

## New Spanish National court criterion restricts software development projects access to Innovation technology tax credit.

Spanish National Court (NC) has pronounced recent judgements (\*) on similar cases in which the Spanish tax authorities (STA) regularize Technological Innovation (TI) tax credits applied by Corporate income taxpayers for software development projects. In the cases subject to review, the Companies had a reasoned report from the Ministry of Science and Innovation qualifying the activities as TI.

▶ Spanish Corporate income tax Law does not specifically regulate software within the basis for the TI tax credit but it only admits certain cases including:

1. Activities for technological diagnosis aiming at identifying, defining and orienting advanced technological solutions, irrespective of their results.
2. Industrial design and production processes engineering (...).

▶ The question under discussion is whether software fits into paragraph 2 above as “production processes engineering”, given that software programs are specifically excluded from an industrial design activity in article 1.2.b) of Law 20 / 2003 for the legal protection of industrial design.

▶ Th NC refines the concept of “production processes engineering” based on the analysis of the arguments provided by public servants forming part of the TI support team of the STA Central delegation of big-seized taxpayers and considers that:

- Reasoned reports issued by the Ministry of Science are binding in relation to the accomplishment of the requirements to qualify the activities whilst the tax credit basis computation is the sole competence of the STA.

- Production processes engineering is a specialized discipline in the field of business process engineering that is focused on the production context but which does not include the development of computing tools, as this latter is a complementary activity but not a production process engineering per se.

- Spanish CIT regulations do not specifically mention software developments expenses in any of the deductible concepts for TI and the division in similar phases of developments of prototypes and software which does not qualify as a prototype does not constitute a valid criterion to conclude that the expenses can be assigned to the tax credit basis.

▶ What’s next:

- It is highly likely that the STA may follow this criterion in upcoming tax audits.
- Until the Spanish Supreme Court judges on open cases, we strongly recommend reviewing which expenses have been taken into account to calculate the basis of the tax credit in cases similar to the ones analysed and quantifying, in so much as possible, any potential tax risk. What is more, we recommend valuating whether additional defence file can be prepared to supplement the taxpayers’ arguments in any eventual tax audit procedure.
- In the future, we would expect an update of the CIT Law wording so as to specify that software development expenses are included in the tax credit basis, so as to help enhance legal certainty to taxpayers.

(\*) National Court judgements 5731/2022, 5529/2022, 5530/2022 and 5537/2022



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