FORM 720 and JUDGMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

The CJEU in the judgment published on 27 January 2022, declares that, in relation to the "Form 720" legislation, Spain has failed to fulfil its **obligations under the principle of the free movement of capital**.

Understanding that the obligation to file "Form 720" and the penalties for failure to comply with or for partial or late with that obligation, which do have no equivalent in respect of assets or rights located in Spain, establish a difference in treatment between residents in Spain according to the location of their assets.

In the CJEU's assessment that legislation goes beyond what is necessary to achieve those objectives, in the following three respects:

- Firstly, the CJEU considers that Spain has failed to fulfil its obligations under the principle of the free movement of capital by providing that the failure to comply with or for partial or late compliance with the obligation to provide information, concerning assets and rights located abroad, entails the taxation of undeclared income corresponding to the value of those assets as 'unjustified capital gains', with no possibility, in practice, of benefiting from limitation. Thus, the measure adopted by the Spanish legislature, in addition to including an effect of non-applicability of any limitation is disproportionate, allowing the Tax Administration to proceed without time limitation to regularise the tax due, undermining the fundamental requirement of legal certainty and going beyond what is necessary to guarantee the effectiveness of fiscal supervision and to prevent tax evasion and avoidance.

- Secondly, the CJEU considers that Spain also failed to fulfil its obligations under the free movement of capital by subjecting the failure to comply with or the partial or late compliance with the obligation to provide information concerning assets or rights located abroad to a proportional fine of 150 % of the tax calculated on the amounts corresponding to the value of the assets or those rights held overseas. That fine may be applied concurrently with the flat-rate fines, which apply to each missing, incomplete, incorrect or false data item or set of data, which should appear on 'Form 720'. The CJEU also notes that the very high rate of that fine gives it a highly punitive nature.

- Thirdly, the CJEU finds that the Spanish legislature also failed to fulfil its obligations under the free movement of capital by subjecting the failure to comply with or partial or late compliance with the obligation to provide information concerning assets and rights located abroad to flat-rate fines, the amount of which is disproportionate to the penalties imposed in respect of similar infringements in a purely national context and the total amount of which is not capped. Noting that their amount is disproportionate to the amount of the fines, which penalise failure to comply with similar obligations in a purely domestic context in Spain.

(CJEU – Press Release re Form 720 published 27/01/2022: Full Text)

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