

Renewable energies sector: possibility of applying the exemption of Article 21 CIT Law in the transfer of SPVs shares

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Tax area

Legal alert

The construction and start-up of renewable energy production installations, whether solar photovoltaic plants or wind farms, requires many procedures and the project goes through the achievement of numerous milestones, the most important of which is the achievement of "ready to build" (RTB) status, i.e. the moment when all the necessary permits, licenses and authorizations for the construction of the plant have been obtained.

The Directorate General of Taxation (DGT) has recently recognized the possibility of applying the exemption of article 21 of the Corporate Income Tax Law (CIT Law) (95% exemption, in general) to capital gains derived from the transfer of shares in subsidiaries dedicated to the development of photovoltaic solar plants, considering that they develop an economic activity from the moment in which there is a clear will to carry out such development activity, even if the construction works have not been started. It has done so in the binding consultation V2200-23, dated July 26, 2023, published in September 2023 (the "Consultation").

The Consultation represents a change of criterion with respect to the position previously adopted by the DGT in its reply to binding consultation V2265-21, in which it qualified as an asset-holding company an entity that had processed and obtained all the necessary permits for the development of the installation, but had not started the development of the solar plant, considering that such actions were "*simple preparatory actions or actions tending to start the effective development of the activity*". Therefore, it was understood that there was no material start of the activity and, consequently, the assets were not considered to be assigned to an economic activity. Hence, the DGT concluded that the aforementioned exemption was not applicable.

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A change of criterion on the part of the DGT began with the publication of the binding consultation V0863-23 which, although it referred to the online gaming sector, represented an important precedent. By virtue of this, we had already stated [in a previous publication](#) that the criterion established by the DGT could be applied to the case of RTB projects in the renewable energies sector.

In the Consultation analysed here, it is determined that the capital gain obtained in the sale by a holding company of the participation in some subsidiaries (which are SPVs) wholly owned, whose main activity is the management, purchase and sale and technical analysis of all types of renewable energy production installations, as well as the promotion, marketing and operation of photovoltaic plants, can benefit from the aforementioned 95% exemption. These subsidiaries are processing and promoting several photovoltaic projects in Spain, although all the SPVs are in a promotion or development phase, and in no case have started the construction works of the photovoltaic solar parks, since they are processing the appropriate permits, licenses and authorizations to reach the RTB status.

Likewise, the SPVs, during the processing and legalisation stage of the projects, do not have their own staff to carry out this economic activity, but have opted to outsource all the work to the holding company. Therefore, the material and human resources of the SPVs to carry out the administrative activity of developing photovoltaic solar plants come from the holding company and from the rest of the suppliers that have been previously selected and validated by the holding company.

In this context, and based on certain case law and administrative doctrine (citing rulings of the Supreme Court and the National Court, as well as two resolutions of the Central Economic-Administrative Court), the DGT concludes that, in view of the circumstances of the case, it can be considered that each of the SPVs carries out the activity of promotion or development of photovoltaic solar plants, so that these entities would not be considered as an asset-holding company, since their elements would be assigned to the development of an economic activity.

In short, the DGT states that, to the extent that the activity carried out by the SPVs determines the existence of a management, on its own account, of means of production or human resources, its own or those of third parties, with the purpose of intervening in the production or distribution of goods or services in the market, the entity that transfers the shares may apply the exemption of article 21 of the CIT Law on the capital gain obtained as long as it complies with the rest of the requirements established in the aforementioned precept. Therefore, the DGT extends to the renewable energies sector the criterion it had recently expressed in relation to the online gaming sector, thus abandoning the criterion followed in the aforementioned binding consultation V2265-21, which generated so much stir in the sector.

However, the DGT itself introduces in its reply a safeguard by stating that "*this is a question of fact that the taxpayer must prove by any means of proof admitted in law*", and its assessment corresponds to the competent bodies in matters of verification of the Tax Administration.

Therefore, in view of the above, we consider that it is necessary to analyse the specific circumstances of each case in order to determine whether we are faced with a factual situation that allows us to apply the criterion expressed by the DGT in the binding consultations analysed.