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Tax

April 2019

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PERSONAL INCOME TAX ("PIT")

Controversial issues regarding the expatriate regime

In its judgment of March 28, 2019, the Supreme Court ("SC") resolved an appeal, establishing various interpretative criteria about the expatriate regime in article 7.p) of Act 35/2006 on Personal Income Tax ("PIT Act").

In its judgment, the SC addresses several limitations arising from the restrictive interpretation that the administration and some courts have used when applying the exemption on income earned abroad, which traditionally have been controversial.

The SC addresses (i) the limitation regarding application of the regime based on the nature of the duties carried out while working abroad, and (ii) the application to the expatriate regime of minimum time limits or restrictions arising from the existence of several beneficiaries of the work carried out.

Regarding the duties of the taxpayers working abroad and the beneficiaries of the work carried out abroad, the SC concludes that the tax rules do not limit the application of the tax benefit, even when the work consists of supervisory or coordination duties. The tax benefit will apply if the work, whatever its nature, is carried out abroad for the benefit of a non-resident entity, and does not exclude the possibility of there being several beneficiaries (one of which can be the employer based in Spain).

Regarding the minimum time limit that some courts establish as a requirement for application of the expatriate regime, the SC concludes that there is no time limit to the minimum stay abroad, as the tax rules do not require that "*trips abroad be long term or occur on a continuous basis, without interruption; therefore, in principle, sporadic and even one-off transfers outside the national territory cannot be ruled out, as they are not incompatible with the purpose of the exemption (internationalization of human resources residing in Spain, reducing the tax burden of those who, while continuing to be residents, are temporarily transferred abroad for work)*."

Severance pay. Employees re-hired by employer

The High Court of Justice of Murcia ("HCJM") and the High Court of Justice of Asturias ("HCJA") passed judgment on the application of the exception to the exemption established in article 7.e) PIT Act. The two courts passed judgment on the application of the exemption on the severance pay received by employees in cases in which they are re-hired by the employer as a professional (this was the case of the HCJM judgment) or appointed as a member of the board of directors (this was the case of the HCJA judgment).

Traditionally, the administration has considered in similar cases that the exemption in article 7 PIT Act does not apply, understanding that there is not an effective separation of the employee from the employer.
However, in its judgment of May 29, 2018 the HCJA admitted application of the exemption, understanding that there is a real and effective separation in cases in which the employee is dismissed and subsequently appointed as a member of the board of directors. The HCJA considered that the employment relationship had been terminated and not been renewed and, therefore, it complied with the definition of separation under law.

The HCJA concluded that *"there is no employment relationship, and that the existence of a relationship between the dismissed employee and the former employer, now that the employee is a member of a corporate management body of the former employer, cannot be compared to or included in the cases established by law as a presumption of the non-existence of a real and effective separation between the parties. The employment relationship ended, and there is no other employment relationship replacing it and linking the two parties in an employment contract; therefore, the purpose of the regulation—to avoid tax benefits in false circumstances in which a dismissal is followed by re-hiring—does not apply in the case being resolved."*

Similarly, in its judgment of December 13, 2018 the HCJM concluded that *"The real and effective separation cannot be denied when there is a dismissal (ending the employment relationship), and the new relationship is a professional one (commercial relationship) and not an employment relationship. Therefore, there is no continuation and keeping of the contractual conditions under the original employment relationship (e.g., financial conditions, keeping of category and seniority), regardless of whether the work carried out (first as an employee and later as a professional) is related to IT and involves an IT engineer, without the reasoning being admitted..."*

Therefore, the two courts agree that, once the employment relationship has ended if another employment relationship has not started, this means effective separation of the employee and, therefore, the exemption in article 7.e) PIT Act applies.

We must be cautious when considering the interpretations in these judgments, as some opinions consider that the separation must be effective, regardless of whether the new relationship is commercial or professional.

INHERITANCE AND GIFT TAX

Application of regional legislation by non-resident non-EU taxpayers

The Directorate-General for Taxation ("DGT") amended its criteria in resolutions V3151-18 and V3193-18, basing its arguments on case law on the application of the regional legislation regulating the tax in cases in which the taxpayers reside in non-EU countries.

We highlight that the second additional provision of the Inheritance and Gift Tax Act ("IGT Act) was intended to adjust the regulations to that established in Judgment of the Court of Justice of the European Union ("CJEU") of September 3, 2014 (case C-127/12) to enable the regional legislation to be applicable to cases involving taxpayers residing in an EU Member State or in the European Economic Area ("EEA").

The DGT concluded that the effects of CJEU judgment of September 3, 2014, also apply to residents of non-EU countries, meaning that it was not necessary to consider the exclusion of third countries outside the EEA in relation to the scope of application of the second additional provision of the IGT Act.

Therefore, the regional legislation applies to all non-residents, regardless of whether they reside in an EU Member State, in the EEA or in a third country.

CATALONIA

The Catalonian law on the non-productive assets of entities

The tax is charged on ownership of certain non-productive assets held by entities with tax domicile in Catalonia.

Under Spanish Act 6/2017, the assets that can be regarded as non-productive are:

- Real estate
- Motor vehicles with 200 horsepower or more
- Leisure vessels
- Aircraft
- Art and antiques
- Jewellery

The Official Gazette of the Regional Government of Catalonia has published a Decree Law that establishes the obligation to self-assess, between October 1 and November 30, 2019, the tax on non-productive assets of legal persons accrued in 2017, 2018, and 2019.

Taxpayers that may be affected by this law are advised to examine its impact and consider the possibility of challenging some aspects of it in court, based on their specific situation.

For additional information about the Catalonian law on the non-productive assets of entities, please click here.

ANDALUSIA

Decree-law 1/2019, of April 9, introducing important amendments regarding assigned taxes in the autonomous region of Andalusia ("Decree-law 1/2019")

The autonomous region of Andalusia amended its regulations on inheritance and gift tax. The most relevant measure introduced by Decree-law 1/2019 is the approval of a 99% allowance on the tax, which applies to (i) *mortis causa* acquisitions, including beneficiaries of life insurance; and (ii) *inter vivos* acquisitions, provided that the acquirers and beneficiaries are the spouse, descendants and ascendants of the deceased or donor.

The approval of this measure practically entails the elimination of taxation deriving from the Spanish inheritance and gift tax.

In addition, this measure does not only apply to acquisitions by taxpayers residing in Spain, but it will also apply i to those of non-resident taxpayers, as established by the second additional provision of IGT Act.

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