Resolution of 25 June 2021 of the Directorate General for Taxes relating to the Tax on Certain Digital Services.

I

On 16 October 2020, Law 4/2020 of 15 October on the Tax on Certain Digital Services was published in the '"Official State Bulletin".

The Tax Law was implemented under Royal Decree 400/2021, of 8 June, implementing the rules for locating user devices and the formal obligations of the Tax on Certain Digital Services, and amending the General Regulation on tax management and inspection actions and procedures and implementing common rules for tax application procedures, approved by Royal Decree 1065/2007, of 27 July.

The Law for Tax on Certain Digital Services approved a new tax, which is indirect, centred on the provision of certain digital services, with a view to addressing the new, complex ways of doing business arising from the economy's digitisation process. Specifically, these are the digital services where there is user participation that constitutes a contribution to the value creation process of the company providing the services, and through which the company monetises those user contributions. The tax is limited to solely taxing the following provisions of digital services: the inclusion on a digital interface of advertising aimed at the users of the interface ("online advertising services"); making multi-faceted digital interfaces available that allow their users to find other users and interact with them, or facilitate the delivery of goods or the provision of underlying services directly between these users ("online intermediary services"); and, including sale or assignment, transmission of the data collected about the users that have been generated by activities carried out by them on digital interfaces ("data transmission services").

The resolution aims to set up an interpretive, explanatory framework, that is clear and precise, giving legal certainty to the practical application of the regulations set out, which are considered to be essential taking into account that it is a new phenomenon and its immediate application. Therefore, it is considered to be suitable to set criteria for interpretation and explanation regarding taxable advertising and, specifically, what should be understood to be targeted advertising and who should be considered to be the advertising services provider. Furthermore, it is understood that the taxable event of intermediation and the case of non-liability provided for in letter a) of article 6 of the Law require explanation. In addition, an explanation is given relating to the case of non-liability in letter f) of the same article 6 of the Tax Law. Finally, it is considered to be appropriate to explain articles 9 and 10, relating to accrual and the taxable base, respectively.

By virtue of the foregoing, and taking into account that the Tax Law came into force on 16 January 2021, and that the first tax period must be declared between 1 and 31 July 2021, this General Directorate considers it appropriate to pass this Resolution, in application of article 12.3 of the General Tax Law 58/2003, of 17 December, (hereinafter, GTL), in order to ensure legal certainty for all those affected by it, whether they are taxpayers or bodies in charge of applying the taxes. The article cited, states

the following:

"3. Within the scope of the State's jurisdiction, the power to pass provisions interpreting or explaining tax laws and other regulations falls to the Treasury Minister and Public Authorities and to the bodies of the Tax Office referred to in article 88.5 of this Law.
Interpretative or explanatory provisions passed by the Minister must be complied with by all bodies of the Tax Office.
Interpretative or explanatory provisions passed by the Tax Office bodies referred to in article 88.5 of this Law will be binding on all Tax Office bodies and entities in charge of applying taxes.
The interpretative or explanatory provisions provided for in this section will be published in the relevant official gazette.
Prior to the resolutions referred to in this section being passed, and once their text has been drawn up, where their nature so advises, they may be submitted for public consultation."

II

Online advertising services

In relation to online advertising services, article 4.6 of the Tax Law defines online advertising services as "those consisting of the inclusion of a proprietary or third party digital interface for advertising aimed at the users of the interface. Where the organisation including the advertising is not the owner of the digital interface, the organisation will be considered to be the advertising service provider, and not the organisation owning the interface".

Article 4.10 defines targeted advertising as "any form of commercial digital communication aimed at promoting a product, service or brand, targeting the users of a digital interface, based on the data gathered from them. All advertising will be considered to be "targeted advertising", unless proven otherwise".

Targeted advertising. Online advertising services constitute the taxable event for the tax when targeted advertising is involved.

Targeted advertising requires that, when deciding which advertisement to show on the interface, users' data is taken into account. Advertising should be considered to be targeted looking at the different levels of intensity or personalisation, which means that the amount of information about the users taken into account to show advertising may vary. Targeted advertising is advertising that uses users' data. These data may have been collected beforehand, or during the browsing session, and they will not necessarily come from using the digital interfaces. They may be data that have been provided by the user when signing up or registering, or at any other time, in addition to data acquired from third parties. Amongst others, these data may be:

– Geographic location (country, city, IP, geolocation, etc)
– Socio-demographic: age, gender, etc.
– Individual preferences or interests.
– Search word or words.
– User profile, which may come from the data collected when signing up or registering,

from surveys or telephone calls, or from any other way of obtaining such data, or from data collected from the user's activity on several digital interfaces.

The use of just one of the user's data will be enough for the digital advertising to be considered to be targeted.

Taxpayer. Once what should be understood to be targeted advertising has been defined, and in order to clarify who will be the online advertising services provider, that is to say, who undertakes the taxable event, becoming the taxpayer for the tax, as long as the thresholds provided for in article 8 of the Tax Law are exceeded, it is appropriate to refer to article 4.6 of the Tax Law again. The article provides that where the organisation including the advertising is not the owner of the digital interface, the organisation will be considered to be the advertising service provider, and not the organisation owning the interface.

The Tax Law, therefore, distinguishes between two different cases:

– Where whoever includes the advertising is the owner of the interface.
– Where whoever includes the advertising is a third party other than the owner of the interface.

Currently, the way of providing advertising services has become highly complex and many companies and operators have appeared that provide a wide variety of services in the process, from advertisers to the owner of the interface. Various forms of interrelation may also appear in this process, where the levels of use of technological tools may be very different.

The varied nature of the type of service provider organisations taking part, their name and the possibility that their functions do not exactly coincide with those of any commercial or doctrinal classification, requires that, instead of focussing on a specific type of organisation, the person performing the taxable event is identified by looking at a certain function. This function is the inclusion of online advertising.

For this purpose, it is worth distinguishing between two large groups of people who may act between the advertiser and the owner of the digital interface:

a) On the supply side: those marketing digital interface advertising spaces.
b) On the demand side: those facilitating acquisition of public spaces to advertisers.

The advertising service provider and, therefore, taxpayer, will be the organisation that, from the supply side, includes advertising content to be shown to each user on the digital interface. This inclusion may be made by the owner of the interface themselves, or via a third party, that, by virtue of an agreement with the former, markets the owner's portfolio of advertising spaces, acquiring the right or obligation to include advertising on them. These third parties are known today as affiliate networks, that aggregate advertising spaces ("portfolio") from one or several interfaces allowing their owners to monetise them and, at the same time, enabling advertisers to have a large catalogue of interfaces available where they can show their advertising.

Definitively, when the interface owner gives its advertising spaces to an affiliate

network for marketing, the latter organisation will be considered to be the online advertising services provider and, therefore the taxpayer.

On the other hand, online advertising may be the result of direct agreements between the interface owner or the affiliate network and the advertiser, or their representatives. It is also possible that the advertising is programmatic, in which case various technological tools are used to acquire the advertising spaces in automated form. The interface owner and the affiliate network may assign their advertising spaces via direct agreements with the advertiser or their representatives or do so programmatically.

Furthermore, it should be clarified that the function of including the advertising is only done by one of the intervening organisations, to prevent cases of waterfall taxation, in such a way that there can only be one taxpayer for this type of taxable event, without prejudice to the fact that the other intervening organisations, both on the supply side and on the demand side, may provide some other taxable service, online intermediation or data transfer, if it complies with the requirements provided for in the Law. In the same way, the organisation including the advertising may also provide other taxable services when it carries out other activities in addition to those constituting the online advertising service.

Finally, the advertising service provider and, therefore, the taxpayer, will be the owner of the interface, or the affiliate network, as appropriate.

III.
Online intermediary services

With regard to online intermediary services, it should be pointed out that article 4.7 of the Tax Law defines them as “those making a multi-faceted digital interface available to users (which allows interaction with several users at the same time) facilitating the delivery of goods or provision of underlying services directly amongst the users, or that lets them locate other users and interact with them”.

Online intermediary services are those that, via a multi-faceted digital interface, allow users to interact amongst each other. These services are divided into two types:

– Online intermediary services with underlying transaction.
– Online intermediary services without underlying transaction, hereafter, interaction services.

In both cases, the definition of intermediary, for tax purposes, requires the existence of at least two users and that the contact between the users is made via a digital interface which allows them to interact concurrently. It is not necessary for all of them to use the device at the time the transaction concludes.

Online intermediary with underlying transaction. These are intermediary services using a digital interface to facilitate the delivery of goods or provision of services.

Interaction services. These are intermediary services without an underlying transaction. Instead, the intermediation consists of making an interface available that enables users

to connect and interact with each other. This would, for example, be the case of an organisation that owns a digital interface via which different users share content and opinions, can locate other users and maintain contact with them, and get to know people, etc.

Non-taxable cases. Making a digital interface available may allow various digital services to be provided. It should be taken into account that the non-taxable cases regulated in letters a), b), c) and d) or article 6 of the Tax Law exclusively refer to online intermediary services. As a result, when the same digital interface provides intermediary services and online advertising services, the exclusions provided for in those non-taxable cases are limited to the online intermediary services and not to online advertising.

In the case of an online service with delivery of goods or provision of services with an underlying transaction, article 6.a) of the Tax Law states that the following will not be subject to tax, “sales of goods or services arranged online via the website of the provider of these goods or services, where the provider is not acting in the capacity of intermediary”.

The preamble to the Tax Law explains that it was not the aim to tax the sales of goods and services because, for the retailer, the creation of value in these cases lies in the goods and services supplied, and the digital interface is only used as a means of communication. The preamble adds that in order to determine if a provider sells goods or services online on their own account or provides intermediary services, it will be necessary to take the transaction’s legal and economic substance into account.

In accordance with the reiterated doctrine of the Directorate General for Taxes (see consultations V1273-19 and V0369-20), an “intermediary” may only be considered to be whoever receives their remuneration according to a contract being entered into which they are a party to, that is to say, whoever receives remuneration or a fee because of a result, which determines the underlying transaction. Therefore, in online intermediary services the intermediary will be considered to be whoever puts the users taking part in an underlying transaction in contact, via a multi-faceted digital interface, in order to undertake the underlying transaction. This is regardless of whether the intermediary imposes conditions on the underlying transaction, such as price or other contractual conditions, or not. That is to say, it should be taken into account that the fact the intermediary organisation determines, in whole or in part, the commercial and contractual conditions for the transactions carried out among the users of the interface does not necessarily mean that it is not providing an online intermediary service.

In any event, and in conclusion, it is a matter that will depend on the specific clauses in the contract or legal transaction entered into by the parties and on the underlying economic reality.

IV
General non-taxable case

Article 6.f) of the Tax Law includes the following non-taxable case: “the provision of digital services where they are carried out between organisations that form part of a group with a direct or indirect holding of 100%”.

The Tax Law does not provide for non-taxability for general intra-Group transactions, except that the provision of digital services be carried out between organisations forming part of a group with a direct or indirect holding of 100%, as in these cases they may be considered to be in-house transactions as there is an entire identity among the people involved.

A non-taxable case here would be the case where the organisation making the digital interface available to users is 100% directly or indirectly owned by the organisation providing its assets and, therefore, this is an identical case to that regulated in letter a) of article 6, that is to say: “the sales of goods or services signed up to online via the website of the provider of these goods or services, where the provider does not act in the capacity of intermediary”.

Moreover, non-taxability covers the provision of services that takes place between group companies, although there is an investee relationship between them, as long as they are directly or indirectly owned 100% by the group's parent company.

V
Accrual and taxable base

Concept of transaction and accrual. The taxable base for the tax, regulated in article 10 of the Law, is made up “of the amount of the income, excluding, as appropriate, Value Added Tax or other similar taxes, obtained by the taxpayer for each provision of digital services carried out in the territory where it is applicable”.

In this regard, it is worth clarifying that, as stated in the Tax Law Regulatory Impact Analysis Report, the conclusion can be reached from this general rule that the tax is calculated on a transaction by transaction basis, and not in aggregate for the set of transactions in a specific period, without prejudice to the fact that settlement is later made by settlement periods for all the transactions carried out in that period. This is a logical consequence, when looking at the indirect nature of the tax, that is to say, a tax that falls on certain services provided, without taking into account the features of their provider, including their financial capacity. In addition, from various precepts in the Law itself, it can be deduced that it is a tax type for which the taxable base must be determined for each transaction. Therefore, article 9 links accrual of the tax to the moment when the taxable transactions are provided, performed or carried out. For its part, article 10.1 provides that the taxable base is made up of the amount of the income, excluding VAT and similar, for each one of the taxable provisions of digital services, with it being understood that the article does not refer to “categories of provisions”. Furthermore, article 10.3, where it refers to the possible adjustment of the taxable base, in the event that the amount is unknown for the settlement period, is referring to the taxable base for each transaction; it could not be interpreted otherwise as the adjustment “must be made within a maximum of 4 years after the accrual date of the tax on the transaction”.

In the light of queries from the business sector, it is necessary to clarify what is understood to be a “transaction”, for the purposes of determining the taxable base and also for the purposes of the records provided for in article 3 of Royal Decree 400/2021, or 8 June.

A transaction is understood to be:

a) In online advertising services:

1) If the advertising shown is the result of agreements between the taxpayer and the advertiser, or their representative, each agreement entered into between them for the purposes of providing online advertising services (usually relates to an advertising campaign).

2) If it is programmatic advertising, where the advertisements are included on the owner of the digital interface's advertising spaces (directly or via an affiliate network) using platforms that serve to optimise and automate the sale of advertising spaces ["Supply Side Platform" (SSP)], the set of services provided to the taxpayer by each one of the platforms during the settlement period.

b) In online intermediary services with an underlying transaction, each intermediary service carried out with regard to each underlying delivery of goods or provision of services facilitated by the digital interface.

c) In other online intermediary services, each contract entered into between the taxpayer and users for the purpose of opening or renewing the account.

d) In terms of the transmission or assignment of data, each contract entered into by the taxpayer with the recipient of them for the purpose of providing data transmission services.

Regarding accrual, in accordance with article 9 of the Tax Law, this will occur when "the taxable transactions are provided, performed or carried out". The taxpayer may demonstrate when the accrual occurred by any means of proof admissible under Law. In particular, it may be considered that the transaction has been provided, performed or carried out on the issue date of the invoice, or similar document. However, in transactions subject to tax that give rise to advance payments prior to carrying out the taxable event, the tax will become due at the moment of total or partial receipt of the price for the amounts effectively received.

Taxable base. Sections 1 and 2 of article 10 of the Tax Law provide that:

"1. The taxable base for the tax will be made up of the amount of the income, excluding, as appropriate, Value Added Tax or other similar taxes, obtained by the taxpayer for each provision of digital services carried out in the territory where it is applicable.

In the provision of digital services between entities in the same group, the taxable base will be their normal market value.

2. For the purposes of determining the taxable base for the tax the following rules will be taken into account:

a) In the case of online advertising services, the proportion representing the number of

times the advertising appears on a device in Spanish territory compared to the number of times it appears on any screen, regardless of their location, will be applied to total revenue.

b) In the case of online intermediary services with delivery of goods or provision of underlying services directly between users, the proportion representing the number of users in the territory where the tax applies compared to the total number of users involved in this service, regardless of their location, will be applied to total revenue.

The taxable base for other online intermediary services, will be determined by the total revenues directly from users when accounts with access to the digital interface used were opened using a device located at the time in territory where the tax applies.

For the purposes of the provisions of the previous paragraph, the time when the account used was opened is immaterial.

c) In the case of data transmission services, the proportion representing the number of users who generated these data who are in the territory where the tax applies compared to the total number of users who have generated these data, regardless of their location, will be applied to total revenue.

For the purposes of the provisions of the previous paragraph, the time at which the data were transmitted is irrelevant".

Once settled that this is a transaction-based tax, according to article 10.1 of the Tax Law, the taxable base will be made up of the amount of income, excluding VAT and similar taxes, obtained by the taxpayer for each transaction carried out in the territory where it applies.

Therefore:

– If the transactions are limited to the territory where the tax applies, the taxable base will be made up of the total income obtained in Spain. In this case, it will not be necessary to resort to the rules in article 10.2, in as far as all the transactions take place and the users are located in Spanish territory.

– In the case of transactions that are outside the territory where the tax applies, but have a specific geographic area of reference, the rules provided for in section 2 of article 10 will be applied to the total income from the transaction to determine the part relating to Spanish territory.

– Finally, in the case of transactions that do not have a specific geographic area of reference, the total worldwide income will be taken and the rules in article 10.2 will be applied to determine the part relating to Spanish territory.

In conclusion, in cases where the geographic scope of the transactions goes beyond the territory where the tax applies, article 10.2 of the Tax Law should be taken into account as, for the purposes of calculating the base, it establishes rules to exclusively tax the part of the transactions relating to users located in the territory where the tax applies in relation to the total users.

The rules used to determine the taxable base vary depending on the category of service subject to tax (online advertising service, online intermediary service or data transmission service).

Online advertising services. In online advertising services, income obtained by the taxpayer will be understood to be the total consideration received for the taxed service for including advertising.

Online intermediary service with underlying transaction. The taxable base is made up of all the sums paid to the taxpayer by the interface users in each transaction.

The ways used to calculate the sums receivable or the fact that the taxpayer is paid a commission by the purchasing user and another by the selling user are irrelevant. All commission received will be subject to tax.

Interaction services with no underlying transaction. The taxable base will be made up of the amount received by the taxpayer for subscription to or opening the account that allows the user to access the multi-faceted digital interface.

Data transmission service. The taxable base will be made up of the amount received by the taxpayer for data transmission in a transaction.

Adjustment and rectification of the taxable base. Article 10, sections 3 and 4. Furthermore, sections 3 and 4 of article 10 of the Tax Law provide:

"3. If the amount of the taxable base is unknown in the settlement period, the taxpayer must set it provisionally, applying grounded criteria that take into account the whole period in which income will be generated from the provision of digital services, without prejudice to its adjustment when the amount is known, with the relevant self-assessment relating to the settlement period.

The adjustment must be carried out within a maximum of 4 years following the accrual date of the tax corresponding to the transaction.

4. When the taxable base has been incorrectly calculated, the taxpayer must rectify it in accordance with the provisions of the General Tax Law 58/2003, of 17 December, and its implementing regulations."

Now is the time to clarify the content of those sections.

The law clearly distinguishes two procedures for rectifying the taxable base, depending on whether this was unknown at the time of the tax return and was set provisionally (section 3), or whether, being known, it was incorrectly declared (section 4).

In the latter case - incorrect calculation of the taxable base involving an incorrect self-assessment of the tax payable in the relevant period - the law regulating the tax declares that the general adjustment procedure provided for in the GTL is applicable.

By virtue of this general procedure, when the party liable for the tax payment must pay

in an amount that is higher than was initially self-assessed, they must submit a supplementary self-assessment for the same settlement period which will be extemporaneous (sections 1 and 2 of article 122 of the GTL). On the other hand, and in accordance with general tax regulations, when the amount to be paid in is less than that initially self-assessed, the taxpayer may submit a request for rectification of the previous self-assessment (articles 120.3 and 122.2 of the GTL) by the procedure legally provided for in articles 126 to 129 of the General Regulations on tax management and inspection actions and procedures and implementing common rules for tax application procedures, approved by Royal Decree 1065/2007, of 27 July (hereafter, RGAT), and, at the same time, requesting the relevant refund.

Nevertheless, when the taxable base for the settlement period cannot be known, the law regulating the tax determines that this should be provisionally set, applying grounded criteria. Later, when the amount is known, this is adjusted within a period of 4 years from when the tax accrued, in accordance with a special procedure provided for in the aforementioned section 3 of the law itself.

Section 3 of article 10 of the Tax Law expressly states: “without prejudice to its adjustment when the amount is known, with the relevant self-assessment for that settlement period”.

An interpretation of the section is needed to clarify whether the law requires an adjustment to the self-assessment for the period in which the taxable base was provisionally determined, the period of origin, or the self-assessment for the period in which the taxable base was definitively known.

Like all tax laws, article 10.3 of the Tax Law should be interpreted pursuant to the criteria provided for in sections 1 and 2 of article 12 of the GTL, which is the basic law for the tax system, and which state:

"1. Tax laws will be interpreted pursuant to the provisions of section 1 of article 3 of the Civil Code.

2. Where not defined in the tax regulations, the terms used in its regulations will be understood according to their legal, technical or usual meaning, as appropriate.”

In addition, section 1 of article 3 of the Civil Code, referred to in the GTL, reads as follows:

"1. The rules will be construed according to the proper meaning of their wording, in connection with the context, with their historical and legislative background and the social reality of the time in which they are to be applied, mainly attending to their spirit and purpose.”

In line with the above, it follows that to interpret the expression “without prejudice to its adjustment when the amount is known, with the relevant self-assessment for that settlement period”, attention must essentially be paid to the proper meaning of the words in the context of section 3, which includes the expression, and mainly attending to the spirit and purpose of the law that provides for a special adjustment procedure.

In accordance with the provisions of article 7.1.d) of the GTL, regulating the sources of the tax system, the Tax on Certain Digital Services is ruled by the special law regulating it, that is to say the Tax Law and the GTL. Specifically, article 10.3 of the Tax Law provides for a special procedure apart from the general procedure in the GTL to adjust the taxable base declared, which was provisionally set as its definitive amount was unknown. The interpretation of the section should, therefore, be made paying attention to the purpose of the special procedure.

Where the law requires the adjustment to be made when the amount of the taxable base is definitively known, “with self-assessment relating to the settlement period”, it seems to say that it is precisely the self-assessment relating to the settlement period in which the taxable base is definitively known in which the adjustment must be made to the base provisionally declared previously.

This is deduced not just from the actual meaning of the wording, but also taking into account the speciality of this adjustment regulation provided for in the tax law itself.

Furthermore, it should be considered that, if the purpose of the regulation had been to undertake an adjustment using the general procedure in the GTL, it would have been enough to refer to that law, as provided for in section 4 of article 10 in the case of incorrect calculation of the taxable base.

Moreover, it makes no sense that section 3 of article 10 refers to adjustment “with self-assessment relating to the settlement period”, as this is understood to be the original settlement period that the definitive taxable base is allotted to. This is because, pursuant to the general procedure in the GTL, this would only be applicable for making an adjustment with a supplementary self-assessment, when this results in a higher amount payable (sections 1 and 2, article 122 of the GTL), but not for adjustment where a lower amount is payable, for which reason, in this case, it should be made with the relevant request for rectification of the self-assessment using the procedure legally provided for as required by the resolution from the Tax Office (article 120.3 of the GTL and articles 126 to 129 of the RGAT).

In conclusion, it can be deduced that article 10.3 of the Tax Law is providing for a special procedure for the adjustment of the taxable base set provisionally, when this cannot be known in the settlement period it was generated in. Therefore, within 4 years after accrual, the adjustment must be included in the self-assessment relating to the settlement period in which the definitive amount of the taxable base is known. Therefore, this is a special system provided, as it could not be otherwise, by a special law in the tax law itself.

On the other hand, an analysis should be performed as to whether the special adjustment procedure in article 10.3 of the Tax Law will require the obligation to pay interest on late payment in favour of, or against, the party liable for the tax payment, depending on whether the adjustment amount is negative or positive, respectively, and the obligation to pay the surcharge on an extemporaneous tax return in article 27 of the GTL, in the event of a positive adjustment, that is to say, where there is a higher amount payable.

In relation to the eventual obligation to pay the surcharge for untimeliness, this should

be studied in the light of the concept of the surcharge for untimeliness in article 27 of the GTL.

Therefore, it is necessary to point out that there is no definition of such surcharge in the tax regulations. However, Constitutional Court (hereafter, CC) case law, including the sentence of the CC Plenary Session 276/2000, of 16 November, makes an analysis of the surcharges with key points about them.

Therefore, the CC defines the surcharges with the following points:

– They are not a penalty.
– They are a reparatory measure.
– They have a coercive, dissuasive or stimulative function.

If we centre on the last point, that is to say, the coercive, dissuasive or stimulative nature of the surcharge, it should be pointed out that the point requires and presupposes the existence of the free will of the taxpayer who, being able to comply by submitting the self-assessment on time, does not submit the self-assessment on time, submitting it late but without having received a request to do so. By doing so, the action generates the obligation to pay the surcharge ex lege.

Therefore, in the opposite case, if there is no free will on the part of the taxpayer, that being able to submit the self-assessment on time it is not submitted, the prior requirement for the obligation to pay the surcharge due to untimeliness will not be met.

In the case of article 10.3 of the Tax Law, such free will of the taxpayer justifying, in the last instance, the eventual application of the surcharge as a coercive, dissuasive or stimulative measure would not exist, in as far as the taxpayer could not submit a complete, correct self-assessment due to the objective, exogenous circumstance of lacking knowledge about the taxable base for the settlement period and, therefore, having to set it provisionally, using grounded criteria.

In the last instance, this constitutes a cause of force majeure justifying non-application of the surcharge for untimeliness in article 27 of the GTL in the case in article 10.3 of the Tax Law. This non-application occurs as long as the adjustment is made in the self-assessment submitted within the deadline for the settlement period in which the amount of the adjusted taxable base is known.

Moreover, the foregoing conclusion on non-application of the surcharge for untimeliness due to force majeure is consistent with the Central Economic-Administrative Court's doctrine. Therefore, the decision of 17 July 2014 (second grounds in law) states:

"As a matter of fact, and in application of the provisions of article 1105 of the Civil Code, of supplementary application to tax obligations according to the provisions of article 7.2 of the General Tax Law and 1090 of the Civil Code itself, the birth of the obligation may be excluded where the non-compliance was caused by unforeseen circumstances or force majeure (...).

Accrual of the surcharge due to late submission with no demand is not conditional on

demonstrating the guilt or negligence of the party liable for the tax payment, as this is not provided for by the law and is not a penalty regulation by nature. In this event, as stated by this CEAC on previous occasions (00/4063/2010 of 26/04/2011; 00/4732/2011 of 28/11/2013) the birth of this ancillary obligation may only be avoided where unforeseen circumstances or a case of force majeure occurs
(…)."

A similar case of non-application of the surcharge for untimeliness caused by force majeure, such as the one provided for in article 10.3 of the Tax Law, a provisional taxable base for the settlement period due to lack of data that is adjusted later on, is to be found in the Tax on the value of electric energy production, regulated in Law 15/2012, of 27 December, on tax measures for sustainable energy.

Article 10.1 of Law 15/2012 provides that:

"1. Taxpayers are under the obligation to self-assess the tax and pay the tax due within the month of November following the accrual of the tax, (...). The final electricity generation measurements must be taken into account for these purposes."

This was resolved in a tax consultation from this Management Centre (CV 1652-15, of 27 May), which stated the following:

"If the taxpayer lacks the definitive details to settle the tax as a result of the lack of supply, within the deadline, of the definitive production data by the relevant organisation or institution on the electricity market, the taxpayer must submit a self-assessment based on the data that they know of provisionally and, subsequently, once the definitive data are known, proceed to correct the first self-assessment.
(…)

In the case subject to consultation, the free will of the taxpayer justifying, in the last instance, the eventual application of the surcharge as a coercive, dissuasive or stimulatory measure would not exist, in as far as the taxpayer could not submit a complete, correct self-assessment due to the objective, exogenous circumstance of lacking knowledge about the final electricity production measurements, as the data were not supplied by the Market Operator, System Operator or the CNMC, the bodies that legally have the functions of settlement and communication of the payments and receipts on the system.

In the last instance, this constitutes a cause of force majeure that justifies the non-application of the surcharge for untimeliness in article 27 of the GTL in the case under consultation."

Another, very different matter is the obligation to pay interest on late payment in favour of or against the party liable for the tax payment, as a result of the special adjustment in article 10.3 of the Tax Law, depending on whether there is an amount to be refunded (negative adjustment) or paid (positive adjustment), which, at any event, would be demanded in accordance with the provisions of article 26 of the GTL.

The CC has ratified the compensatory nature of interest on late payment, confirming in the ninth grounds in law in its sentence number 76/1990, of 26 April, that interest on

late payment, “is a type of specific compensation, in accordance with an objective model, at financial cost which for the Tax Office means not having amounts of money that are legally due to it on time”. In the case of interest in favour of the party liable for the tax payment, this is to compensate the financial cost of not having amounts of money available which have been unduly paid to the Tax Office.

In any event, it should be emphasised that for the surcharge for late submission not to be applied, the factual conditions legitimising the application of the provisional calculation of the taxable base under article 10.3 of the Tax Law must be complied with, that is to say, that its amount is unknown and that grounded criteria are used for its provisional calculation under the terms given. Therefore, if those criteria are not complied with, the special adjustment mechanism described in article 10.3 of the Tax Law will not apply, and the general rules provided for in the GTL will be applied instead.

VI

This Resolution, based on the previously reproduced article 12.3 of the GTL, will have a binding effect on the Tax Office’s bodies and organisations in charge of levying taxes from its publication date in the “Official State Gazette”.

Madrid, 25 June 2021 - The Director General of Tax Affairs, María José Garde Garde.