

THE INWARD
INVESTMENT AND
INTERNATIONAL
TAXATION REVIEW

NINTH EDITION

Editor
Tim Sanders

THE LAWREVIEWS

THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW

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PREFACE

There have been significant recent changes in the global tax landscape as highlighted in the OECD annual report on global tax policy reforms published on 5 September 2018. The report noted the impact of major tax reform in a number of countries, notably in the United States, Argentina and France. At the time the US tax reform became effective on 1 January 2018, Goldman Sachs estimated there was US\$3.1 trillion of overseas profit kept outside the United States, which highlights the significance of this reform. One aspect of the US tax reform was lowering of corporate taxes, which reflects a global trend, with the average corporate income tax rate across the OECD dropping from 32.5 per cent in 2000 to 23.9 per cent in 2018. Other tax reform trends identified were the lowering of personal income taxes and new excise taxes, to deter harmful consumption, such as sugar taxes.

An area where coordinated tax reform has not materialised, despite being identified as a key area in the BEPS Action Plan in 2015, is in the taxation of the digital economy. The OECD produced an interim report in April 2018, with further work scheduled for 2019, with the aim of arriving at a 'consensus based solution by 2020'. Although there is widespread recognition of the need for change, consensus on how such change should come about has been limited. Some countries, including the UK, have decided to take unilateral action, pending an international solution. The UK's 2018 Autumn Statement announced a digital services tax (DST) to be introduced from April 2020. The proposal is that a 2 per cent tax will apply to the revenues above £25 million of certain digital businesses to reflect the value they derive from the participation of UK users, with consultation on the detail of the legislation to take place between now and the introduction of the tax in the Finance Act 2020. One may conclude that this reflects the UK's view on the likelihood of an OECD solution by 2020. The UK is not alone: Malaysia revealed plans in November 2018 to introduce a consumption tax on the supply of digital services to Malaysian residents from 1 January 2020; Quebec is introducing a digital sales tax in January 2019; and Chile, Uruguay and Colombia all have plans to tax foreign suppliers of digital services. Potentially, as more countries start to fill the vacuum with their own domestic digital taxes, the possibility of conflict with the regimes in other countries arises.

The potential for tax conflict, rather than competition, is not restricted to the digital economy and is much more likely than in recent years. It is possible that 2019 will see some nations retaliate to US tax reforms and also see the US and certain jurisdictions use tariffs and duties as weapons in their trade wars. Brexit is another potential source of tax conflict.

It is hoped that this volume will prove to be a useful guide to the tax rules in the jurisdictions where clients conduct their businesses. Each chapter aims to provide topical and current insights from leading experts on the tax issues and opportunities in their respective jurisdictions. While specific tax advice is always essential, it is also necessary to have a broad

understanding of the nature of the potential issues and advantages that lie ahead; this book provides a guide to these.

I should like to thank the contributors to this book for their time and efforts, and above all for their expertise. I would also like to thank the publisher and the team for their support and patience. I hope that you find the work useful, and any comments or suggestions for improvement that can be incorporated into any future editions will be gratefully received.

The views expressed in this book are those of the authors and not of their firms, the editor or the publishers. Every endeavour has been made to ensure that what you read is the latest intelligence.

Tim Sanders

London

January 2019

SPAIN

Raúl Salas Lúcia and Elena Ferrer-Sama Server¹

I INTRODUCTION

With more than 90 double taxation agreements and one of the best tax regimes for holding companies in the world, Spain has evolved from a purely inward investment country to a tax-attractive platform jurisdiction.

Indeed, the holding regime together with the extensive participation exemption make Spain the best gateway for two main regions: (1) Latin America, since owing to its cultural links Spain is surely the best platform for investing in that region and many multinational groups are using Spain; and (2) Europe, since given the favourable tax regime for holding companies, many groups could get access to the European single market without almost any tax burden.

Spain is a business-friendly jurisdiction with highly skilled and sophisticated tax authorities that are in favour of giving certainty by means of advance tax rulings and pricing agreements.

Aligned with base erosion and profit shifting (BEPS) OECD and EU principles, Spain is involved in, and leading some of, the international initiatives aimed to promote transparency and implementation of anti-avoidance provisions such as those provided by the Anti-Tax Avoidance Directive and the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.

II COMMON FORMS OF BUSINESS ORGANISATION AND THEIR TAX TREATMENT

i Corporate

Business can be developed by way of corporate entities, most commonly in the form of joint-stock companies (*sociedad anónima* or SA) requiring a minimum share capital of €60,000, or limited liability companies (*sociedad limitada* or SL) requiring a minimum share capital of €3,000. The responsibility of the shareholders is limited in both cases.

From the tax viewpoint, corporations, generally speaking, including not only SA and SL, but also other types of commercial companies, are subject to corporate income tax (CIT) regulations, which are levied on all legal entities resident in Spain.

Certain entities, mainly public entities and certain income of non-profit organisations, can be exempt from CIT.

¹ Raúl Salas Lúcia is a partner and Elena Ferrer-Sama Server is a director at Roca Junyent.

ii Non-corporate

There are non-corporate entities that could operate in businesses, such as the civil partnership or private equity funds.

CIT rules are also applicable to non-corporations, such as partnerships or lying heritages, provided they have a business purpose. Otherwise, in the event they do not have a business purpose, their income will be allocated (transparent) to their partners or co-proprietors. This is also the case regarding economic interest groupings, where profits or losses are taxed at the level of their co-proprietors.

Increasingly, individuals carrying out business activities – although taxed under personal income tax (PIT) – will apply, under certain cases, CIT rules when determining their business taxable income.

III DIRECT TAXATION OF BUSINESSES

i CIT

Determination of taxable profit

The taxable profit is the company's gross income for the tax period, less certain deductions. Its determination comes from the annual financial statements prepared under Spanish generally accepted accounting principles (SGAAP), as adjusted under certain statutory tax provisions.

The tax authorities are legally authorised to modify accounting results in order to determine tax results if they consider that the accounting results have not been calculated according to the SGAAP.

All necessary expenses and costs connected to producing income may be deducted from gross income to arrive at a taxable income determination. Additionally, the Spanish CIT Law provides for certain items that are never deductible (permanent differences) or are deductible in a different year (timing differences).

The standard tax rate is 25 per cent, although different rates may apply depending on activity and legal form (e.g., 30 per cent for banks).

Regarding costs, although all expenses incurred by the company will depress accounting profit, not all such expenses will be allowed for tax purposes. To be deductible, an expense must be correlated with the company's income. However, some expenses are considered non-deductible by the CIT Law: penalties, gifts, gambling losses, losses from intra-group sales, financial expenses with the group for intra-group acquisitions.

Capital gains and income

Capital gains are normally considered as ordinary income taxable at the standard CIT rate (generally 25 per cent) in the tax period they arise.

As explained below, participation exemption applies to capital gains arising on the transfer of shares when at least 5 per cent participation (or a participation value of over €20 million) is held for an interrupted period of at least one year, the transferred entity is an operating entity and certain other requirements are met.

Losses

Tax losses may be carried forward indefinitely, although any deduction is limited to 70 per cent of the positive taxable income before the application of the tax benefit for the capitalisation reserve and other specific items. Tax losses of at least €1 million can always be offset without limitation.

There are additional limitations for large companies and tax groups. When their turnover in the previous 12 months to the taxable period commencement reaches:

- a* €20 million: tax losses offsetting cannot exceed 50 per cent of the yearly taxable income before capitalisation reserve and tax losses are offset; and
- b* €60 million: tax losses offsetting cannot exceed 25 per cent of the yearly taxable income before capitalisation reserve and tax losses are offset.

The CIT Law provides anti-avoidance rules to prevent tax losses being utilised when there is a change in the control.

Rates

The standard CIT tax rate is 25 per cent and it applies to most companies, although there are other specific rates:

- a* special tax rates apply to certain activities such as banking, mining, oil and gas that are subject to a 30 per cent tax rate;
- b* non-profit entities are subject to a 10 per cent tax rate; and
- c* investment funds and UCITs are taxed at 1 per cent.

Apart from that, there is a special 15 per cent rate for newly created companies, applicable to the first tax period in which profit is obtained and the following period.

Administration

The tax year for CIT purposes matches with the accounting financial period, which may be other than a calendar year, but cannot exceed 12 months.

Corporate taxpayers must file tax returns within 25 days after six months following the end of the tax year.

Companies must make three advance payments on account of CIT during the first 20 days of April, October and December, calculated as follows depending on the turnover of the previous 12 months to the start of the taxable period and on the applicable tax rate (all below rates only apply to those companies subject to the 25 per cent CIT rate):

- a* companies with a turnover under €6 million must pay 18 per cent of the gross tax due liability of preceding tax year generally;
- b* companies with a turnover over €6 million and under €10 million must pay 17 per cent of the taxable income for the year to date; and
- c* companies with a turnover over €10 million will make an advance payment resulting from the higher of the following amounts:
 - 24 per cent of the taxable income for the year to date, reduced by withholding and current year payments in advance; or
 - 23 per cent of the positive accounting profit for the same period reduced by current-year payments made in advance.

The statute of limitations for an assessment is four years as from the end of the voluntary filing period.

Tax grouping

The Spanish CIT Law allows Spanish tax resident companies and Spanish permanent establishments (PEs) belonging to a Spanish or multinational group to be taxed as a single group and, therefore, apply a special tax consolidation regime for CIT purposes.

To apply this regime, the main requirements are as follows:

- a* the Spanish companies should be owned (directly or indirectly) by the same parent company (either resident or non-resident);
- b* the parent company (either resident or non-resident) of the tax group must hold a direct or indirect minimum holding of 75 per cent (70 per cent for quoted companies) and the majority of voting rights in the Spanish companies belonging to the group;
- c* the above participation should be maintained during the whole taxable period; and
- d* the parent company cannot be tax resident in a tax haven.

The main characteristics of the tax consolidation regime are described below:

- a* the taxable income results from the sum of all the taxable incomes of each Spanish tax resident company of the tax group, corrected as established in the following points;
- b* tax losses of any of the companies of the tax group can be offset against any company tax profits;
- c* tax profits generated from intra-group transactions are deferred and only included in the consolidated taxable income when:
 - they are carried out with third parties;
 - one of the intra-group companies that is part of the transaction ceases to form part of the group; and
 - the consolidation regime is no longer applied;
- d* specific limitations apply concerning the offsetting of tax losses or the application of tax credits generated by the group companies before they formed part of the tax group; and
- e* no withholding applies on payments made at intra-group level.

Advance price agreement (APA)

Taxpayers and the Spanish tax authorities may negotiate APAs on transfer pricing issues. The Tax Agency is quite favourable to the use of APAs since they can provide certainty for both parties, out of the context of a tax audit.

Although legally the length of an APA is not supposed to be longer than six months, its negotiation always takes longer. The APA cannot cover longer than four years, although it can have retroactive effect to years within the statute of limitation.

The documentation provided to the Tax Agency in the course of an APA cannot be used in a tax audit.

Alternative dispute resolution

Spanish taxpayers also have access to 'the competent authority procedure' provided in the tax treaties signed by Spain following the OECD Model Tax Treaty and the Arbitration Convention (90/436/ECC Convention of 23 July 1990) concerning the elimination of double taxation that may arise in intra-group transactions within companies residing in EU countries.

Finally, Spain is yet to implement Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, which should be in force by 30 June 2019.

Means of appeal

After a tax audit, taxpayers are entitled to appeal the claim if they do not agree with it. Additionally, taxpayers might obtain suspension of the tax due under the claim, which in most cases would require a guarantee from the taxpayer.

With regard to appeals, a taxpayers have two alternatives: (1) appealing before the same body issuing the tax claim; or (2) appealing to an economic-administrative tax court.

Decisions issued by the Economic Court could be appealed to the Courts of Justice: to the Regional Courts of Justice or the High Court, depending on the amount of the claim.

Afterwards, there might be even another tier of appeal to the Supreme Court, but only when the case may create precedents, so the likelihood of accessing the Supreme Court is very limited.

Lastly, the appeal could reach the Court of Justice of the European Union (CJEU), although the taxpayer cannot directly request its involvement, but only through the Spanish tax court, if the court decides so.

ii Other relevant taxes

Value added tax (VAT)

Spanish VAT regulation implements the EU directives on VAT.

VAT is levied on the supply of goods and services provided by entrepreneurs and professionals, intra-Community acquisitions and imports of goods into Spain.

The concept of entrepreneurs and professionals includes a large number of assumptions, but basically refers to those persons (physical or legal) who carry out business or professional activities, meaning those that involve the commissioning of material and human factors of production, or one of them, for their own account in order to intervene in the production or distribution of goods or services.

The territory of application of the tax is the peninsula and the Balearic Islands. In the Canary Islands, Ceuta and Melilla other indirect taxes are applied (IGIC and IPSI, respectively). The operation of IGIC is similar to that of VAT with some differences with regard to exemptions. On the other hand, the IPSI is a basic sales tax.

There are three different rates of VAT: 21 per cent (general rate applied to regular deliveries of goods and services); 10 per cent (reduced rate applied to basic needs); and 4 per cent (super-reduced rate applied to basic needs other than those classified in the reduced rate). The ordinary rate of the IGIC is 7 per cent, and the other rates are zero per cent, 3 per cent, 9.5 per cent, 13.5 per cent and 20 per cent.

VAT group

When a Spanish parent company owns at least 50 per cent of one or more Spanish subsidiaries (dependent), all of them taxable in Spain, they could opt for the VAT group regime.

Within this special regime there are two forms of taxation: (1) basic level: the result of VAT tax returns of all members is aggregated and, if so, compensated; or (2) advanced level: the group is taxed like a single entity and internal operations do not generate VAT.

Regarding capital goods, their cost must be fully imputed within the period of regularisation of the quotas corresponding to the aforesaid goods.

Property transfer tax (TPO)

TPO applies to transfer of goods and rights when the transferor is a private individual. It also applies to real estate transfers and real estate leases when the seller is an entrepreneur but the operation is exempt from VAT.

Transfer of shares is exempt from both VAT and TPO, but when the transfer is aimed at dissimulating the transfer of real estate owned by the company, the actual taxation of transfer of real estate is applied.

TPO tax rates are 6 per cent for the transfer of real estate, as well as for the constitution and transfer of rights *in rem* over them; 4 per cent in the case of the transfer of movable property and livestock; and 1 per cent in the case of constitution of rights *in rem* of guarantee, pensions, bonds or loans.

The above rates may change from one region to another, since regional authorities have competence to increase those tax rates.

Tax on financial transactions

In October 2018 the government announced a draft of law that would establish a new tax on financial transactions; this tax would apply to acquisition of shares in traded Spanish companies when they have a market capitalisation above €1 billion. The tax amounts to 0.2 per cent of the consideration paid exclusively for the shares and the taxable person is the intermediary acting in the operation.

The above-mentioned draft of law requires parliamentary approval.

Tax on certain digital services

Also in October 2018, the government announced another draft of law whereby the ‘Google Tax’ is enacted. The tax requires parliamentary approval.

This tax applies to companies with worldwide turnover of over €750 million or Spanish income subject to this tax of over €3 million. The tax rate amounts to 3 per cent of income resulting from rendering digital services as defined in the draft of law.

Local property tax (IBI)

This tax is a direct municipal tax, periodic, real and mandatory in all councils, which taxes the value of real estate. The rate of taxation will vary depending on the city council, ranging from 0.3 per cent to 1.1 per cent of the cadastral value.

Stamp tax (AJD)

Stamp tax (document duties and registration fees) is levied on notarial instruments and records documenting transactions that need to be registered in public registries. The tax rates range from 0.5 per cent to 1.5 per cent of the operation value.

Net wealth tax (NWT)

NWT is levied on all assets and rights of economic content held by an individual.

IV TAX RESIDENCE AND FISCAL DOMICILE

i Corporate residence

In general terms, an entity is deemed to be resident in Spain for tax purposes if at least one of the following requirements is met:

- a* it has been constituted under Spanish law;
- b* the registered office is located in the Spanish territory; and
- c* the effective management (direction and control of the activity) is located in the Spanish territory.

Under certain conditions, Spanish tax authorities can assume that an entity, located in a tax haven or a country with no taxation, is a tax resident in Spain. In order for this assumption to be applicable, the main assets and rights of the entity must be, directly or indirectly, located in Spain.

ii Branch or PE

Branches or PEs of foreign entities that are located in Spain are subject to CIT on their worldwide income.

However, a limitation in the deductibility of some of their expenses is imposed on PEs, such as payments (in the form of royalties, interests or commissions) made to its parent entity or any of its other branches as remuneration for technical assistance services or the transfer of goods and rights.

Nevertheless, administrative and management expenses derived from the parent entity might be deductible under certain conditions.

As regards the allocation of profits of PEs, reference is usually made to OECD guidelines and principles.

In practice, operating in Spain through a PE leads to uncertainty situations in terms of income allocation, as it is more difficult to be supported and sustained before the tax authorities than operating through a clearer frame (basically, resident subsidiary).

V TAX INCENTIVES, SPECIAL REGIMES AND RELIEF THAT MAY ENCOURAGE INWARD INVESTMENT

i Holding companies regime

The holding companies regime can be applied by entities, with material and personal means, whose corporate purpose includes the administration and management of participation in foreign entities.

Under this regime the distributions made by holding companies, of profits derived from exempt foreign-source dividends and capital gains, to foreign shareholders are not subject to withholding tax in Spain.

Additionally, the capital gains derived from the transfers of shares of holding companies that correspond to exempt dividends and capital gains are not taxed in Spain.

This regime will not be applicable if the shareholder of the entity applying the holding companies regime is located in a tax haven or a no-taxation country.

Participation exemption for dividends and capital gains, and capital losses

Dividends obtained by Spanish entities either from resident or foreign entities may be exempt from taxation under the participation exemption regime. Both domestic and foreign entities' dividends will be generally exempt when the following conditions are met:

- a* the recipient either owns at least 5 per cent of the distributing entity or has an acquisition cost higher than €20 million; and
- b* such stake has at least one year's seniority (the one-year seniority could be fulfilled afterwards).

In the case of a foreign subsidiary an additional condition is required. In order for the exemption to apply, the foreign subsidiary should be effectively subject to (and not exempt from) a tax similar to CIT at a nominal rate of at least 10 per cent; this requirement is understood to be met when a tax treaty is applicable and it includes an exchange of information clause.

It must be noted that specific requirements are demanded in case of indirect participation through a holding entity.

Furthermore, capital gains resulting from the sale of shares in both Spanish and foreign entities would be generally exempt from taxation when requirements for participation exemptions are fulfilled. In case of sale of foreign subsidiaries, the minimum taxation requirement must be met during all the years in which the participation has been held.

Capital losses from shares that could benefit from the participation exemption are not tax allowed, unless they come from liquidation with certain requirements.

Patent box

A partial exemption can be applied to the income obtained by entities from the transfer of the right to use or exploit certain assets (patents, utility models, registered advanced software, complementary certificates for the protection of medicines, phytosanitary products and legally protected designs), that have been generated by research, development and technological innovation activities. This partial exemption can amount to a maximum of 60 per cent of the income.

This partial exemption can also be applied to capital gains generated from the transfer of the above-mentioned assets to third parties. If the transaction is carried out between related parties, the partial exemption will not apply.

Capitalisation reserve

Entities that are taxed under the general and increased tax rates (25 per cent and 30 per cent, respectively) can apply a special reduction to their positive taxable base in an amount equal to 10 per cent of the increase in its net equity. The following conditions must be met in order to apply this reduction:

- a* there must be an increase in the entity's net equity that must be maintained during a five-year period; and
- b* a reserve for the amount of the reduction must be booked separately in the account balance. This reserve should be recorded as restricted reserves for, at least, a period of five years.

However, this reduction cannot exceed 10 per cent of the entity's positive taxable base prior to certain adjustments. The excess over the aforementioned limit can be carried forward for application in the following two years.

ii State aid

Spanish internal regulations establish certain tax incentives to promote investment by foreign companies in Spain, which reduce the tax burden in the field of taxation on company profits.

However, state aid is forbidden by the EU.

Start-up companies

In Spain, a series of incentives for start-ups were introduced in 2013 with the aim of boosting business creation and encouraging job creation. They consist in some measures on CIT and PIT that are applicable during the first years of an activity.

VI WITHHOLDING AND TAXATION OF NON-LOCAL SOURCE INCOME STREAMS

i Withholding on outward-bound payments (domestic law)

Provided that a double tax treaty (DTT) is applicable, the terms of such DTT should be observed. If there is no applicable DTT or a limit of taxation is not envisaged in the relevant DTT, payments made by a Spanish taxpayer to a non-resident entity will subject to withholding tax in Spain at the following general rates:

- a* the general rate is 24 per cent, except for 19 per cent for tax residents in the EU and EEA;
- b* 19 per cent on dividends and interest;
- c* 19 per cent on royalties paid to residents in the EU, Iceland and Norway, and 24 per cent in all other cases; and
- d* 19 per cent on capital gains.

For the application of a reduced rate or one of the exemptions described below, the taxpayer must be in possession of a tax residence certificate issued by the tax authorities of the country of the recipient.

ii Domestic law exclusions or exemptions from withholding on outward-bound payments

Dividends

According to the domestic law, dividends paid by a subsidiary to its EU parent company are exempt from withholdings when:

- a* the parent company holds at least a minimum holding of 5 per cent in the Spanish subsidiary (or alternatively, the acquisition cost exceeds €20 million) and the interest in the Spanish subsidiary has been held for at least one year before the dividends distribution (or will be held up to completing the one-year period);
- b* both the entity paying the dividends and the beneficial owner are subject to and not exempt from one of the corporate taxes mentioned in Article 2(c) of the Council Directive 2011/96/EU of 30 June 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States;

- c* the payment is not a consequence of the liquidation of the subsidiary; and
- d* both the entity paying the dividends and the beneficial owner have one of the legal forms listed in the Annexes to the Council Directive 2011/96/EU of 30 June 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

This exemption will not be applicable if the majority of voting rights of the receiving entity is directly or indirectly owned by non-residents in the EU, unless it is proven that the incorporation of the receiving entity is due to valid economic reasons and sound business reasons.

Interest

Interest paid to a resident in the EU will be exempt of withholding. This exemption does not apply when the recipient is tax resident in a tax haven.

Capital gains

Capital gains from alienation of movable goods (including shares) by tax residents in the EU are exempt from withholding, except in the following cases:

- a* the transferred shares are issued by a Spanish company whose main asset or assets are (directly or indirectly) assets located in the Spanish territory;
- b* the non-resident selling the company is a private individual that has held (directly or indirectly) at least a 25 per cent holding in the Spanish company at any time during the 12 months prior to the transfer; and
- c* when the transferor is a non-resident entity, the exemption will only apply if the domestic participation exemption requirements (described above) are fulfilled. This requirement aims to equalise the treatment of both residents and non-residents.

Royalties

Royalties paid to an EU Member State would be exempt from withholding when the following requirements are met:

- a* both the entity paying royalties and the beneficial owner have one of the legal forms listed in the Annexes to the Council Directive 2003/49/EC of 3 June 2003;
- b* both the entity paying royalties and the beneficial owner are subject to and not exempt from one of the corporate taxes mentioned in Article 3(a)(iii) to the Council Directive 2003/49/EC of 3 June 2003;
- c* both entities are resident in the EU and none of them is resident in a third country in accordance with a DTT;
- d* both entities are associated companies (i.e., (1) one has a direct minimum holding of 25 per cent in the capital of the other, or (2) a third company has a direct minimum holding of 25 per cent in the capital of both entities). This holding should be held for a minimum holding period of one year that may be completed after the payment; and
- e* the entity that receives those royalties should receive them for its own benefit and not as an intermediary, such as an agent, trustee or authorised signatory, for some other person and, when the recipient is a PE, the received royalties should effectively be connected with that PE's activity and it should be a taxable income for the PE.

This exemption over royalties will not apply when the majority of voting rights of the receiving entity is directly or indirectly owned by a non-resident in the EU unless it is proven that the incorporation of the receiving entity is due to valid economic reasons and sound business reasons.

iii DTTs

Currently, Spain has entered into DTTs with more than 90 countries, the main aim of which is to eliminate double taxation and provide for reduced rates of withholding taxes of dividends, interests and royalties. DTTs concluded by Spain are generally compliant with the provisions set forth by the OECD.

A certificate stating that the taxpayer is a resident in another contracting state is required for a non-resident to benefit from the provisions of a treaty. Certificates of residence are valid for one year.

Taxation on foreign-sourced income

Dividends from foreign subsidiaries might benefit from the participation exemption as described above.

Profit from foreign PE of Spanish companies could benefit from income exemption, as could dividends.

Other income from abroad might benefit from double taxation relief (credit method), which in certain cases could be more beneficial than the exemption method.

VII TAXATION OF FUNDING STRUCTURES

i Thin capitalisation

Thin capitalisation rules were replaced by rules preventing earnings stripping rules.

ii Deduction of finance costs

As a general anti-avoidance rule, interest paid to a group entity incurred in order to acquire shares or increase equity interests in other group members is wholly non-deductible (tainted financial expenses), unless the operation might pass a test business purpose.

Remaining net finance cost (this is the net amount of financial income and cost, excluding the above-mentioned tainted financial expenses) is deductible up to an amount equal to 30 per cent of the operating profit defined as the accounting operating profit eliminating the effect of (usually increasing):

- a* the amortisation of fixed assets;
- b* the subsidies for non-financial fixed assets and others; and
- c* the depreciation for impairment of fixed assets as well as the gains or losses derived from the transfer of fixed assets.

The resulting amount should be increased with dividends derived from entities when the stake represents at least 5 per cent of their share capital, or, alternatively, has an acquisition cost exceeding €20 million. This rule will not apply to dividends from subsidiaries that have been acquired from other companies of the group with group debts generating tainted non-deductible financial expenses referred to above.

Net financial cost above 30 per cent of operating profit could be carried forward and deducted in the following tax years (with no term limitation) within the same limit of 30 per cent of the annual operating profit.

Conversely, if net financial cost is below 30 per cent of operating profit (e.g., capacity excess) that excess of capacity may be carried forward to deduct more financial cost in the following five years.

The above limitations do not apply when:

- a* net financial cost does not exceed €1 million;
- b* the entities are incorporated under the legal form of insurance or financial entities; or
- c* in case of entities belonging to a tax unit or tax consolidation group, all the above calculations (net financial cost, operating profit, etc.) would be referred to the whole group.

LBO operations

There is a special rule for interest allowance in case of leveraged buyout operations (LBOs) whereby the above-mentioned 30 per cent operating income limit should exclude acquired entities operating income provided that the latter has been merged into the acquiring entity (or acquiring entity's tax unity) within four years following the target company acquisition.

Two considerations should be made in relation to this LBO additional limitation:

- a* this limitation does not prevent the general interest barrier rule from being applied, therefore, the rule that determined the lower amount of interest will be the applicable one; and
- b* the LBO specific limitation rule will not apply if the interest bearing debt does not exceed 70 per cent of the purchase price of the shares and is proportionally reduced during eight years following the acquisition, until the debt reaches 30 per cent of the purchase price.

iii Restrictions on payments

Dividends

Spanish corporate law provides that dividends or distributions of the earnings for the financial year are decided by shareholders at general meetings on the basis of an approved balance sheet.

Dividends may only be drawn on the year's profits or freely available reserves if:

- a* the requirements laid down by law and in the by-laws are met; and
- b* the value of the corporate equity is not, or as a result of such distribution would not be, less than the company's capital.

Regardless of the above, dividends distributions are subject to the following additional limitations:

- a* the dividend distribution should not entail a direct or indirect distribution of any profit directly allocated to equity;
- b* in the event of losses in preceding years that reduce corporate equity to less than the company's capital, profits shall be used to offset such losses; and
- c* profit distribution shall likewise be prohibited if the amount of the distributable reserves comes to less than the sum of the research and development expenses shown as assets on the balance sheet.

When there is an adverse tax treatment for dividend distribution, an alternative to be considered could be the purchasing (back) of shares by the company, which could be done with certain limits. Share buy-backs are not deemed a distribution of dividends, but a sale of shares that accordingly generates capital gains or losses to the shareholder.

Board of directors' retributions

Despite being quite a controversial issue, any retribution paid to a director (including salaries when together with their position in the board the director also acts as senior management of the company) should be expressly provided in the company by-laws, since otherwise retributions are not tax deductible.

Financial assistance

Spanish companies must also be aware of an issue called financial assistance, which is designed to stop a target assisting by any means in its own transfer.

iv Return of capital

Shareholder contributions can take three main forms: share capital, share premium and equity contributions. As a general principle, it is advisable to contribute as little capital as possible and as much share premium as possible since share premium is equity (solvency) but it gives the shareholder more flexibility when it comes to capital reduction, losses or dividend distributions.

Repayment of capital should be approved by the general meeting and it is subject to approval by a qualified majority of the shareholders, the reduction of the capital should be executed in a public deed and sometimes it is also required to be published.

From the tax perspective, when the capital repayment is executed by means of a shares cancellation, 1 per cent stamp duty applies to the equity refunded to shareholder; where shares are bought back usually no transfer tax applies.

Anti-hybrid provision

As of 2015 there are two limitations in connection with the hybrid structure. First, there is a limitation on interest payable with respect to a profit participating loan (PPL) that will not be deductible where the lender and the borrower belong to the same group. PPLs are a type of loan which are regarded as equity in situations where the borrower is in an unbalance situation. Second, participation exemption will not apply to the income that is regarded as dividends in the recipient entity but that generates a deductible cost in the paying entity.

Finally, Spain is about to implement the anti-hybrid rules included in the Anti-Tax Avoidance Directive (ATAD).

Secondary adjustment and substance over form principle

As of 2008, SGAAP mostly follow IFRS; hence, the principle 'substance over form' has become of great importance. According to that principle, when there is an operation without an arm's-length value between a shareholder and a company, it should be understood that there is an equity contribution or an equity distribution depending on the party taking advantage of the lack of retribution. If the shareholder is not the single owner of the company, it is

understood that there is an equity contribution or distribution on the ownership percentage but a taxable income or a non-deductible gift for the remaining share capital owned by another shareholder.

The same rules applies when there is a tax transfer pricing adjustment and the Spanish tax authorities consider that the conditions applied are not market conditions.

VIII ACQUISITION STRUCTURES, RESTRUCTURING AND EXIT CHARGES

i Acquisition

In Spain the acquisition of a business activity could be done by means of an asset deal or a shares deal. While an asset deal is generally advisable from the acquirer point of view, the sale of shares is more beneficial from the seller point of view.

Asset deal

From the seller point of view, generally, an asset deal triggers a capital gain or deductible taxable loss; the capital gain may be offset with carry-forward losses, within the legal limitations.

Conversely, the buyer might recover the price paid by taking advantage of the step up resulting from the sale. Besides, an asset deal may determine a limitation of the tax liability shifted to the buyer. Special attention should be paid when the asset deal involves real estate, since the indirect taxation could be worse than in a share deal, as VAT does not apply to a transfer of a branch of activity and, then, real estate will trigger TPO, which would result in a higher acquisition cost (non-recoverable) for the buyer.

Shares deal

Provided the sold entity is a business operating entity, the share deal will not likely result in a tax burden for the seller.

The buyer, however, will not take advantage of the assets step up (and accordingly does not uplift the basis for depreciation or amortisation and future capital gains) and the entity will be fully liable for past contingencies.

When a foreign investor acquires a Spanish entity through a special purpose vehicle (SPV) a fiscal unit (tax group) should be considered between the acquiring entity and the Spanish target company, subject to certain requirements. Accordingly, interest expense on the acquisition debt at the level of the SPV could be offset against the profits of the target entity (when the debt does not exceed 70 per cent of the price and it is proportionally reduced during eight years following the acquisition, until the debt reaches 30 per cent of the purchase price, as described above).

Reorganisation

The Spanish CIT Law offers many ways for reorganisation, such as merger, divisions, spin-off, portfolio demerger and special assets contribution. Following Council Directive 90/434/EEC of 23 July 1990, and Council Directive 2009/133/EC of 19 October 2009, on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, those operations could be done without tax costs under the neutrality regime, avoiding most direct and indirect tax costs.

However, in order to apply the neutrality regime, companies participating in the operation should be able to demonstrate that the operation is not tax-driven and it is done mainly for valid business reasons.

The neutrality regime is based on deferral and the assets acquiring entity would subrogate (for tax purposes) in acquisition value and date of the transferred assets.

Cross-border reorganisation might be tax-neutral if assets of the Spanish resident participating company are allocated to a Spanish PE.

iii Exit

The transfer abroad of either the tax residence of a Spanish entity or its legal seat is allowed by Spanish law.

When it comes to the transfer of legal seat some obstacles might appear depending on the country of destination.

For tax purposes, the transfer of tax residence will trigger a capital gain or loss for the difference between the company's assets (and liabilities) market value and their historical tax value, triggering the exit tax.

The exit tax could be either avoided or deferred:

- a* it would be avoided if the assets are allocated to a PE of the foreign entity (formerly tax resident in Spain) in Spain; or
- b* alternatively, it could be deferred if (1) the tax residence of the company or the PE is transferred to an EU Member State or to an EEA country with effective exchange of information with Spain; and (2) the taxpayer asked for that deferral, constituting the relevant guarantee until the assets are transferred to third parties, when the tax will eventually become payable. Late payment interest will accrue along that period.

In October, the government announced a draft of law where ATAD is implemented, amending the current exit tax regime, introducing some situations where the exit tax also applies (i.e., when a PE ceases its activities) and providing that the exit tax cannot be deferred *sine die*, but it has to be paid in five instalments. This draft of law needs parliamentary approval.

IX ANTI-AVOIDANCE AND OTHER RELEVANT LEGISLATION

i General anti-avoidance

The Spanish General Tax Law provides several General Anti-Avoidance Rules (GAAR) that would allow Spanish tax authorities to tackle situations where the taxpayer artificially avoids the payment of taxes:

- a* the substance over form or requalification rule;
- b* a rule for conflicts in the application of the law; and
- c* rules for simulated schemes.

According to ATAD, EU Member States have to implement GAAR. However, since Spain already had such rules and there would not be a need to introduce new rules, no modification would be required.

Additionally, Spanish legislation has numerous Specific Anti-Avoidance Rules (SAAR), the most frequently applied being the following:

- a* the transfer pricing anti-avoidance rule;
- b* limitation of financial interest paid to group entities deductibility;
- c* the anti-abuse rule for mergers, spin-offs and exchange of shares; and
- d* a rule preventing the transfer of companies with carry-forward tax losses.

ii Controlled foreign corporations (CFCs)

CFC legislation applies to all resident taxable entities holding a participation in foreign entities located in low-tax jurisdictions other than EU and EEA Member States and whose income is passive income or, despite the nature of its income, the subsidiary does not have any substance, as defined in the law.

For CFC rules to be applicable, the following requirements should be met:

- a* the Spanish entity, together with other related parties, should have at least 50 per cent participation in the foreign company;
- b* the foreign participating entity does not have any substance or the subsidiary income is passive as defined in the law; and
- c* the income tax paid by the entity is lower than 75 per cent of the tax payable in Spain.

When CFC rules apply, the Spanish taxpayer owning the foreign subsidiary should allocate (transparent) the latter's income in the proportion the taxpayer participates in the subsidiary.

CFC rules do not apply when: (1) the foreign subsidiary is tax resident in an EU Member State; and (2) it is demonstrated that the foreign entity was incorporated for sound business reasons.

In October 2018, the government announced a draft of law that will modify the CFC rules in order to implement CFC rules provided by ATAD.

iii Transfer pricing

Spanish companies and PEs must value their operations with related parties in accordance with the arm's-length principle. This principle applies both for accounting and tax purposes. In both cases, the burden of proof is on the taxpayer's side. It is important to keep in mind that, according to the Spanish income tax, the number of people and entities that are regarded as related parties (the 'related parties perimeter') is larger than in most countries.

Apart from the related parties' perimeter, Spanish transfer pricing rules are totally aligned with the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations and EU transfer pricing regulations.

Transfer pricing documentation

As of 2008, transfer pricing documentation should be prepared. Documentation obligations are based not only on the EU Joint Transfer Pricing Forum Code of Conduct, but also on the OECD Transfer Pricing Guidelines.

Documentation obligations stipulated by the transfer pricing regulation can be divided into:

- a* group documentation to which the taxpayer belongs (master file); and
- b* specific documentation for the taxpayer (local file).

These new documentation requirements are applicable for tax periods beginning from 1 January 2016.

Tax penalty regime since 2015

The Spanish CIT Law establishes a specific tax penalty regime as follows:

Fulfilment of documentation obligations	Fulfilment of the obligation to apply market value	Penalties	Amount
No	Yes	Yes	€1,000 for each data or €10,000 for each set of data
Yes	No	No (Only for those cases in which the valuation applied can be deducted from the documentation)	
No	No	Yes	15 per cent of the adjustment

It is important to point out that the penalty regime is aimed at the taxpayer fulfilling formal documentation obligations rather than fulfilling the obligation to apply market value.

iv Tax clearances and rulings

Taxpayers may obtain certainty in advance mainly by two means:

- a* asking for an advance tax ruling: this type of ruling is requested from the General Directorate of Taxes (DGT) and, when obtained, is binding for tax agencies in connection to the taxpayer asking for it (other taxpayers might also benefit from the ruling's criteria, in terms of avoiding penalties); and
- b* APAs, as described in Section III.

X YEAR IN REVIEW

2018 has been a peculiar year owing to an unsteady political situation, including a change of government, which is expected to trigger significant changes in the Spanish tax picture, but not before the end of 2018. This has meant, somehow, a quieter year in terms of tax changes than usual.

In terms of changes foreseen in 2019, in October 2018, the government announced a draft of law planning relevant changes to the Spanish taxation scenario, among which, the following could be stressed:

- a* a new tax on financial transactions;
- b* a new tax on certain digital services; and
- c* implementation of the ATAD.

In any case, the above measures are still in the preliminary stages and will need parliamentary consensus to be approved.

XI OUTLOOK AND CONCLUSION

Lack of a clear parliamentary majority and even a close government election would likely lead to few changes on the tax side; only those changes coming from the EU and those where a clear consensus exists are likely to be eventually enacted.

Among the possible changes to be approved is the limitation of participation exemption in order to implement a minimum tax over dividends and capital gains from stakes. However, again, consensus will tell us if this could be approved.

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