

SPANISH LEGAL FLASH

RECENT LEGISLATIVE AND CASE LAW DEVELOPMENTS

SPAIN

Q2 2020

TAX

(i) COVID-19 implications on tax residence

The Secretariat of the Organization for Economic Cooperation and Development ("OECD") published, on 3 April, its "*Analysis of Tax Treaties and the Impact of the Covid-19 crisis*", which contains a kind of guide recommending that member countries adopt legal measures to respond to the exceptional situations created by this health crisis, in matters such as tax residence, among others.

In addition, a recent Order from the Spanish Ministry of Health has provided that those who have been obligated to stay in any country because of the mobility restrictions derived from COVID-19, will not be affected in terms of residence. However, Spanish Tax Authorities has not taken a position on this issue yet. Notwithstanding the above, the intention of this order, at first sight, seems to be to attract tax residence to Spain.

(ii) Spanish Constitutional Court unanimously declares unconstitutional the regulation of the payment on account of corporation tax

The rule that established a minimum payment on account in corporate tax for companies with a turnover of more than 10 million euros was declared unconstitutional.

Although this does not affect the final taxation of these companies, it may give rise to a refund of the interest for having paid such amounts.

Finally, as on other occasions, the Constitutional Court has declared that situations that can be reviewed on the basis of this rule, either those decided by a judgment or, in this specific case, by requirement of the principle of legal certainty, those consolidated by administrative means cannot be considered because they have not been challenged in time and form.

(iii) New proposed interpretation of income tax treaties following OECD Model Tax Convention

Two are the ways the doctrine considers the OECD Model Tax Convention on Income and Capital can be interpreted: the so-called dynamic and static interpretations.

The dynamic way of interpretation of the aforementioned treaty model implies taking into account the latest version of said treaty model, overriding the literal wording of the treaty signed between two contracting States. Whereas pursuant to the static interpretation of the treaty model, the literal wording of the treaty in question prevails over the latest treaty model regardless the latter leading to a different conclusion such as but not limited to the real estate company clause or the Sinatra clause.

The Spanish Supreme Court had created jurisprudence in favor of the dynamic interpretation of the treaty model but new jurisprudence was recently created by the said Supreme Court thru case dated March 3rd, 2020, in line with a previous precedent (Spanish Supreme court case dated February 21st, 2017) according to which Spain returns to the static interpretation of the OECD model tax convention on income and capital.

(iv) VAT implications of financial derivatives and sale of participations by holdings

Two recent court decisions from the Spanish Supreme Court dated May 18th and 19th address, respectively, the Value Added Tax ("VAT") deductibility associated to income obtained by the settlement of contracts over financial derivatives as well as to capital gains derived from the sale of participations by holding companies ("HC") rendering financial and central management services to their subsidiaries, and the following was decided:

- In relation to the income derived from the settlement of contracts on financial derivatives, the Supreme Court considers that those activities do not constitute a service subject to VAT and thus should have no impact on the percentage of deductibility of input VAT borne by the taxpayer.
- Regarding the income derived from the sale of participations by HC, the Supreme Court, based on ECJ case law, considers that said transaction shall not be considered as accessory in the case at hand as it derives from an ongoing, permanent and necessary activity of the HC.

(v) Taxation of procedural costs on a net income basis

Pursuant to a resolution dated June 1st, 2020, the Spanish Economic Administrative Central Court has concluded that procedural costs (i.e. the indemnity obtained by the party who wins the court case upon the court decision to reimburse legal costs borne) shall be taxable only on a net income basis. Given the remittance of the Spanish Non-Resident Income Tax to the Spanish Personal Income Tax, this decision may be of relevance for foreigners (non-Spanish) exposed to and winning litigation cases in Spain that become entitled to the payment of the procedural costs by the defeated party.

CORPORATE

During the last quarter and within the framework of the alarm state enacted, several regulatory texts have been published aiming at mitigating the effect of the economic and social impact generated by the outbreak of COVID-19.

In this sense, despite the preliminary measures adopted by Royal Decree-Law 8/2020, March 17 on the first quarter regarding to, among others, the possibility to hold corporate meetings by telematic means, the extension of the legal periods to draft, approve or audit of annual accounts, and the impossibility for the shareholders to execute their separation right or to dissolve a company, there have been additional measures adopted within this last quarter which must be highlighted.

(i) Important corporate measures implemented

Royal Decree-Law 11/2020, March 31, introduces certain adjustments to Royal Decree-Law 8/2020 such as the following:

- Regarding the application of the economic result stated in the annual accounts, despite these annual accounts were already drawn up and the general shareholders meeting had already been called, this royal decree allows companies to replace the application of the result stated in the Financial Statements if justified by the company's directors.
- Regarding the possibility of holding telematic meetings by the corporate bodies of the companies, this royal decree establishes the possibility of holding them by multiple telephone conference and always provided that the secretary is able to recognize and identify to all the assisting members.

In this regard, the Royal Decree-Law 21/2020, June 9, extends the possibility of holding meetings of the corporate bodies by telematic means until 31 December 2020, provided that all the requirements are met. The board of directors may also adopt resolutions in writing in lieu of a meeting if the chairman so decides or if two of its members request it, until such date.

Finally, the Royal Decree-Law 18/2020, May 12 (as amended by Royal Decree-Law 24/2020, June 26) establishes a relevant issue regarding the dividend distribution. In this sense, the companies which take advantage of the temporary layoff proceedings (due to force majeure and due to economic, technical and organizational reasons) may not distribute dividends corresponding to the corporate year in which these temporary layoff proceedings are applied, unless they previously pay the amount corresponding to the exemption applied to the social security contributions and renounce it. This limitation on the distribution of dividends shall not apply to those entities which, on 29 February 2020, had less than fifty employees.

(ii) Foreign Investments

Royal Decree-Law 11/2020, March 31, together with Royal Decree 8/2020, suspends their liberalization regime regarding certain foreign investments, in order to protect Spanish companies within strategic sectors of activity (e.g. infrastructures, technology, and media) whose market value has decreased due to the current health crisis.

In this respect, the suspension implies that those investments **(i)** from residents outside the EU and the European Free Trade Association (EFTA) or residents of EU/EFTA countries whose real ownership corresponds to residents of countries outside the EU or EFTA; which **(ii)** exceed the amount of EUR 1 million and, **(iii)** grant the foreign investor a stake equal to or greater than 10 per cent of the share capital of the Spanish company, or which, as a consequence of any legal transaction or business, the foreign investor achieves effective control or management of the company, they will be subject to a previous authorization by the Spanish Authorities.

(iii) Bankruptcy

Additionally, Royal Decree Law 16/2020, April 28, establishes several new amendments regarding bankruptcy matters such as the following:

- The obligation of the insolvent debtor to apply for bankruptcy will be suspended until 31 December 2020, with voluntary bankruptcy taking precedence over necessary court proceedings.
- Provided certain conditions are met, the possibility of modifying Court approved refinancing agreements is allowed even if a year has not elapsed since the refinance agreements approval.
- The obligation of the insolvent debtor to seek liquidation if the Court approved agreement cannot be fulfilled will be suspended until 14 March 2021.
- More advantageous treatment of financing by especially related persons is enacted affecting bankruptcy proceedings declared within two years from the declaration of the alarm state.
- Losses for the current financial year 2020 shall not be taken into consideration for the sole purpose of determining mandatory dissolution provided for in article 363.1 e) of the Spanish Companies Act.

CRIMINAL LAW

On June 3rd, 2020, the Spanish Supreme Court found guilty the director of a company for the commission of a forgery crime with in article 390 of the Spanish Criminal Code because he issued false certificates regarding the holding of the general shareholders' meetings of the company. The High Court concluded that a certificate could be also considered as a commercial document and issuing a forged certificate could be as well constitutive of a forgery of documents crime considering the seriousness of the alteration of the certificate and its significance in legal transactions.

ENERGY LAW

Royal Decree-Law 23/2020, which came into force on 23 June, introduced various measures in the field of energy and other areas for economic recovery and enabled the Government to adopt others within the framework of the decarbonisation and sustainability agenda, with important measures affecting the promotion and development of electricity production facilities. In this area, the most relevant modifications content refers to:

- The expiration of the access and connection permits the distribution and transport networks granted after the entry into force of Law 24/2013, of December 26, on the Electricity Sector that, until now, were not yet subject to an expiration period. The new regulations foresee different time limits for the permitting process of the renewal electric.

The goal is to promptly expire the permits requested for projects that do not advance in their development, allowing the relinquishment of the permits already granted in order to recover the guarantees deposited. Furthermore, the regulations prohibits the granting of new permits until the Government passes a new Royal Decree ruling new access criteria to the electric grids.

- The empowerment of the Government to establish a new remuneration framework, in addition to the current specific remuneration regime, in order to promote predictability and stability in income and financing of new electrical energy production facilities from renewable energy sources. This new regime will be based on a fixed price of energy, despite the market price.
- The simplification of the permitting process for the construction, expansion, modification and operation of the electrical production, transport and distribution facilities. In addition, non-significant modification cases of production facilities that have obtained administrative authorization and that do not require new authorization are regulated.
- The amendment of Law 24/2013, of December 26, on the Electricity Sector, to incorporate specific provisions for storage, independent aggregators, renewable energy communities and hybridization of production facilities, amongs others.

GTA VILLAMAGNA

ABOGADOS

CHR
LEGAL