

**TAX**

*SPAIN AND TAX HAVENS: THE CASES OF THE DUTCH ANTILLES, ARUBA, ANDORRA AND BAHAMAS*

Changes have occurred lately in relation to the regions that Spain regards as tax havens. Here, we should highlight the recent agreements signed with the Dutch Antilles (10.06.2008, State Gazette 23.11.2009) and Aruba (24.11.2008, State Gazette 23.11.2009), overseas possessions of the Netherlands, with Andorra (14.01.2010), although this has not yet come into effect, and with the Bahamas (11.03.2010), which has not yet come into effect either. All of these agreements envisage the right of the Spanish tax authorities to request relevant information for tax purposes, albeit always referring to properly identified taxpayers and ruling out the possibility of global, collective or indeterminate requests, what is commonly known as “fishing trips”.

As a result of these agreements coming into effect, these regions will no longer be regarded as tax havens for Spanish tax rules, which will have significant consequences not only on international tax planning but also on the specific and direct application of taxes payable in Spain by taxpayers who may be involved in one way or another.

Specifically, in the internal sphere, and without the intention of offering a comprehensive list of the tax implications, the following effects should be highlighted: on international tax transparency, the presumption of the requirements being met for its application (Article 91.11 of the Personal Income Tax Act - IRPF - and 107.12 of the Corporate Tax Act – LIS), the presumption of tax residence in Spain for companies resident in these regions when their assets are principally located or are fulfilled in Spain directly or indirectly (Article 8 LIS), the deductibility of service costs for operations carried out directly or indirectly with organisations or persons resident in these regions (Article 14.1.g LIS), the appropriateness of the right to deduction for the performance of export activities (Article 37 LIS) and the non loss of nature of IRPF taxpayer by individuals who move to or establish their usual residence in these countries during the year in progress and four more (Article 8 IRPF Act).

**CRIMINAL**

*RELATIONSHIP BETWEEN THE TAX OFFENCE AND CRIMINAL OFFENCES THAT GENERATE FINANCIAL GAIN FOR THE OFFENDER*

On numerous occasions, the question arises as to whether a tax offence is compatible or not with other offences that generate financial gain for the offender, i.e. if there is an overlapping of offences or, to the contrary, the overlapping of rules set out in Article 8 of our Criminal Code should apply. This question was tackled, in its day, by Supreme Court ruling no. 20/2001 (Criminal Court), of 28 March 2001 (judge: His Honour Mr Cándido Conde-Pumpido), the “Urralburu” case, which constitutes essential case law in this matter and establishes the premises that should be taken in order to make a tax offence compatible with other offences that generate financial gain. So, as we will remember from the press reports about this case, a number of figures of institutional relevance in Spain were sentenced by the Pamplona County Court, in a ruling dated 7 September 1998, as authors of the offences of corrupt practices and offences against the Tax Authorities, and although an appeal against the ruling was made to the Supreme Court and they were finally absolved of the offences against the Tax Authorities as our High Court considered that the dual verdict was incompatible as the penalty for the continued offence of corrupt practices absorbed the offences against the Tax Authorities derived from it, the really relevant part lies in the argument offered by our Supreme Court, in the scheduled ruling, to explain the cases where the overlapping of rules should be applied. Consequently, according to the above legal principles underlying the case law, for the application of the overlapping of rules in which the criminal penalty for the offence that is the direct source of the income absorbs the tax offence that is considered to be consumed by the former, the following three requisites have to occur:

a) The income generated by the tax offence comes directly and immediately from the previous offence. When this is not the case and it is income from a variety of sources or that only indirectly has its origin in an offence because the gain from the offence has been reinvested and led to new gains, the overlapping of rules does not apply

b) A ruling has effectively been given on the initial offence. When this is not the case, due to lapse of time, insufficient evidence or other causes, the penalty for tax offence should be maintained as the devaluation of the conduct has not been in the alleged source offence, see Supreme Court Ruling of 7 December 1996 (Nécora case).

c) The criminal verdict for the source offence includes the confiscation of the gain obtained from it or the ruling to return it as civil liability.

This way, and in accordance with the case law set out, to assess whether it is an overlapping of offences or an overlapping of rules, we should look at the case in question, analysing whether the presuppositions indicated occur or not and, consequently, assessing whether the dual penalty is breaching the non bis in idem principle or not inherent in the principles of legality and criminal conduct set out in Articles 9.3 and 25.1 of our Magna Carta.

## INTELLECTUAL PROPERTY

### A CIVIL RULING FINDS P2P DOWNLOAD NETWORKS TO BE LEGAL

Mercantile Court Number 7 of Barcelona dismissed the action filed by the Spanish General Society of Authors and Editors (SGAE) against Jesús Guerra, whom it accused of breaching the intellectual property of musical works in its repertoire through his 'Elrincondejesus' website.

The ruling was not limited to dismissing the action by the SGAE, which was ordered to pay costs, but entered the heart of the matter by stating that link websites such as the one developed by the defendant are limited to offering the possibility of downloading via a P2P network, but that this "does not mean the distribution, reproduction or public communication of the works subject to intellectual property as it is a mere index that helps search on P2P file exchange networks through the system of menus, posters or covers with titles of films or musical works".

Similarly, Judge Raúl N. García Orejudo indicated that "the system of links constitutes the very basis of the Internet and a great many sites and search engines (such as Google) technically allow what it is precisely being sought to ban in these proceedings, namely to link P2P networks."

## CONSUMERS

### COURT OF JUSTICE OF THE EUROPEAN UNION

The Court of Justice of the European Union has issued a ruling in reply to a request for preliminary ruling posed by the Salamanca County Court, asking for the correct interpretation of Article 4 of Directive 577/1985, referring to consumer protection in the case of contracts negotiated outside commercial premises, specifically the right of waiver and the obligation of the trader to provide certain information, within the measures aimed at protecting the consumer in the event of non-fulfilment, with regard to the invalidity of the contract and the authority of the national judge. In its finding, the CJEU commented that the above article of the Directive should be interpreted as not opposing a national jurisdictional body declaring on its own initiative the invalidity of the contract comprised in the scope of application of the Directive due to the consumer not having been informed of their right to rescind, even when the latter has not at any time invoked this invalidity before the competent national jurisdictional bodies. It is now up to the Salamanca County Court to continue with the process started, in accordance with the reply given by the CJEU.

## IMMIGRATION

### LATEST REFORM OF THE IMMIGRATION ACT

Constitutional Law 2/2009, of 11 December 2009, sees the umpteenth reform of the Immigration Act. Together with amendments that represent clearly regressive aspects in terms of rights and liberties, compared with the previous wording, others appear of a more progressive, or at least more positive, tone for exercising certain rights more efficiently and with less bureaucracy. Among the positive elements, we should highlight the automatic granting of work permits to the children who have previously been reunited and who are of working age, albeit with some limitations with regard to sectors of activity or occupations, at least during the first year.

We should also stress the inclusion in the new legal text of a new form of reunion referring to the "common-law couple", non-existent until now in the sphere of the non-community system.

In short, we should expect the imminent regulatory development to see in what way and how the scope and requirements of these new possibilities come about by virtue of the reform carried out.

## SPORTS

### SPORTS LAW

Lawyer and partner in our firm José Juan Pintó spent February in the city of Vancouver (Canada) as part of the team of arbitrators of the ad hoc Division of the Court of Arbitration for Sport for the 2010 Winter Olympics. During the Games, four cases were submitted to the ad hoc Division of the CAS, making them the Olympics with the least disputes, as all previous editions saw more cases. José Juan Pintó arbitrated in two of the actions, specifically the one filed by the Olympic Committee of the Virgin Islands in relation to the possible participation of Skeleton athlete Putnam and the one filed by German skater Pechstein, also in relation to her possible participation in this year's Winter Olympics. The best news is that there was not one single case of doping.

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