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Tax Treaty Case Law around the Globe 2019

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Tax Treaty Case Law around the Globe 2019

Why this book?

This book is a unique publication that gives a global overview of international tax disputes on double tax conventions and thereby fills a gap in the area of tax treaty case law. It covers the 41 most important tax treaty cases which were decided around the world in 2018. The systematic structure of each chapter allows for the easy and efficient study and comparison of the various methods adopted for applying and interpreting tax treaties in different cases.

With the continuously increasing importance of tax treaties, Tax Treaty Case Law around the Globe 2019 is a valuable reference tool for anyone interested in tax treaty case law. This book is of interest to tax practitioners, multinational businesses, policymakers, tax administrators, judges and academics.

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Preface

Both the OECD Model Tax Convention on Income and on Capital (OECD Model) and the United Nations Model Double Taxation Convention (UN Model) often serve as a basis for tax treaty negotiations between different jurisdictions worldwide. At the same time, however, and for a number of reasons, the interpretation of a particular tax treaty provision may still differ from country to country. Therefore, the risk of double or even multiple (non-)taxation is not fully eliminated. In order to promote a uniform interpretation of tax treaties worldwide and, hence, to reduce the risk of double or multiple (non-)taxation, basic knowledge is needed on how various tax treaty issues are solved in different jurisdictions. It is widely known that a unified approach to interpretation and application of international tax treaty rules can benefit not only the countries which are parties to the tax treaty in question but also their taxpayers, as well as international trade and investment in general. Therefore, this topic is of ongoing concern to many tax scholars, practitioners, representatives of international organizations and public officials.

On 23–25 May 2019, the conference "Tax Treaty Case Law around the Globe" was held at the WU (Vienna University of Economics and Business). This international conference took place for the ninth time (for the fifth time in Vienna) and was jointly organized by the Institute for Austrian and International Tax Law of the WU and the European Tax College of Tilburg University. The conference was dedicated to the analysis of the most important cases on international tax treaty law decided in different tax jurisdictions across the world in 2018. 40 cases were presented by outstanding tax experts from 24 countries. Each presentation was followed by an intensive and fruitful discussion. The participants in the conference compared interpretation approaches existing in both the OECD and non-OECD Member countries and came up with comprehensive conclusions and suggestions. The main scientific results of the conference are presented in this book.

Each report in this book is dedicated to a court case or a number of cases from 2018 on a particular article of the tax treaty at issue (often based on the OECD Model or UN Model) in a certain jurisdiction. Every report is structured in a similar way: facts of the case, the decision and reasoning of the court and the author's observations, including the possible impact of the decision on international tax law development in the respective country and in other jurisdictions. This clear and concise structure enables a solid and accessible overview of the 2018 case law on tax treaty application. The systematic structure of each report allows for different tax treaty case law to be studied and compared in a simple and efficient way.

The editors believe that the reports presented in this book are of high value and, therefore, will be of particular interest for academics, tax consultants, judges, public officials and all those interested in international tax law. The fact that many domestic decisions are otherwise available only in the respective national languages makes the materials contained in this book even more valuable.

The editors would like to express their sincere gratitude to the Linde Publishing House for their cooperation and swift realization of this publishing project. Ms. Eleanor Campbell contributed greatly to the completion of this book by editing and polishing the texts for authors, for whom English is – for the most part – a foreign language. Furthermore, we are most grateful to Ivan Lazarov and Annika Streicher who helped with the preparation and realization of the conference and assisted in editing the book. Finally, special thanks go to Renée Pestuka and Layomi Gunatilleke-Jester who were responsible for the organization of the conference in Vienna and who also worked on the publication of this book.

Vienna, October 2019 The Editors

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Contents

Spain: Double International Taxation as a result of an inbound dividend payment

José Carlos Pedrosa López

1. Introduction[1]

On 29 June 2018, the Spanish National High Court (hereinafter NHC)[2] dismissed the contentious administrative appeal filed against the decision of the Central Economic-Administrative Tribunal (hereinafter CEAT) of 6 November 2014.[3] This judgment rejected the claim filed by the taxpayer[4] on 30 September 2011, against the agreement of 26 August 2011, of the Large Companies Management Unit of the Regional Inspection Unit of the Special Delegation in Madrid of the State Tax Administration Agency (hereinafter STAA)[5], which had rejected its request for rectification of the taxpayer's 2008 corporate income tax assessment (hereinafter CIT).

The dispute arose in the context of the alleviation of international double taxation, resulting from the payment of a cross-border dividend by a British company in favour of a Spanish company. The application of the Spain-United Kingdom Income and Capital Tax Treaty (1975)[6] (hereinafter Spain-UK Tax Treaty) and the domestic rules of both jurisdictions raises issues on which not even Spanish case law has pronounced.

This Spanish Case deals with the interpretation of article 24 of the Spain-UK Tax Treaty, which corresponds to article 23 of the OECD Model. However, the relevant article is not similar to either of the two versions of article 23 of the OECD Model.

The Court did not refer to article 23 of the OECD Model nor to its Commentary, but this is logical, in so far as the text of the Spain-UK Tax Treaty is different: it was not based on the OECD Model, and therefore, little guidance could have been obtained from the Commentary.

The oldest tax treaty between Spain and the United Kingdom made it posible to alleviate not only juridical international double taxation, but also economic international double taxation, by expressly accepting the possibility of applying domestic measures to alleviate double taxation. Moreover, the case also takes into account the singularities of the application of the Advance Corporation Tax (hereinafter ACT) collected in the United Kingdom at the time of distribution of the dividends and its consideration in the residence state of the shareholder.

1 ES: Audiencia Nacional [National High Court, (NHC)], 29 June 2018, JT\2018\812.
2 JT\2018\812 (29 June 2018).
3 ES: Tribunal Económico-Administrativo Central [Central Economic-Administrative Court, (CEAT)], 6 Nov. 2014, 00/5848/2013.
4 Complaint filed on 30 Sep. 2011 before TEAC.
5 Rejection agreement for the rectification of the 2008 corporate income tax self-assessment, extended on 26 Aug. 2011 by the Large Company Management Unit of the Spanish Directorate of the Tax Agency.
6 Double Tax Convention between Spain and the United Kingdom of Great Britain and Northern Ireland on the avoidance of double taxation and the prevention of tax evasion in respect of taxes on income and wealth (21 Oct. 1975), Treaties IBFD [hereinafter Spain-UK Tax Treaty].

The case under review in this chapter, mainly questions: (1) whether the percentage holding of the entity receiving the dividends in the paying entity should be calculated with respect to share capital and equity or in relation to economic and political rights; and (2) whether the legal concept of offsetting can be likened to payment, or whether, despite the fact that both extinguish the tax debt, they are different legal concepts.

2. Facts of the case

On 27 July 2009, the applicant company Servired Sociedad Española de Medios de Pago S.A. (hereinafter Servired), resident in Spain and a participant in a UK-resident company, Visa Europe Ltd (hereinafter Visa Europe), filed a corporate income tax return for 2008, which gave rise to a tax refund of EUR 8,7 million.

Approximately one and a half years later, on 5 January 2011, Servired sought the rectification of its self-assessment return on the understanding that, in accordance with article 24(2)(b) of the Spain-UK Tax Treaty, there was a mistake in the double taxation avoidance deduction that had initially been applied. Consequently, the entity requested a refund, in addition to the one that had initially been determined, in the amount of EUR 17,1 million.

As a subsidiary claim, it requested a refund of EUR 11,9 million, resulting from the application of the deduction provided in article 24(2)(a) of the Spain-UK Tax Treaty.

On 26 August 2011, the STAA rejected in full the request for rectification and subsequent return. The taxpayer filed an economic-administrative claim against this resolution, which was rejected by the decision of the CEAT.

On 20 April 2015, the appellant's lawyer filed a contentious-administrative appeal against this decision at the Registry of the NHC in order to request a rectification of the 2008 CIT assessment. The company sought a rectification and a refund resulting from the general claim, which it quantified as a refund of EUR 17,1 million plus the corresponding interest on late payment, with a tax credit of EUR 1,8 million pending deduction in future years due to insufficient tax liability.

In the alternative, and in the hypothetical event that the principal claim was not accepted, the HNC was requested, to grant the taxpayer the right to a refund in the amount of EUR 11,9 million plus any default interest that may have accrued.

Ultimately, the HNC dismissed this appeal against the decision of the CEAT.

3. The Court's Reasoning and Comments

Because the judgment analysed in this chapter does not refer to a single question and there are different issues to be dealt with, for ease of analysis the author will proceed to explain the arguments made by the taxpayer and the reasoning of the NHC on each specific issue and then comment on it rather than explaining the reasoning on all arguments and then commenting on all of them.

3.1. Introduction

Article 10(4) of the Spain-UK Tax Treaty stipulates that income classified as a dividend "… includes income from shares or other rights …". In accordance with the second paragraph, it establishes a shared power to tax the dividend by allowing "… dividends paid by a company resident in the United Kingdom to a resident of Spain to be taxed in Spain. Such dividends may be taxable in the United Kingdom… ", the tax paid in the UK being 10 % of the sum of the dividends received and a tax credit of 10/90 granted.

This situation gives rise to international double taxation, which is why article 24 of the Spain-UK Tax Treaty establishes mechanisms to alleviate it. The NHC acknowledged that these mechanisms, which implicitly establish a reference to the Spanish CIT[7], do not imply that there is a conflict with the latter tax.

In accordance with the main issue, article 24(2)(b) of the Spain-UK Tax Treaty establishes a full deduction mechanism assuming that international double taxation must be treated as if it were an internal situation. "When dividends from a company resident in the United Kingdom are included in the profits of a company resident in Spain, the former company is entitled to the same deduction that would have been applied if both companies had been resident in Spain … ". Implicitly, the provision refers to article 30 of the Spanish Corporate Tax Law (hereinafter CTL), since it is the provision that establishes the mechanism to alleviate internal double taxation of dividends. However, Article 30(2) of the CTL establishes that the full deductibility of tax payable corresponding to the taxable base of the dividend received is subject to the fact that "… the percentage of direct or indirect participation is equal to or greater than five percent …", otherwise, the first paragraph restricts the deductibility to 50 %.

In this sense, the question that arises is whether the exceeding of this threshold must be satisfied with respect to the receiving company's participation in the share capital and equity, or whether it can be justified by proving possession of five percent, or more, of the economic and political rights of the paying company.

In relation to the subsidiary issue, article 24(2)(a) of the Spain-UK Tax Treaty establishes a mechanism to avoid international legal double taxation caused by profit sharing. It establishes a tax credit by providing that "… Spain will deduct

7 ES: Real Decreto Legislativo 4/2004 (Royal Legislative Decree 4/2004), 5 Mar. 2004, approving the revised text of the Ley del Impuesto sobre Sociedades (Corporate Income Tax Act). This provision was repealed. Ley 27/2014 del Impuesto sobre Sociedades (Law 27/2014 on corporate income tax), 27 Nov. 2014, is currently in force.

from that person's income tax an amount equal to that of the tax paid in the United Kingdom …", the key element being that the tax has been paid. In this regard, article 32 of the CTL also establishes, in a complementary manner, that "… the tax actually paid shall be deducted …".

The controversy in the case arose because the British tax system did not abolish the ACT in its amendment of 6 April 1999. The ACT was a partial imputation system for the payment of dividends. In this regard, British companies were required to withhold a tax on a dividend before distributing it to its shareholders, but at the same time, UK companies could offset the amount of the ACT against the overall amount of their corporation tax.

Therefore, this rule required any company resident in the United Kingdom which was distributing dividends to its shareholders to make a payment on account of UK general corporation tax. However, as the amount of the debt in this case coincided with the tax credit (10 %), both were offset without giving rise to any income or repayment by the British Treasury, that is, without any payment in cash.

In this scenario, the problem arose as a result of the requirement of the term "*tax paid*": the question was whether set-off/offset-and payment of the tax are similar legal terms, or whether, on the contrary, the mechanism for alleviating double taxation was not applicable.

3.2. Main issue: Is the taxpayer entitled to deduct 100 % of the total taxable amount of dividends received?

3.2.1. Arguments of the taxpayer in favour of calculating the percentage holding by reference to economic and political rights.

The taxpayer requested rectification of the 2008 corporate income tax assessment on the basis of double content. The main argument was based on the application of article 24(2)(b) of the Spain-UK Tax Treaty in order to apply the deduction of 100 % of the total tax liability corresponding to the taxable base derived from the dividends received. The taxpayer considered that this article had to be complemented with the applicable internal law, which, in the taxpayer's view, affirmed that article 24(2)(b) complied with the requirements established in article 30(2) of the CTL.

The taxpayer acknowledged that its stake in the entity's share capital and equity was less than 5 %. However, according to its company statutes, at the time the dividend was received and throughout the previous year, the economic rights of its stake in Visa Europe represented 5.18 % of the profits, assets and liabilities resulting from the hypothetical liquidation of that company. Similarly, its share of Visa Europe's voting rights amounted to 6.48 %.

By providing the necessary documentation, the taxpayer asserted that it had passed the evidentiary requirement, without this leading to further dispute.

The taxpayer assumed that, after overcoming the evidentiary problem, there was no controversy because, based on a grammatical interpretation of the domestic law, the participation did not have to be in the share capital, but could be in the economic rights. In short, according to a systematic interpretation of the internal law in *sensu contrario*, when it demands that the participation be in the share capital it is explicit in its wording, as is evident in article 32 of the CTL. This is not the case in the Spanish legislation applicable to the case, article 30 of the CTL, and therefore, the taxpayer argued that the application of 100 % of the deduction was justified since it had shown that it held a percentage participation in the economic rights in excess of 5 %.

3.2.2. The Court's reasoning

The NHC rejected the arguments put forward by the taxpayer and, consequently, it rejected the taxpayer's main petition relating to the deduction of 100 % of the total tax liability corresponding to the taxable base derived from the dividends received.

The court, on the basis of a finalist interpretation, concluded that the reference element for the share in profits was to be determined by the investment, which was represented by the number of shares. Therefore, the reference element for determining the ownership percentage generated by the right to receive the dividend could not be anything other than the share capital and shareholders' equity.

The NHC discarded the systematic interpretation that was put forward in support of the taxpayer's claim because taxation occurs as a consequence of a certain participation in the share capital, and consequently, the application, or not, of the deduction of 100 % also depends on that participation level. Thus, the percentage relating to economic and political rights was irrelevant.

The NHC assumed that its reasoning was in line with the conclusions that case law has reached on other occasions; for example, the Supreme Court's judgment of 16 February 2017[8] which, in relation to discriminatory treatment applied to investments in non-resident companies, declared that "… in the case of internal double taxation, art. 30 of Legislative Royal Decree 4/2004, when the entity receiving the dividends holds 5 % or more of the capital of the entity from which they were obtained, a de facto exemption regime is applied, as the deduction of 100 % of the total tax liability …".

The court also assumed that this interpretation could also be inferred from *Commission v Kingdom of Spain* (C-487/08)[9] which ruled "… to declare that the King-

8 ES: Tribunal Supremo [Supreme Court], 16 Feb. 2017, RC255/2016.
9 ES: ECJ, 3 June 2010, Case C-487/08, Commission v Kingdom of Spain, ECJ Case Law IBFD.

dom of Spain has failed to fulfil its obligations under Article 56(1) EC, by making the exemption of dividends distributed by companies resident in Spain subject to the requirement that recipient companies have a higher percentage of participation in the capital of companies distributing dividends in the case of recipient companies resident in another Member State than in the case of companies resident in Spain …". In other words, it does not prohibit unequal treatment by reference to economic and political rights but to the percentage of participation of the beneficiary companies in the share capital of the distribution companies.

The NHC reached its conclusion by applying a grammatical interpretation of the domestic law. In line with the arguments of the CEAT, it considered that, in accordance with article 12 of the General Tax Law (hereinafter GTL)[10], "the terms used in its rules shall be understood in accordance with their legal, technical and usual meaning". Therefore, in reference to article 25 of the Personal Income Tax Law (hereinafter PITL)[11], the concept of dividends had to be understood as the "income obtained from the participation in the equity of any type of entity". Consequently, participation in a company had to be understood as a legal concept relating to the ownership of shares, which could be realized in no other way than through the ownership of the entity's shares or holdings. There was no doubt that the shareholding referred to in article 30 of the CTL referred to the share capital and own funds in the paying entity.

3.2.3. Comments

The taxpayer deducted in its 2008 corporate income tax return, 50 % of the total taxable income corresponding to the taxable income derived from said dividends or shares in profits, equivalent to the amount of EUR 18,9 million. A year and a half later, it requested that this be corrected in order to deduct 100 % for the same reason, in the taxpayer's opinion, the amount of EUR 36 million.

The dispute to be resolved was not a question of calculation, however, the truth is rather that, the taxpayer's request was not even exactly correct from a numerical perspective, since 100 % does not give a sum that is equivalent to multiplying by two the amount corresponding to 50 % initially applied, but rather amounts to a figure lower than that indicated by the taxpayer. However, the author would like to point out that this observation, being of a formal nature, does not affect the legal argumentation of the answer to the problem.

The normative interpretation of the NHC is coherent if one considers that the participation in the share capital is what generates the right to participate in the

10 ES: Ley 58/03 General Tributaria (Law 58/2003 on General Taxation), 17 Dec. 2003.

11 ES: Ley 35/2006 del Impuesto sobre la Renta de las Personas Físicas y de modificación parcial de las leyes de los Impuestos sobre Sociedades, sobre la Renta de no Residentes y sobre el Patrimonio (Law 35/2006 on Personal Income Tax), 28 Nov. 2006.

distribution of profits of the entity, invariably of the participation in the rest of representative attributes of the shareholder such as: voting rights, profit share and dissolution right. Thus, the fact of being a shareholder justifies the right to receive dividends, and not any other power that this person holds over the entity or other partners.

The possession of shares in an entity represents the participation of that person in the entity in a way that is not open to manipulation, unlike economic and political rights. If this were not the case and these rights legitimated the receipt of dividends, a multitude of incongruous situations would arise since, ultimately, the right to obtain profits from a company would be at the expense of what is established in the statutes of the paying entity to the extent that a person who is not even a shareholder would be directly entitled to receive dividends from that entity.

Therefore, despite the fact that Spanish case law has not ruled on the reference element that should be used to determine the "holding percentage", the author understands that, according to the interpretation inferred from the internal rule, share capital and equity are the decisive elements for the application of a one or other deduction percentage.

This decision is also in line with the Parent-Subsidiary Directive (2011/96)[12] because, in article 3, it refers to participation in the share capital of the paying company. Moreover, the Parent-Subsidiary Directive (2011/96) provides that by way of a bilateral agreement the criterion of participation in the share capital may be replaced by the criterion of possession of voting rights, however, this is not the case here.

Without prejudice to the foregoing, the author considers that the fact that Spanish domestic legislation makes the deduction of the dividend received 50 % or 100 % of the total taxable income dependent on the tax base is contrary to its purpose, which is merely to avoid tax duplication. The fact that the total deduction is contingent on exceeding the 5 % threshold in the percentage of shareholding in the entity, regardless of whether there may be justifiable reasons, means that the elimination of double taxation may not be total, but only partial.

Bearing in mind that double taxation affects a shareholder with a stake in the share capital of more than 5 % with the same intensity as it affects a shareholder with a lower stake, it seems contrary to the purpose of the rule that in the former case double taxation is totally eradicated, and in the latter it is simply attenuated.

However, the author also assumes that the particularity of this rule is not attributable to the NHC, but is ultimately a matter for the legislature. The court's ruling is

12 Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries in different Member States, OJ L 345 (2011), EU Law IBFD [hereinafter Parent-Subsidiary Directive (2011/96)].

in line with the interpretation inferred from article 30 of the CTL. It has not formulated a restrictive or extensive interpretation of the article, but in accordance with the principle "*ubi lex non distinguit nec nos distinguere debemus*", where the law does not distinguish or it is appropriate for the interpreter to do so, the court has assumed a systematic interpretation of the rule in accordance with the purpose established by the legislature.

3.3. Subsidiary question: Are set-off and payment to be treated in law as similar legal concepts for extinguishing the tax debt?

3.3.1. Arguments of the taxpayer in favour of set-off as a means of extinguishing the tax debt being equivalent to payment

In the alternative, the taxpayer considered that the tax credit method stipulated in article 24(2)(a) of the Spain-UK Tax Treaty should be applied. To this effect, it argued that the reference in the agreed standard to "tax paid abroad" should be understood as a broad concept that not only contemplates the payment of the tax debt in cash, but also by way of a credit because both satisfy the obligation to extinguish the tax debt.

3.3.2. The Court's reasoning

In relation to the taxpayer's subsidiary argument relating to the application of article 24(2)(a) of the Spain-UK Tax Treaty that provides for a the tax credit of 10/90 of the dividend received, the NHC rejected an extensive interpretation of the rule. The Court assumes that when the law refers to payment, it is not referring to any other way of extinguishing the tax debt, but only and exclusively to payment in cash. According to article 14 of the GTL, the analogous application of tax terms is prohibited, and it is assumed that the legal regime of payment established in article 60 of the GTL is differentiated with respect to the legal regime of compensation, stipulated in article 71 of the GTL.

3.3.3. Comments

The British company distributed a dividend to the company resident in Spain which was subject to taxation in the United Kingdom, the tax paid in the United Kingdom being 10 % of the sum of the dividends received and a tax credit of 10/90 was granted. Since the amount of the debt and the tax credit were the same, each was offset against the other without giving rise to any revenue for or repayment by the UK Treasury. Therefore, the payment to the United Kingdom of the tax due was effected by offsetting.

The application of the wording of the tax treaty and the particularity of the UK domestic law gives meaning to this discussion. The controversy arose as to whether the term "tax paid abroad" should be interpreted restrictively by requiring payment of the tax in cash, and therefore offsetting would not be acceptable as a means of extinguishing the tax debt. Or if, according to an extensive interpretation of the term, the tax could be understood as having been paid through the offsetting of the tax debt with a tax credit, liquid and enforceable.

The appellant's subsidiary claim was based on a misinterpretation of article 24(2)(a) of the Spain-UK Tax Treaty, as a result of the non-equivalence of the payment in cash of the foreign tax and the credit. On the other hand, the position taken by the NHC, in accordance with the arguments set out above, is totally opposed.

The situation was caused by the tax regime in force in the United Kingdom because the UK domestic law obliged the paying entity to make the payment of the ACT, which consisted of a payment on account of the general UK corporation tax. However, the problem in this case was different because the internal rule was applied to a transnational payment of dividends and not to an internal payment between entities resident in the United Kingdom, which explains the mismatch.

From the internal perspective, the author understands that it is irrelevant that there is reference to both offsetting compensation and payment because both extinguish the tax obligation. However, if the assumption that they are the same is extrapolated to a transnational scenario, the result is different.

In the internal case, the dividends that a company resident in the United Kingdom receives from another company resident in that territory, will have been taxed by the ACT but in turn the recipient will have been entitled to a tax credit corresponding to the share of the ACT paid by the company distributing the dividends. However, as the amount of the debt in the case under review coincided with the amount of the tax credit, the entirety of the tax debt was offset without giving rise to any revenue for or repayment by the UK Treasury. The situation in the domestic context would be identical because, in one way or another, the amount was paid as general corporation tax. However, the transnational payment situation is different.

This rule that has been maintained by the British legislature has optimal application from an internal perspective, but not when there is a transnational dividend payment, because, in that case, all Spanish tax residents who carry out operations and to whom the provisions apply will find themselves in this situation of international double taxation.

The position of the NHC is correct insofar as it understands that any deduction for double taxation requires, by definition, that the same income be "*effectively*" subject to taxation. Thus, in order to apply a double taxation deduction it is necessary that there has been a previous payment of the tax. Therefore, when the rule refers to the tax actually paid, the amount to be compared is the amount actually paid abroad. This is the problem: no paid tax exists but, according to UK domestic law, there has been a payment on account of the British Corporation Tax, which is also not payable by the Spanish entity.

The court makes no reference to article 23 of the OECD Model but this decision is in line with the OECD Commentary because it states that, in order to avoid tax sparing situations, the tax has to actually be paid.

According to the interpretation inferred from the foregoing precepts, the ruling of the NHC rejecting the application of the tax credit to Spanish residents is in accordance with the law because, regardless of whether it leads to a situation of international double taxation, there has not been the payment abroad that the law requires.

The criterion maintained by the court, and previously by the CEAT, which rejects the assertion that payment and offsetting are identical and substitutive legal concepts is adequate in accordance with the requirements of the legislative rule. Regardless of whether both alternatives are forms of extinction of the tax debt, they are not equal.

4. Conclusion

Irrespective of whether or not the author's opinion on the issues raised coincides with the decision of the HNC, he has attempted to conduct a legal analysis of the case in greater detail and depth.

In his opinion, the HNC has not taken advantage of the opportunity this case presented to pronounce on legal issues and concepts that Spanish case law has so far failed to address. This undoubtedly leaves the door open for an appeal in cassation, through which the taxpayer may request the Supreme Court (hereinafter SC) to make a pronouncement, if this is previously accepted.

The author does consider that, from a legal perspective, the threshold relating to the percentage participation in the entity paying the dividends must be exceeded with respect to share capital and own funds, and not with respect to economic and political rights. The requirement of Spanish domestic law must be understood in this sense because, otherwise, the legal treatment of the distribution of profits would be subject to what is established in the company's articles of association, and not to what has been established by the legislature.

On the other hand, however, the author concludes that the interpretation inferred from both the Spanish domestic rule and the Spain-UK Tax Treaty is that, regardless of the applicable British law, offsetting and payment are different legal concepts. Even though both are alternative methods of extinguishing the tax debt.

Nevertheless, without prejudice to what has been said so far, the author is aware that the judgment handed down by the NHC is not final, insofar as the taxpayer may yet file an appeal in cassation to the SC.

Although it is true that the SC would first have to decide whether or not there is an interest that obliges it to rule on these legal matters, the author understands that there would be almost an obligation on the SC to do so, at least it would have to consider it necessary in view of its relevance and frequency in the context of international double taxation. In this regard, the author understands that the relevance of the case demands the existence of case law with respect to the issues raised.

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