for the purposes of CIT

In its recent judgment of February 8, 2021 on tax deductibility for CIT purposes of the late payment interest charged by the tax authorities. The Supreme Court lays down an interpretative criterion of article 14 of Royal Legislative Decree 4/2004, of March 5, approving the consolidated text of the CIT Act.

The Supreme Court resolves that "*for the purposes of corporate income tax, late payment interest, regardless of whether this interest is claimed in a settlement carried out in a tax inspection or interest accrued owing to the suspension of the performance of a challenged administrative act, will be considered a tax deductible expense, owing to its legal nature, with the scope and limits set out in this legal basis.*"

This Supreme Court judgment allows the rectification of CIT tax statements and taxpayers will be refunded any unduly paid taxes if they were subject to the settlement of late payment interest or interest accruing due to a suspension carried out by the tax authorities and this interest was not considered a tax deductible expense.

Moreover, and although this does not apply to the case under analysis, in its ruling on article 15. F) of the CIT Act, the Supreme Court specifies that any expenses arising from acts contrary to the legal order will not be considered tax deductible. With regard to this precept, the judgment argues that *acts contrary to the legal order "cannot simply be compared with any breach of the legal order (…), this interpretation would be contrary to its purpose,"* also pointing out that this expression "*needs to be delimited to avoid overly broad interpretations, given that this expression only refers to a certain type of actions, e.g., bribery and other similar conduct.*"

For a more detailed analysis, see our legal flash of February 2021, by clicking this link.

## Supreme Court judgment establishing doctrine on the concept "donations and gifts" and on the principle of matching revenues and expenses

Supreme Court judgment of March 30, 2021, handed down in cassation appeal 3454/2019, filed under our legal supervision, has clarified and shed light on the characteristics an expense must have for its tax deductibility to be rejected on the grounds of being a donation or gift.

The case brought to justice by the Supreme Court in this judgment relates to financial expenses being considered deductible expenses for CIT purposes when they accrue owing to a loan taken out by the company to finance the acquisition of its own shares to be subsequently redeemed on carrying out a capital reduction resolution.

The Supreme Court upholds the cassation appeal filed by the taxpayer and lays down several criteria that, as well as being applicable to the case brought to justice, can clearly be applied in a broader sense:

(i) For an expense to qualify as a donation or gift, it must necessarily be a contribution that is free and without consideration. Therefore, this automatically excludes all expenses involving consideration.

(ii) The Supreme Court also clarifies that some accounting expenses incurred free of charge will be tax deductible if they are attributed to public relations with clients or suppliers, or those that are made for staff purposes as part of the company's practices and customs, and expenses related to the direct or indirect promotion of the sale of goods and provision of services.

(iii) Finally, the Supreme Court underlines that tax deductibility will apply to all expenses incurred free of charge that do not fall into the above categories, which are correlated to the business activity because their overall aim is to improve the business results, even if indirectly or in the future and not immediately.

Thus, in the case brought to justice, the Supreme Court clearly states that financial expenses borne by the company as a result of the loan taken out are clearly for valuable consideration, which prevents them from qualifying as non-deductible donations or gifts.

For a more detailed analysis, see our legal flash dated April 12, 2021, by clicking this link.

## PERSONAL INCOME TAX ("PIT")

### The Supreme Court clarifies the interpretation of the calculation of travel time for the purposes of the exemption provided under article 7.p) of the PIT Act

The Supreme Court issued a judgment on February 25, 2021, allowing the application of exemption on earnings obtained from work performed abroad taking travel time into consideration.

It resolved that the time an employee uses to travel to the country of destination or return to Spain is an obligation imposed by the employer. Thus, the outward and return journeys must be considered to calculate the exemption because they are part of the number of days of work actually carried out.

For a more detailed analysis, see our legal flash of March 8, 2021, by clicking this link.

### Supreme Court judgment on the scope of the exemption provided under article 7.p) of the PIT Act

In its judgment of March 22, 2021, the Supreme Court ruled on the scope of the exemption provided under article 7.p) of the PIT Act.

According to the findings of fact described in the judgment, the taxpayer applied the exemption provided under article 7.p) to earnings obtained from work performed abroad for a non-resident entity of which the taxpayer was a member of the board of directors. The authorities did not allow the exemption to be applied, arguing that the work performed by the taxpayer did not bring any added value to the non-resident entity because the taxpayer was merely carrying out management duties inherent to those performed by any board member.

Thus, the case brought before the Supreme Court addresses *the scope of the expression "income received from work effectively performed abroad" included in article 7.p) of the PIT Act and, specifically, whether it can be applied to the performance of management and monitoring duties typically fulfilled by board members of a subsidiary based abroad or, conversely, these duties cannot be considered effective work and, therefore, do not entitle taxpayers to the exemption provided in the above precept."*

The Supreme Court judgment is based on a restrictive interpretation of the exemption provided under article 7.p) of the PIT Act and concludes that it cannot be applied to income received for the performance of management and monitoring duties typically fulfilled by board members of a subsidiary based abroad.

It is worth highlighting that, despite the Supreme Court's negative decision, attention must be drawn to the findings of fact of the ruling, from which it can be assumed that the taxpayer is a board member of the non-resident entity and carries out duties pertaining to that office.

In view of this circumstance, the matter considered under cassation was not examined so as to determine whether the exemption is applicable to directors of the Spanish company for the tasks and duties they perform in a non-resident entity, but to determine whether the exemption is applicable to income received for the performance of management and monitoring duties typically fulfilled by board members of a subsidiary based abroad if the taxpayer is a member of that non-resident entity's board of directors.

Note that in appeal no. 3468/2020, the Supreme Court must decide whether the exemption can be applied by PIT payers that are directors of the company resident in Spain and who travel abroad to carry out tasks other than attending the non-resident entity's board of directors meeting.

## INHERITANCE AND GIFT TAX ("IGT")

### Supreme Court judgment on the taxation of free contributions made to a community of marital property

In its judgment of March 3, 2021 the Supreme Court rules on the taxation of free contributions made by spouses to a community of marital property.

Specifically, the Supreme Court resolves on the matter whereby *if a spouse makes a contribution without consideration of an asset of which he or she is the sole owner to a community of marital property, this transfer is subject to gift tax or, conversely, to transfer tax and stamp duty and, in the first case, if the taxpayer is the community of marital property or the other spouse.*

It previously clarifies that *the free contribution by one spouse of an asset of which he or she is the sole owner to a community of marital property can in no way be considered a gift made to the other spouse, but that the recipient of that transfer, the beneficiary of the contribution, is the community of marital property, i.e., the solely held asset belonging to the community of marital property*.

The Supreme Court considers that the community of marital property cannot be subject to gift tax *as a separate estate, as this only applies to individuals and institutions and entities provided for by law, in the absence of any rules applicable to communities of marital property, and with there being no room for confusion in the transaction at hand, in which the beneficiary is the community of marital property, with the free contribution of an asset held solely by one spouse in favor of the other spouse.*

Thus, the Supreme Court concludes that if a spouse makes a free contribution of an asset of which he or she is the sole owner to a community of marital property, that contribution is not subject to transfer tax and stamp duty, and cannot be subject to gift tax.

# VALUE ADDED TAX ("VAT")

## Note issued by the tax authorities' inspection department on full VAT adjustment

The Spanish Tax Agency's Finance and Tax Inspection department has issued a note on full VAT adjustment, including a body of consolidated case law on the matter, some deriving from the mentioned rulings filed under Cuatrecasas' legal supervision. In this note, the Spanish Tax Agency concludes that if a taxpayer that paid incorrectly charged VAT undergoes a tax inspection, that inspection must follow the principle of full adjustment, in a "single act," and thus not only reject the deduction of input VAT, but also consider refunding undue payments corresponding to incorrectly charged VAT when (i) the supplier of the goods or service has already paid that VAT, and also, (ii) there are no conflicting interests between the taxpayer charged VAT and the party paying the amount charged.

# OTHER DEVELOPMENTS

## The Supreme Court reinforces its doctrine on mandatory inspections by public administration experts for the purposes of real estate valuation

In its judgment of January 21, 2021, regarding a case filed under our legal supervision, the Supreme Court ruled on when inspections by public administration experts are mandatory for the purposes of real estate valuation, and when they may be validly avoided, with the aim of clarifying, explaining, reinforcing—and potentially correcting or rectifying—its doctrine.

It reinforces its doctrine by emphasizing the "general imperative and mandatory rule" regarding the individual and direct assessment of the real estate by a public administration expert as an indispensable guarantee that the valuation is carried out on a specific asset (rather than an abstract, common or generic asset).

Specifically, it imposes three requirements on the public administration expert:

(i) The expert must provide arguments individually and on a case-by-case basis, providing rational and sufficient justification as to why the mandatory inspection of the real estate is unnecessary, if one is not conducted.

(ii) Experts that use similar real estate sales values, whether drawing a comparison or performing an analysis, must accurately identify the samples providing certification of the public documents showing the values and circumstances, as required by the Central Economic and Administrative Tribunal.

(iii) Also, if the taxpayer's declaration complies with the reference values approved by the authorities, the expert opinion must underline the need to amend that valuation owing to the mistake affecting the taxpayer who took the values to be valid or, if applicable, the mistakes in the tables or overall estimates.

Therefore, Supreme Court doctrine requires that the valuation of the asset under appraisal be individualized, and this individualization will affect the means to verify the opinion of public administration experts and how multiplying factors are imposed on the cadastral value, as stated in the Supreme Court judgments of May 23, 2018, handed down in cassation appeals

1880/2017 and 4202/2017, followed by other judgments on the same matter. We assume that this requirement must also apply to other means of verification used by the public administration.

## The CJEU confirms compliance with EU law of the tax on the value of electricity production

The Court of Justice of the European Union (CJEU) issued a judgment on March 3, 2021 (case C-220/19) stating that the tax on the value of electricity production ("IVPEE") does not infringe EU law.

The CJEU concluded that IVPEE is not an indirect tax and, therefore, cannot infringe Directive 2008/118/EC of December 16, 2008, concerning the general arrangements for excise duty, under which Member States are permitted, subject to fulfillment of certain conditions, to establish indirect taxes on products on which a harmonized tax is already levied as in the case of electricity.

The fact that IVPEE is levied on the production of electricity from renewable energy and may have the aim of raising revenue does not give rise to an infringement of Directive 2009/28/EC, of April 23, 2009, which seeks to promote electricity production from renewable energy sources.

Finally, it considers that the fact that IVPEE does not apply to electricity producers located in other Member States that incorporate electricity into the Spanish electricity system does not constitute a state aid contrary to the internal market for electricity, nor does it violate the principle of non-discriminatory network access.

For a more detailed analysis, see our legal flash dated March 4, 2021, by clicking this link.

## Transposition of European regulations on hybrid mismatches

Royal Decree-Law 4/2021, of March 9 has transposed Directive (EU) 2017/952 into Spanish law.

It amends the CIT Act and the Non-Resident Income Tax Act to now include detailed tax regulations on hybrid mismatches, which essentially result from differences in the classification criteria applied in Member States.

It also introduces a new article 15 bis in the CIT Act, which sets out the new regulation. Moreover, it makes the necessary amendments to the Non-Resident Income Tax Act to correct hybrid mismatches in the tax base of permanent establishments.

Note that these rules are applicable in situations inside the EU and in those relating to third countries.

Finally, regarding the date on which the amendment will enter into force, Royal Decree-Law 4/2021 specifies that the new regulation will be applied to tax periods beginning on January 1, 2020, and not ending before March 11, 2021.

For a more detailed analysis, see our legal flash dated March 17, 2021, by clicking this link.

## Spain concludes the transposition into national law of Council Directive (EU) 2018/822 of May 25 ("DAC 6")

Three regulations have been published that conclude the transposition into national law of Council Directive (EU) 2018/822 of May 25, 2018, amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable crossborder arrangements, known as the "Intermediaries Directive" or "DAC 6."

The first is Royal Decree 243/2021, of April 6, amending the General Regulation on the steps and procedures for tax management and inspection, and implementing the common rules on tax application procedures; the second is Order HAC/342/2021, of April 12, approving Forms 234, 235 and 236, which will be used to report potentially aggressive tax planning arrangements; and finally, the Spanish Tax Agency's resolution of April 8, 2021, approving the forms for communications between parties involved in a reportable crossborder tax planning arrangement subject to reporting.

The Regulation implements many aspects of the following three reporting obligations established in Additional Provision 23 of the General Tax Act:

(i) The obligation to report crossborder arrangements meeting any of the hallmarks set out in Annex IV of the Directive.

(ii) The obligation to report updated information on marketable crossborder arrangements referred to in article 3.24 of the Directive.

(iii) The obligation to report the use in Spain of previous crossborder tax planning arrangements.

The Order approves new Forms 234, 235 and 236 for filing, respectively, the above information, and the Resolution approves the format and minimum content to be included in the communications between the intermediaries and relevant taxpayers.

Also, the Spanish Tax Agency has published some FAQs on it website (click this link), explaining the general aspects of the obligation to report crossborder tax planning arrangements and matters relating to the submission of the reports and communications between the parties involved in these planning arrangements.

Among the joint application of these implementing regulations, we highlight the following deadlines to submit the reports and communications, some of which, as explained below, are very brief.

**Form 234, for reporting information on crossborder tax planning arrangements that meet a hallmark**

- Arrangements where the first implementation stage has taken place between June 25, 2018, and June 30, 2020 (first transitional period): 30 calendar days after April 14, 2021, the date on which the Order approving the forms entered into force. The deadline is May 14, 2021.
- Arrangements where the reporting obligation (the date on which the arrangement is made available, the date on which it can be implemented or the date of the first stage of implementation of the arrangement) was triggered between July 1, 2020, and April 14, 2021 (second transitional period): 30 calendar days after April 14, 2021, the date on which the Order approving the forms entered into force. The deadline is May 14, 2021.
- Arrangements where the reporting obligation (the date on which the arrangement is made available, the date on which it can be implemented or the date of the first stage of implementation of the arrangement) was triggered after April 14, 2021: 30 calendar days after the date on which the reporting obligation is triggered.

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- When the reporting obligation falls on the secondary intermediary, 30 days from the day on which that intermediary provided aid, assistance or advice; and if the reporting obligation falls on an intermediary that has received notification from another intermediary that the latter is exempted from the reporting obligation as a result of professional secrecy privilege, the 30-calendar-day period will be calculated from the day following the date on which that notification is received.

**Form 235, for reporting updated information on marketable crossborder arrangements**

- This report will be filed within the calendar month following the end of the calendar quarter in which the updated marketable arrangement originally reported has been made available.
- If the update was made available between July 1, 2020, and March 31, 2021, the filing must take place within 30 calendar days after April 14, 2021, the date on which the Order approving the forms entered into force. The deadline is May 14, 2021.

**Form 236, for reporting the use in Spain of crossborder tax planning arrangements that should have been reported**

- Within the last calendar quarter of the calendar year following the year in which the arrangement was used in Spain. The first report must be submitted during the last quarter of 2022.

**Communication to other intermediaries and to the relevant taxpayer of the exemption from reporting to comply with the professional secrecy privilege**

- Five days from the date on which the reporting obligation is triggered (the date on which the arrangement is made available, the date on which it can be implemented or the date of the first stage of implementation of the arrangement). Since the regulations do not specify whether the deadline should be calculated as five calendar or business days, the term should be calculated as business days in accordance with article 30.2 of Act 39/2015, of October 1, on the Common Administrative Procedures of Public Administrations.
- The regulations make no mention of this communication when referring to arrangements in the first and second transitional period. It can be reasonably interpreted that the term of five (business) days should be calculated from April 14, 2021, the date on which the Resolution establishing the forms and minimum contents of this communication was published.

**Communication from an intermediary to other intermediaries involved in the arrangement informing them that the information on a reportable crossborder tax planning arrangement has been filed**

- Five days from the date on which the report is submitted.

**Communication from a relevant taxpayer to other relevant taxpayers involved in the arrangement informing them that the information on a reportable crossborder tax planning arrangement has been filed**

- Five days from the date on which the report is submitted.

For a more detailed analysis, see our legal flash dated April 13, 2021, by clicking this link.

## Main practical aspects of the accounting reform

From January 1, 2021, some new developments have been implemented that may affect companies' operational activity.

First, rules on financial assets have been completely transformed but, despite the changes made to the names of different financial assets, in practical terms the changes have been insignificant.

Also, a qualitative test has been introduced for the novation of loans, making it advisable to pay careful attention to these transactions

The rule on the recognition of revenue is much more detailed, which may make it necessary to adapt some agreements.

Moreover, it measures the net amount of turnover on an annual basis in some cases. Specifically, it provides for a detailed regulation of the net amount of turnover and measures this amount on an annual basis to determine the possibility of drawing up a balance sheet and report in abbreviated forms in cases where the financial year is less than a year.

Finally, commercial registries will be in charge of ensuring compliance with account filing obligations.

For a more detailed analysis, see our legal flash of March 2021, by clicking this link.

## Agreement between Spain and the United Kingdom on Gibraltar

The Official Gazette of the Spanish State has published the Agreement on taxation between Spain and the United Kingdom regarding Gibraltar.

The international agreement mainly addresses two issues: it includes rules for establishing the tax residency of natural and legal persons, and it establishes a specific procedure for administrative cooperation.

It also includes a commitment regarding certain EU laws that will continue apply in Gibraltar.

Particular attention must be paid to the dates the provisions of the Agreement will have effect.

It should be noted that there is no specific mention of Gibraltar being removed from Spain's list of tax haven jurisdictions. Therefore, based on the literal wording of the law in force, it can be concluded that Gibraltar will still be considered a tax haven.

For a more detailed analysis, see our legal flash dated March 15, 2021, by clicking this link.

For additional information, please contact Cuatrecasas.