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CORPORATE INCOME TAX ("CIT")

Directors' remuneration as deductible expense for corporate income tax purposes

On July 17, 2020, the Central Economic-Administrative Court issued a [decision](#) in which it found that fees paid to directors for the performance of senior management duties must comply with section 15 f) of the Spanish CIT Act. This makes the deductibility of these fees conditional upon compliance with requirements of commercial regulations on the content of bylaws. Note that these requirements apply to directors irrespective of the development of executive functions for the company.

The Central Court's ruling reaffirms the approach contained in its decision of October 8, 2019 (RG 5548/2018) and is therefore binding administrative doctrine for the tax authorities, as well as the regional and local Economic-Administrative Courts.

PERSONAL INCOME TAX ("PIT")

Spanish Supreme Court issues a new judgment on the tax exemption applicable to indemnity for senior managers due to withdrawal by the company

On November 5, 2019, the Supreme Court handed down [Judgment 1528/2019](#) in favor of applying the exemption to severance payments in cases of a company terminating a senior manager's contract.

The Court ruled that senior managers are entitled to the minimum statutory severance

of seven days' salary per year worked, capped at six months' pay, and, therefore, such minimum severance amount would be exempt from personal income tax.

The Supreme Court issued another [judgment on 4 September 2020](#) on the same issue, referring to the previous judgment and confirming that the exemption does apply to the minimum statutory severance paid in the contractual termination of senior managers.

This position overrides the Spanish tax authorities' position; and prompts the question of whether taxes paid in previous years (not statute barred) could be refunded where senior managers have received severance following the company's termination of the contract.

For more details, see our [legal flash published on November 26, 2019](#).

Tax residence. Binding resolution of the Directorate General for Taxation (DGT) regarding the calculation of days spent in Spanish territory during the state of emergency

The Directorate General for Taxation ("DGT") has issued binding resolution [V1983-20](#), on counting the number of days spent in Spain during the state of emergency due to the pandemic towards determining tax residence under domestic rules. Specifically, the DGT ruled on the tax residence in Spain of a married couple, tax residents in Lebanon, who temporarily moved to Spain for three months but were forced to extend their stay due to the state of emergency.

The DGT concluded that the couple were classified as taxpayers because they had spent more than 183 days in Spain, regardless of the fact that their stay was mandatory as a result of the restrictions on movement imposed by the state of emergency.



INHERITANCE AND GIFT TAX (“IGT”)

Tax benefits for the acquisition of a family business. Binding resolution of the DGT on succession agreements

The DGT has issued three binding resolutions [V1788-20](#), [V1790-20](#) and [V1792-20](#) (which are alike in content) on whether the tax reduction in IGT for acquisition of a family business applies to living transfers made under a succession agreement under regional laws of the Balearic Islands. This agreement allows inheritance to be organized by the transferor transferring assets before his death.

The DGT concluded that while the reduction in IGT applies for acquisitions *mortis causa*, it does not apply in this case because one of the requirements under the IGT Act had not been met, since the transferor in the succession agreement had not deceased when the transfer took place.

This is a change to the DGT’s criteria as compared to previous decisions ([V1760-07](#) and [V2436-18](#), among others).

VALUE ADDED TAX (“VAT”)

Supreme Court judgment on Form 390 and suspensory effects of the prescribed period

In its [judgment of July 23, 2020](#), the Supreme Court ruled in an appeal on the suspensory effect of form 390 (annual VAT summary) on the limitation period on the tax authorities’ right to calculate tax debt.

Previously, the Court had referred to its own well-established position, that filing form 390

suspended the limitation period on the authorities’ right to settle the periods included in the annual summary. However, in this ruling, the Court clarifies that the suspension does not apply under the rules in force for the filing of form 390.

The Supreme Court went on to mention changes to the rules on filing form 390, which currently do not require the accompanying submission of settlements for each period filed that year, therefore *“the suspensory effect on the limitation period by filing the form can no longer be justified by the accompanying data and documents or the content confirming the settlements made during the year”*.

The Supreme Court stresses that form 390 is not a tax settlement or self-assessment, but a summary declaration of self-assessments already filed. As such, the lack of any assessment content in the annual summary means that filing the annual declaration cannot be classified as an official act by the taxpayer to settle or self-settle the tax debt that would justify the suspension of the limitation period, as required in the General Tax Act.

Based on the ruling, the Supreme Court changed its position and concludes that *“form 390 does not have a suspensory effect on the Authority’s right to determine tax debt for the months or quarters of the corresponding annual period”*.

OTHER DEVELOPMENTS

New financial transaction tax

The Spanish parliament has approved a new financial transaction tax, which will become effective three months after publication in the Official Gazette of the Spanish State, that is, from January 16, 2021.



The financial transaction tax is an indirect tax levied on the acquisition for value of listed shares of Spanish companies on a regulated market with a market capitalization value of over €1,000 million, irrespective of where the acquisition is made and the place of residence of the parties to the transaction.

It is worth noting that many transactions are exempt from financial transaction tax, including (i) acquisitions on the primary market; (ii) transactions viewed as necessary for the proper functioning of the market (e.g., price stabilization, central securities depositories, liquidity providers, market makers); (iii) transactions between entities of the same corporate group; (iv) acquisitions arising from business restructuring transactions; and (v) acquisitions of own shares within a buyback program.

For more details, see our tax newsletter of October 8, 2020, by clicking this [link](#).

New tax on certain digital services

The Spanish parliament has approved a new tax on certain digital services, defined as an indirect state tax that is levied on certain digital services when the users involved are located in Spain; this must involve the contribution to the value creation process of the company providing the service and through which the company obtains revenue.

Specifically, tax on certain digital services will be levied on three types of services:

- Online advertising, understood as the inclusion in a digital interface, own or of a third party, of advertising aimed at the users of that interface.
- Online intermediary services, consisting of making a digital interface available to the users (which enables interaction with different users) that (i) facilitates delivery

of goods or the provision of services between users, and (ii) enables users to locate other users and to interact with them.

- Data transmission with consideration, including the sale or assignment of data gathered on the users generated by their activities on digital interfaces.

The tax base is made up of the amount of revenue earned by the taxpayer, excluding VAT and similar taxes, for each provision of taxable digital services subject to digital services tax.

The tax rate is 3% and the installment must be paid quarterly.

Considering that Act 4/2020 will come into force three months after its publication in the Official Gazette of the Spanish State, the first tax period affected will be the first quarter of 2021, which must include services provided since January 16.

For more details, see our tax newsletter of October 16, 2020, by clicking this [link](#).

Court of Appeals judgment on declaring assets and rights abroad. Form 720

The Spanish Court of Appeals handed down an interesting [judgment on September 21, 2020](#) questioning the legality of the rules relating to form 720 (the declaration of assets held abroad) and its implications for PIT and criminal purposes.

In the scenario ruled on by the Court, a number of taxpayers were charged with a tax crime against the Public Revenue. Specifically, it was found that a number of taxpayers opened bank accounts in an Andorran bank, in which they made a series



of deposits and withdrawals in 2009, 2010 and 2012 that were not declared on form 720 for 2014 or in their PIT return for 2013.

Firstly, the Court of Appeals clarified that the rules on the declaration of assets and rights abroad does not apply due to the general principle preventing the retrospective use of criminal and sanctions legislation.

Beyond that, given that the accounts were opened and used before the entry into force of the rules on declaring assets and rights abroad (introduced by Spanish Law 7/2012), the Court found that *“when the defendants paid in the funds to their respective accounts in Andbank – which happened on September 14, 2009, October 10 and 11 2010, December 10, 2010, February 9, 2012 and May 25, 2012, there were no repercussions in terms of the limitation period, the breach of the obligation for reporting assets and rights abroad, which did not even exist at the time, because unjustified capital gains formed part of the tax base in the period in which they occurred, and there was no legal fiction for a number of tax years”*.

The Court of Appeals concluded that the defendants *“cannot be held to the new legislation, which would be to their detriment, when the events in question took place before it was enacted, since all the payments into the Andbank account were made before October 2012.”*

Lastly, the Court referred to the arguments given in the Reasoned Opinion given by the European Commission (in Brussels of 2/15/2017, in the infringement procedure against Spain no. 2014/4330), concluding that it is not possible to remove the limitation period and therefore the Court absolves the taxpayers of criminal liability.

Supreme Court judgment on entering and searching companies' premises

The recent [Supreme Court judgment of October 1, 2020](#) examines the requirements that must be met to authorize tax inspectors to enter and search a taxpayer's premises, which are protected under the Spanish Constitution.

The number of searches that the tax authorities are performing of taxpayers' premises is on the rise. In nearly all instances, the tax inspectors have been granted a court order to enter the premises. The Supreme Court ruling collates and summarizes the requirements of case law and includes some new elements to safeguard taxpayers' rights so that the incursion into their inviolable home causes the least amount of harm and carries the maximum number of safeguards.

Essentially, the Supreme Court found that for entry and search orders to be valid:

1. An inspection procedure must have already been opened and the party subject to it must have been informed. Without this advance notice, the Court may not issue an order to enter a constitutionally protected home.
2. The affected taxpayer is not required to be informed of the entry and search; but the justification for it must be set out in the authorities' written application, and most importantly, in the court order.
3. Searches performed in the hope of finding something on the taxpayer's premises are not permitted; there must be a specific and detailed purpose.
4. The court order must justify the need, appropriateness and proportionality of entering the premises, and the information provided by the authorities in the application must be examined.



5. General or vague information or reports from statistics, calculations or comparison of the taxpayer's alleged situation with that of others cannot be used as a basis for the court to grant entry. Their prior response to actions or information requests made by the authorities should also be taken into account.

These enhanced requirements to apply for authorization and for the order to be granted offers better rights and safeguards for the taxpayer in these kinds of actions, and therefore offers greater possibilities of defense against an entry and search by the tax inspectorate.

For additional information, please contact Cuatrecasas.

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