BARTOLOME & BRIONES

Legal Status

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ENERGY

Grants approved for heating and cooling network projects using renewable energy sources

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Within the framework of the European Recovery and Resilience Facility, established by Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021, whose objective is the reconstruction of post-COVID 19 economies, the Government of Spain approved the *Plan de Recuperación, Transformación y Resiliencia* [Recovery, Transformation and Resilience Plan (PRTR)]. One of the objectives of the PRTR is decarbonization through investment in green infrastructure, all in line with the *Plan Nacional Integrado de Energía y Clima* [National Integrated Energy and Climate Plan (PNIEC) 2021-2030], one of its particular objectives being to achieve a 42% share of renewable energies in final energy use by 2030.

Regulatory bases for the Grants

Order 707/2022 of the Spanish Ministry for Ecological Transition and the Demographic Challenge, dated July 21, approved the regulatory bases for the calls for the incentive programs for heating and cooling network projects using renewable energy sources. These aids are part of the fulfillment of the objective CID 117 (investment 1, of component 7, "Deployment and integration of renewable energies") of the PRTR, to install at least 3,800 MW of renewable generation by the first half of 2026. These regulatory bases will be in force from their publication date (BOE of July 26, 2022) until June 30, 2026.

This line of incentives has a budget of 100 million euros. The total aid per project is limited to 15 million euros and a minimum investment of 450,000 euros is established. Furthermore, additional cumulative aid percentages will be granted if the project is carried out in a municipality with demographic challenges (5%), if it is a medium-sized company (5%) or a small company (10%). The projects must be completed before June 30, 2025.

Beneficiaries may be both individuals and legal entities, public or private, legally and validly constituted with tax domicile in Spain. There are two types of programs depending on the type of beneficiary:

Program 1: aimed at those who carry out some economic activity offering goods and/or services in the market.

Program 2: aimed at those who do not carry out any economic activity offering goods and/or services in the market.

Eligible projects must have power superior to 1 MW, and may be of the following types:

i) new generation plant using exclusively renewable energy sources and one or more

distribution networks with energy exchange connections to consumption centers.

ii) expansion or replacement of an existing generation plant that provides heat and/or cold to an existing distribution network. This type of project will only consist of the expansion of heat and/or cooling generation capacity of an existing network by incorporating new generation equipment or the replacement of existing equipment with new heat and/or cooling generation equipment. Both the new heating and/or cooling generation equipment and the existing equipment not replaced must use exclusively renewable energy sources.

iii) Expansion of existing distribution network and connections that provide heat and/or cold with their connections to reach new consumption centers. The existing heating and/or cooling generation capacity must use exclusively renewable energy sources. The amount of aid granted for the selected projects will be established on the basis of the eligible costs, as established in the Order, as well as the other limiting factors specified in the call and the financial availability. The aid intensity limits for these projects will be 35% for those of Program 1, and 70% for those of Program 2.

The evaluation and selection of the applications will be carried out on a competitive basis; However, the procedure instruction may establish a pre-evaluation phase to verify the fulfillment of the conditions for acquiring the status of beneficiary entity and whether the project meets the objectives of the call. The Order establishes the assessment criteria for the evaluation of the applications, as well as the maximum score for each one; these criteria are the following:

- Economic: based on the subsidy reduction indicated by the applicant with respect to the maximum eligible costs set forth in the Order.
- Administrative feasibility: various aspects of the progress in the processing of the project will be assessed.
- Technical and demonstrative criteria: innovations, efficiency and demonstrative effect of the project.
- Externalities: among others, the positive impact on *Zonas de Transición Justa y Reto Demográfico* [Areas of Just Transition and Demographic Challenge], renewable energy communities, public entities or SMEs, as well as the social and gender impact of the projects.

The aid will consist of a non-refundable subsidy that the IDAE may advance to the beneficiary by means of an advance payment in order to facilitate the financing of the projects. The IDAE will pay the advance payment for a maximum of 80% of the aid granted, subject to the provision of a guarantee, under the terms established in articles 23 to 25 of the regulatory bases and in the call for proposals. The aid will be definitively received by the beneficiary once the execution of the project has been verified, the investment has been certified and, if

applicable, the request for payment has been accepted by the instructing body.

Call for Applications

The first call for these grants was effective through the Resolution of July 27, 2022, of the *Instituto para la Diversificación y Ahorro de la Energía* (IDAE).

Applications for aid under this call and their documentation may be submitted, from 9:00 a.m. on September 26, 2022, until 2:00 p.m. on October 28, 2022, through the corresponding telematic system at IDAE's portal (https://sede.idae.gob.es/). Once this deadline has expired, the call for applications will expire and no further applications will be accepted.

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TAX

Relevant aspects on the exemption in the Personal Income Tax for work carried out abroad of administrators and directors

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The Personal Income Tax Law (LIRPF) establishes alternatives to reduce the tax impact with respect to the remuneration received by employees who exercise part or all of their functions abroad. Article 7.p) of the LIRPF establishes an exemption in these cases.

The Law itself requires some requirements for its application such as: (i) that the person travels abroad (ii) that the displacement is made to provide services that represent a benefit to a non-resident entity (iii) that in the foreign territory a tax similar to Personal Income Tax is applied.

The Law, at no time, establishes that directors or administrators cannot benefit from this exemption. However, the tax authorities - with a particularly restrictive interpretation - have considered that it is only applicable to employees in a situation of employment dependency and categorically denies that this exemption is applicable to administrators and directors, arguing that their relationship with the entity is merely commercial (and therefore, non-labor / non-employment) regardless of the work performed.

In this sense, the exemption contained in article 7.p) has always been a matter of discussion in the Courts since it does not make any specific mention that it is only applicable to "employees" or is derived due to "employment relationship".

Judicial background (Judgment of March 22, 2021 to the appeal of cassation 5596/2019)

On March 22, 2021, the Supreme Court issued a ruling in which it established that both directors and administrators were not susceptible to applying the exemption contained in article 7.p) of the LIRPF when they had moved to a foreign country with the sole purpose of participating in the board of directors of the company based in the foreign country.

It should be noted that, in the specific case before the Supreme Court, the functions carried out abroad by the directors referred only to deliberative functions, that is, control and management functions such as attendance at meetings of the board of directors of the company resident abroad, which in no way add additional value to that entity.

Therefore, the Supreme Court - in the absence of proof that the work carried out by the administrators provided added value - ruled that the fact that the administrators exercised only deliberative functions could not be considered as "effective work" that

generated value in the foreign entity and, consequently, in this case the exemption established in article 7.p) of the LIRPF cannot be applied.

It should be noted that, in this judgment, the Supreme Court did not rule on whether the exemption applies to executive functions performed by directors or directors in an entity resident abroad.

Judgment of the Supreme Court dated June 20, 2022 (Appeal 3468/2020)

However, on June 20, 2022, the Supreme Court again issued a judgment on an appeal related to the application of the exemption with respect to directors and administrators for working abroad.

In this recent judgment, the Supreme Court concludes in favor of the exemption established in article 7.p) on the basis that it is applicable to all those administrators or members of the board of directors whenever they perform functions of direction, executive, management or supervision in favor of the legal entity resident abroad, since these tasks do generate added value among the linked entities.

In this sense, in order to know if this exemption for directors or administrators is applicable, it is necessary to analyze the category of work that will be carried out abroad.

Therefore, if the functions they perform abroad are executive or managerial, it is clear that the tax authorities may not deny the application of the exemption simply because they are administrators or directors, but - following this judgment - each and every one of the tasks carried out abroad must be analyzed to determine whether or not that exemption is applicable.

It is worth mentioning that the Supreme Court itself emphasizes that this judgment does not contradict the one issued by the court itself on March 21, 2021 (cassation appeal 5596/2019) -which was analyzed in the previous paragraph- and that it excluded from the exemption when the directors or administrators only participated in the boards of directors of a subsidiary abroad.

Accordingly, the exemption is applicable when the directors or administrators perform executive functions in favor of the company resident abroad, not being applicable when they only perform deliberative functions such as attending meetings of the Board of Directors.

Finally, the Court concludes that this exemption is also due to tax policy issues where it seeks to favor Spanish companies by expanding their internationalization and this is achieved by reducing their tax burdens since it will allow them to improve their competitiveness against foreign companies.

Conclusions

- The Supreme Court has established that the exemption included in article 7.p) of the LIRPF for work carried out abroad is applicable to directors and administrators as long as they perform executive or management tasks since these services provide

added value to subsidiary companies abroad.

- The exemption does not apply when directors or administrators perform only deliberative tasks since these works do not add value.
- It will be necessary to analyze case by case, to effectively determine the nature of the work carried out by the directors or administrators abroad to determine whether or not the exemption is applicable to them.
- In order to apply the exemption, the taxpayer must provide all those evidentiary means with which he proves to comply with the requirements required by the Law and that the work done by the administrators or directors supposes the implication of an added value for the company resident abroad.

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MEXICO DESK

The new "Ley de la Memoria Democrática" (Democratic Memory Law) opens the option to access Spanish citizenship

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Pursuant to the relevant Spanish legislation, one of the ways to obtain Spanish nationality - a quite useful one - is to reside legally in Spain for 10 years. Fortunately, for nationals of Latin American countries the term is reduced to only two years. However, effective residence is required, so that moving abroad, the means to live, etc., becomes an inconvenience as it interrupts the daily life of the interested party, which makes it an unfeasible option in many cases. It is for this reason that this new way to obtain Spanish citizenship, which opens the door to reside and/or work in any of the member countries of the European Union, becomes relevant.

In that manner, last July 14, the Spanish Congress approved the *Ley de la Memoria Democrática* [Law of Democratic Memory], which requires the ratification of the Senate to complete its legislative process and be published in the Official State Gazette (BOE). Both instances could take place this September and would allow, in the foreseen cases, a considerable number of people to obtain Spanish nationality, which would benefit mainly nationals of Latin American countries, since the region was a main destiny for exiles from the Civil War.

The Democratic Memory Act, according to its explanatory memorandum, is within the framework of a restorative and plural vision focused on recognizing the victims of both the Spanish Civil War and the world conflicts of the 20th Century. Nevertheless, this article focuses on the text established in the eighth additional provision, which provides for the acquisition of Spanish nationality under the aforementioned Act.

Its immediate antecedent is the *Ley de la Memoria Histórica* of 2007, which allowed to obtain or recover the nationality of those Spaniards who had lost it when they emigrated abroad due to the Spanish Civil War. The same applies to their children, and in some cases, even to their grandchildren.

The deadline to apply for nationality under the 2007 law expired some time ago, so this new Law of Democratic Memory gives the opportunity to those who could not take advantage of the benefit offered by the expired law.

The assumptions of application that the Law of Democratic Memory foresees are the following:

- Persons born outside Spain; of Spanish father, mother, grandfather or grandmother of Spanish origin, who had lost or renounced Spanish nationality as a consequence of having

suffered exile. This applies if exile was due to:

1. Political or ideological reasons
2. Religious reasons
3. Sexual orientation/identity

Mexico, for example, was the country that received the largest number of exiles and whose government offered Mexican nationality to Spanish refugees, which not only allowed them to reside in Mexico, but also granted them a certain degree of protection against potential retaliatory measures or persecution. However, at that time, dual nationality was not accepted, so people were legally required to renounce their Spanish nationality.

In this case, in relation to the previous act, reasons for emigration such as sexual orientation or sexual identity are incorporated.

- The children of Spanish women who lost their nationality because they married foreigners. In this case it is only applicable for those cases that occurred before 1978 (approval and promulgation of the Spanish Constitution).

Before 1978, Spanish women who married a foreigner lost their Spanish nationality and could even be stateless. It was not until the reform of the Civil Code in 1954 that it was established that women lost their nationality only if they automatically acquired their husband's. This discriminatory situation was resolved in the 1978 Constitution.

- The children of legal age of those Spaniards whose nationality of origin was recognized on the occasion of the Law of Historical Memory, or even, who obtain the nationality on the occasion of the present Law of Democratic Memory.

In the case of children of Spaniards who had obtained the nationality on the occasion of the Historical Memory Act, if they were of legal age, they were required to reside in Spain for a minimum period of twelve months in order to obtain Spanish nationality.

This requirement is eliminated in the current Law, it is now possible to obtain the Spanish nationality both if their parents obtained it as a result of the previous Historical Memory Act and if they obtained it under the present Law.

It is important to mention that the term to apply for nationality under the present Act is two years, in the event that said term has elapsed, the Council of Ministers is empowered to extend it for one more year.

It is estimated that more than 300,000 people obtained Spanish nationality under the Historical Memory law, and it is estimated that approximately 200,000 could obtain it under the present Law of Democratic Memory.

The applications will be presented in the different Spanish Consulates (where the person resides, in case of being outside Spain).

We will have to wait for the publication of the Law to see the ways of accrediting the assumptions of law. However, taking into account the precedent of the Historical Memory Act, it is worth noting that, as an example, the status of political exile is presumed for those persons who left Spain between July 18th, 1936 and December 31st, 1955. As noted before, we will have to wait for the publication of the Law for further details.

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