BARTOLOME & BRIONES

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COMMERCIAL

New Central Registry of UltimateBeneficial Ownership

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As Royal Decree 609/2023, of July 11, 2023, creating the *Registro Central de Titularidades Reales* [Central Registry of Ultimate Beneficial Ownership] ("**RCTIR**") and approving its operating regulations ("**RD 609/2023**"), came into force on September 19, 2023 with the purpose of including the third and fourth additional provisions of Law 10/2010, of April 28, 2010, on the prevention of money laundering and financing of terrorism ("**Law 10/2010**").

Information centralization.

The objective of the new regulation is to provide authorities, obliged parties and individuals with a more efficient and useful tool for the prevention of money laundering, centralizing the information available on ultimate beneficial ownership, in connection with the central EU platform.

According to Art. 1 of RD 609/2023 "*the Central Register of Ultimate Beneficial Ownership is the sole and central electronic register throughout the national territory which aims to collect and publicize the information on ultimate beneficial ownership referred to in Articles 4, 4 bis and 4 ter of Law 10/2010*", i.e. information relating to legal entities established in Spain or entities without legal personality that carry out their main activity in Spain, or that are managed by individuals or legal entities resident or established in Spain.

It will also be responsible for collecting information on unincorporated entities such as trusts that wish to do business or acquire property in Spain and that are not managed from Spain or the European Union, or registered in another EU country. The obligation to report ultimate beneficial ownership will not apply to funds, but will apply to their management companies.

In addition to the data provided directly, the RCTIR will collect ultimate beneficial ownership information from reliable and independent sources such as Registries of Foundations, Associations, Cooperatives and Commercial Registries, among others.

The information registered in the RCTIR will remain in force and updated throughout the existence of the corresponding legal entities or unincorporated entities, and will be kept for a period of ten years after their dissolution or extinction.

New developments in the provision of information.

- In any case, the parties obliged by Law 10/2010 on the prevention of money laundering shall make an **annual declaration** by electronic means in **January**, and in the event that there have been no changes in the ultimate beneficial ownership, a declaration shall be made confirming this fact.

- All **registries in Spain** with jurisdiction over real title holders, especially the

Registry of Ultimate Beneficial Ownership ("RETIR") which obtains this data from annual accounts filed at the Commercial Registry, must perform a **first collection of information in** favor of the RCTIR, within nine **(9) months** from the entry into force of RD 609/2023.

- In the event that the ultimate beneficial ownership data supplied to the RCTIR by the different registries with competence in the collection of beneficial ownership data or databases are not all those provided for in the Regulation, the same must be completed by the subjects who have the obligation to communicate the data or their management bodies in the case of legal entities. To this aim they must make a **first supplementary declaration** by electronic means to the RCTIR within **two months** from the entry into force of RD 609/2023.

- Likewise, in the case of **changes** in ultimate beneficial ownership, a new declaration of identification of the ultimate beneficial ownership must be filed with the corresponding Commercial Registry by the administrators within a **maximum period of ten days as** from the day after the change becomes known, in order to ensure that the information sent by the Commercial Registry to the RCTIR is adequate, accurate and up to date.

Access to beneficial ownership data.

- The information contained in the RCTIR will be accessible to the authorities in charge of preventing, detecting and investigating financial crimes, as well as to notaries and registrars.

- Other individuals or entities with legitimate interest may have access to certain limited data, such as name, date of birth, nationality and country of residence.

- When access to the information may expose the ultimate beneficial owner to a disproportionate risk, or to a risk of fraud, kidnapping, extortion, harassment, violence or intimidation, or others of similar seriousness, or if the ultimate beneficial owner is a minor or a person with limited capacity or subject to special protection measures, the person in charge of the Central Registry may **refuse** access to such information. Without prejudice to the fact that the person concerned, the ultimate beneficial owner, may previously request the **restriction of access to their information** to the person in charge of the Central Registry, a restriction which, if applicable, shall be granted after a detailed assessment of the exceptional nature of the circumstances. The maximum term to resolve these requests will be **six months** and lack of reply will be considered as rejection.

Registration closure.

- Failure to comply with the obligation to identify and inform the RCTIR, either due to lack of identification in the beneficial ownership sheet or, due to lack of record of the ultimate beneficial ownership sheet due to omission in the filing of the annual accounts, will result in closure as

provided for in Article 378 of the Commercial Registry Regulations.

In the same way as previously regulated, when there is no actual beneficial owner in the proper sense, the administrator or administrators will be considered as such, and if the administrator is a legal entity, the natural person appointed by the administrator legal entity will be the ultimate beneficial owner.

This regulation is in line with the development being carried out by the European Commission for the BORIS system (Beneficial Ownership Registers Interconnection System), which, once implemented, will facilitate consultation by regulated entities.

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TAX

Tax Paradigm Shift: Who is responsible for proving abuse in the parent-subsidiary dividend distribution, the administration, or the taxpayer?

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In a decision that changes the tax landscape, the Supreme Court has upheld the ruling of the National Court, dated May 21, 2021, modifying its own jurisprudential doctrine.

Up until now, the burden of proof rested on the taxpayer. However, the Supreme Court has taken a new approach by now requiring the Administration to prove the existence of abuse to be able to apply the anti-abuse clause contained in Article 14.1.h) of the Consolidated Text of the Non-Resident Income Tax Law (TRLIRNR).

Recall that Article 14.1.h) of the Non-Resident Income Tax Law exempts these dividends by transposing Article 5 of the Parent-Subsidiary Directive, although it provides an anti-abuse rule to ensure that the exemption does not unduly extend to recipients residing outside the EU unrelated to the Directive.

In essence, this decision by the Supreme Court establishes as doctrine that the responsibility to prove the existence of abuse preventing exemption in the Non-Resident Income Tax falls on the Tax Administration.

This position aligns with European justice and the opinion of the National Court, which asserts that it is the Administration's, not the taxpayer's, duty to prove the assumptions for the application of the anti-abuse clause using various information channels outlined in the Double Taxation Conventions or the Exchange of Information Directive.

This recent pronouncement by the Supreme Court, which completely modifies the jurisprudential approach maintained until now and which places the burden of proof on the Administration presuming fraud, rather than on the taxpayer denying it, is significant for both the defense of taxpayers' rights and the balance of power between taxpayers and the Tax Administration. Ultimately, this change in approach improves the legal certainty for taxpayers.

In the following, the background of the case that has served as the basis for the modification of the criteria by the Supreme Court will be explained in more detail.

In this case, a Spanish company did not withhold the corresponding Non-Resident Income Tax (IRNR) in relation with a dividend distribution totaling 7 million euros to its Luxembourg-based parent company. This was due to the belief that such withholding was exempt under Article 14.1.h) of the Non-Resident Income Tax Law.

As a result of this situation, the Tax Administration initiated a debate regarding the applicability of the exemption for

dividend distribution between parent and subsidiary. It determined that the exemption established in Article 14.1.h) of the Non-Resident Income Tax Law was not applicable in this case.

The Administration argued that the company lacked a real economic activity, that there were no valid reasons for its corporate structure, and, ultimately, that there was a lack of evidence supporting the existence of valid economic reasons justifying the establishment of the Luxembourgish parent entity.

However, the National Court in the contested judgment, now confirmed by the Supreme Court, held that the Tax Administration made a mistake by establishing a presumption of motivation solely for tax purposes. The National Court reproached the Administration for automatically denying, without the most basic evidentiary activity, the exemption from withholding tax on dividends paid by a Spanish entity to its European parent solely because the latter is owned by a company residing in a third country (thus infringing on the freedom of establishment). Additionally, the National Court reiterated that it is the responsibility of the Tax Administration to justify the necessary elements for the application of the anti-abuse clause.

As anticipated, in this situation, the Supreme Court aligns itself with European justice and the National Court, reversing the burden of proof.

The Supreme Court's judgment establishes that "to verify whether an operation pursues a fraudulent or abusive objective, competent national authorities cannot limit themselves to applying predetermined general criteria but must proceed with an individual examination of the entire operation in question".

Considering the above, to justify the application of the anti-abuse clause and deny the exemption, the Administration must demonstrate the existence of elements constituting an abusive practice. The refusal of the exemption cannot be based on general presumptions of fraud without the Administration providing evidence or indications of fraud or abuse, nor can it shift the burden of proof, as this would be detrimental to the objectives of the Parent-Subsidiary Directive (Directive 90/435), which aims to prevent double taxation of profits distributed by subsidiaries to their parent companies.

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DISPUTES

Revolving Credit

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Revolving credit is a popular financing option in which a financial institution grants a customer a credit line for a certain period of time, within a set limit, i.e. up to a maximum credit amount.

Unlike other forms of credit, in the case of revolving credit the customer may draw down as many times as requiered within the limit, thus reducing or decreasing credit as it is used, and restoring or increasing it again through payments made to repay it. The credit is normally repaid in very low monthly instalments calculated on the basis of the outstanding balance.

In other words, unlike the ordinary credit card, a revolving credit card offers the user a pre-set credit limit, which can be gradually repaid through periodic payments, but with the possibility of borrowing again from the credit, so that the debt is updated each month. These payments can be constant or represent a percentage of the outstanding debt.

However, as the repayment of the capital is agreed in very low monthly instalments, in many cases only part of the interest or insurance for the service is covered and only a small part goes to repay the debt incurred. As a result, the debt, which remains the same the following month, again bears an interest burden that sometimes exceeds 20%.

In this regard, it is worth noting that the case law on revolving credit is constantly evolving. Specifically, the Spanish Supreme Court ruled in 2020 (STS 149/2020 of 4 March) that the interest applied to a credit card that exceeded 20% APR was abusive, but then issued other rulings with different and confusing interpretations, until ruling STS 462/2023 of 15 February finally established that the criterion of usury in this type of contract appears when the interest applied exceeds the average market rate for credit cards by six percentage points, according to data from the Bank of Spain. Bearing in mind that this average rate is already over 20%, this means that the usurious interest would be 26% or higher (depending on the specific moment) and therefore it is more difficult to obtain a judgement declaring the interest null and void.

However, it should be borne in mind that one thing is the judicial interpretation of usury or usurious interest, and another thing is the judicial interpretation of the financial institution's compliance with its obligation of transparency. In other words, it is possible for a court to declare an interest clause in a revolving credit null and void, not because it is usurious or excessive, but rather because the obligations of transparency and prior information necessary for the client to give informed consent have not been complied with.

Even on this basis, the revolving card contract as a whole, and not only the interest clause,

could be declared null and void, so that the financial institution would be obliged to refund all the interest and fees charged.

In this regard, it should be noted that the regulations governing the obligations of transparency and prior information to the consumer have changed in recent years, so that nowadays the regulations are more demanding than they were years ago. This should be taken into account because when it comes to assessing potential nullity due to non-compliance with these obligations, the regulations in force when the revolving card was contracted will have to be taken into account.

All of the above leads to a complex situation in the assessment of each revolving credit case, and appropriate legal advice on the specific case is always recommended.

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