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Tax Law Department

## **FOREWARNED IS FOREARMED. FORM 720: THE EUROPEAN COMMISSION'S STARTING POINT**

By a formal letter of notice dated 20 November 2015, the European Commission warned the Spanish authorities of the incompatibility with European Union law of certain aspects relating to the obligation imposed on residents in Spain to declare their assets or rights located abroad through what is called form 720 (disclosure statement regarding assets and rights located abroad), since the consequences associated with the breach of that obligation were disproportionate to the aim pursued in principle by Spanish legislation.

Thus began a long-running dispute between the European Commission and Spain, which led to the filing by the former before the Court of Justice of the European Union (CJEU), on 23 October 2019, of the corresponding appeal for non-compliance. This dispute has now come to an end in the European Commission's favour with the Judgment of 27 January 2022, issued in case C-788/19, where the CJEU has declared that the Spanish rule obliging tax residents in Spain to declare their assets abroad is contrary to law.

Thus, after reading this Judgment, in principle, those of us who are taxpayers residing in Spain can feel very satisfied and relatively relieved.

Satisfied, because the Judgment confirms that the Spanish legislature, by regulating the consequences of non-compliance or imperfect or extemporaneous breach of this reporting obligation, has itself breached the principle of freedom of circulation of capital by treating residents in Spain with assets abroad differently. This obligation may dissuade Spanish tax residents from investing in other member states, by preventing them from doing so or limiting their possibilities of doing so, which constitutes a restriction on the free movement of capital.

The CJEU bases its conclusion on the following three aspects of the Spanish regulation:

**1.- Presumption of undeclared income as "unjustified capital gains", without the possibility, in practice, of alleging prescription.** Although it is true that the CJEU does not consider this presumption disproportionate, since the taxpayer can refute it, it does consider disproportionate the effect of imprescriptibility in favour of the Tax Administration, since it is a breach of the principle of legal certainty, especially in the case of a reporting obligation.

**2.- Proportional penalty of 150% of the tax calculated on the amounts corresponding to the value of the goods or rights owned abroad and which**



can be added to with penalties in respect of amounts applicable to each data or dataset. The CJEU considers this rate, 150%, extremely oppressive, and considers that it may lead to situations in which the amounts required by the Tax Agency from the taxpayer exceed 100% of the value of the assets abroad.

**3.- Fixed penalty per data or dataset.** The CJEU declares that the amount of these sanctions, which can be added to those of point 2 above, is excessive, when it comes to declaratory or purely formal obligations, given that they are more severe than those provided for in the general sanctioning regime for similar infractions.

And we are relatively relieved, because Spain is obliged to adapt the regulations governing disclosure statements regarding assets and rights located abroad (720) to the Judgment issued by the CJEU as soon as possible. In fact, in the event that the Commission considers that Spain has not carried out the aforesaid amendments, it may refer the matter back to the CJEU in order to impose on Spain the payment of a pecuniary penalty.

However, in our view, the effects of this Judgment should be as follows:

#### **1) For the years 2021 and following**

- The obligation regarding taxpayers with tax residence in Spain to declare their assets and rights abroad has not disappeared. Therefore, the obligation to submit form 720 corresponding to the year 2021 whose voluntary declaration period ends on 31 March, persists.
- The Administration is obliged to amend the sanctioning regime for complete and imperfect or extemporaneous non-compliance, and the sanctions may not be higher than those in force for the breach of similar obligations in the national territory.
- The presumption of undeclared income as “unjustified capital gains” must be subject to the general limitation rules, that is, four years.

#### **2) For the years prior to 2021**

- The Administration will be unable to verify, settle and impose sanctions for the years prior to 2021 applying the regulations in force to date.
- Those settlements and sanctions issued by the Administration which are not final because they have been appealed against, must be annulled by the body in charge of resolving the appeal or the claim filed against them, and the Administration must proceed to return the corresponding undue income.
- Any settlements and sanctions that are final, either because they had not been appealed against or, because having been appealed against, they had been confirmed by the corresponding administrative or judicial body, could be subject to the presentation of the pertinent claim for liability against the legislating state for being in breach of European law.