Spanish Tax Alert

Significant changes to the penalty system in the taxation of electricity

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With effect from 1 January 2015, Act 28/2014 of 27 November, amending, inter alia, the Special Taxes Act 38/1992 of 28 December, has introduced the following changes in relation to the taxation of electricity:

— Part IX of Title I of Act 38/1992 (abbrev. "**LIIEE**") is repealed and related provisions are adapted to eliminate the Tax on Electricity.

— Title III LIIEE, renamed "Excise Duties on Coal and Electricity", is restructured with the inclusion of a new Part II that regulates a new "Excise Duty on Electricity" (abbrev. "**IEEL**").

In particular, and as a result of these amendments, since 1 January 2015 the new levy on electricity no longer adopts the form of a tax on production and, therefore, the taxable event is no longer the production and importation of electricity, but rather the supply of electricity to a person or entity that purchases it for his or its own consumption or the consumption by the producers of the electricity generated by them (self-consumption).

Due to this new form, neither Part I of Title I LIIEE, containing the common rules applicable to special taxes on production, nor the penalty system under art. 19 LIIEE, included within said Part, apply to the IEEL. By contrast, the IEEL has, as from 1 January 2015, a specific penalty system regulated by art. 103 LIIEE.

In this regard, it should be recalled that, pursuant to art. 19(2)(a) LIIEE, the production and importation of products subject to taxes on production (which included the abolished Tax on Electricity), in breach of the conditions and requirements of the Act and its implementing regulation, constitutes a serious tax default. One of said requirements is the obligation to register with the appropriate registry, under penalty of a fine equal to 100 percent of the rates appropriate to the quantities of manufactured and imported products subject to the special taxes on production.

Following the introduction of the new IEEL, to which the above default does not apply, on 2 March 2015, the Director of the Customs and Special Taxes Department in the Tax Agency rendered a Decision stating that, since *non-registration of an electricity production facility with the appropriate registry is not punishable under the new legislation, having ceased to constitute – and thus be classed as – default under the current system, the retroactive application of this new system will always be more favourable to the taxpaye*r.

In view of the above, the Decision concludes that, in relation to this default, as classed under art. 19(2)(a) LIIEE, of electricity production facilities that should have but did not register with the appropriate registry prior to 31 December 2014, the bodies under the Department of Customs and Special Taxes will proceed as follows:

— In general, an electricity production facility's failure to register with the appropriate registry prior to 31 December 2014, shall not be regarded as constituting, in the absence of characterisation, a breach of art. 19(2)(a) LIIEE and, therefore, *no new disciplinary proceedings shall be opened if such failure is detected*.

— In *disciplinary proceedings already opened but not finalized*, the investigator shall submit a proposed *decision without imposition of penalties*. And where a proposed decision with imposition of penalties has already been submitted but is pending the competent body's decision to impose them, the latter shall proceed to rectify the submission, so that the decision does not impose any penalties.

— In *disciplinary proceedings pending administrative reconsideration, such request shall succeed*.

— In *disciplinary proceedings that have finalized but are pending referral to a Tax Tribunal upon appeal, the penalty shall be retracted* provided that the particulars of the complaint include statements of case and administrative reconsideration has not been requested.

— A non-imposition of penalties, a successful request for administrative reconsideration or a retraction of the penalties imposed must be supported in writing, as determined in the Decision itself.

Although the Decision of the Director of the Customs and Special Taxes Department in the Tax Agency only binds the bodies under the same, the Central Tax Tribunal, in its recent Decision 2540/2014 of 18 June 2015, has accepted the conclusions of the aforementioned Decision and held that the penalty imposed on the taxpayer pursuant to 19(2)(a) LIIEE, amounting to EUR 3,117,641.56 for the years 2009-2012, should be annulled, allowing the complainant's claim on the strength of the arguments set out in the Decision on the retroactivity of the more favourable penalty system resulting from the new legislation.

The Decision of the Director of the Customs and Special Taxes Department was given in pursuance of the provisions of art. 10(2) of the Tax Act 58/2003 of 17 December, which enshrine the principle of retroactivity of the rules regulating tax defaults and penalties that are not final and conclusive when their application is favourable to the interested party. In turn, these provisions include contrariwise the provisions of art. 9(3) of the Constitution, which lay down the principle of non-retroactivity of penalty provisions unfavourable to or restrictive of individual rights (vide judgment no. 3896/2001 of the Supreme Court of 17 November 2006, 5th point of law).

According to the above, notwithstanding the discussed Decision not referring to cases where the matter is under judicial review, the wording of art. 10(2) is clear: the retroactive effects reach all acts "that are not final and conclusive", whereby it follows that said retroactivity of the most favourable provision will affect all cases where the imposed penalty has not become final and conclusive.

Ultimately, the repercussions the aforementioned Decisions can have, for disciplinary proceedings opened in recent years against electricity production facilities for failing to register, are of great importance, so a detailed legal analysis on a case-by-case basis is advisable.