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News Alert

Tax Department

On 16 October, the Official Spanish Gazette published acts numbers 4/2020 and 5/2020, leading to the passage of two new taxes: the former, a Tax on Certain Digital Services and the latter, a Tax on Financial Services. Both cases entailed long-announced tax categories that were based on fruitless international initiatives.

The *Tax on Certain Digital Services* arises from a certain frustration: the inability to reach an international agreement that would enable the concept of *permanent establishment* of the OECD Model Convention to be redefined. Such remodelling should have resulted in better distribution among Corporate Income Tax Statutes, payable by companies that provide certain digital services. The objective was clear, and was baptised the “Google tax”. Now, frustrated by the agreement, a better international regulation of Corporate Income Tax has been replaced now with the creation of a merely indirect tax in Spain.

A Tax on financial transactions, to which the adjective *certain* would not have been superfluous, is much more prosaic. Its only intention is to tax the circulation of wealth evidenced in financial markets when these markets produce a certain type of transaction: the acquisition of listed company shares with a minimum market capitalisation.

Tax on Certain Digital Services

Concerning this tax, state its fundamental aspects, ordering them, for practical reasons, from greatest to least interest:

- Firstly, we indicate that this is a tax that only affects legal entities whose volume of worldwide, individual or group-level transactions exceeds €750 million. This figure is not accidental, so efforts have been made for it to coincide with the country information threshold by applicable country within the linked transaction regulations. Therefore, entities or groups that fall below this threshold shall not be subject to paying tax.

A second and additional “national” threshold is added to the previous threshold. If, according to tax criteria, income subject to taxation in Spain does not exceed €3 million, it would not be subject to tax either.

- The entry into force of this provision is also relevant. This will not occur until 3 months after the Act is published, i.e., 16 January 2021.
- As its name indicates, only “certain” digital services are subject to taxation. These are:
 - o *Online* advertising services.
 - o Intermediation in digital services.

- Data transmission services, although perhaps the term *data assignment* would have been more understandable, i.e., procurement of income derived from the assignment of its users' data to third parties.
- Subject to taxation are services provided throughout the State of Spain. They are those where the user was located when advertising was received, has closed transactions due to digital intermediation or data under the assignment were obtained. It escapes no one that this is one of the most complex items.
- Having been configured as an indirect tax, its accrual occurs on from transaction to transaction; it is the subject of declaration by grouping of taxable events, whose accrual is accumulated in a determined settlement period. This is established on a quarterly basis.
- The taxable base is the total the income obtained from providing digital services located in Spanish territory in accordance with tax criteria. Determination of this magnitude demands an additional effort. Therefore, income will normally be reported to provisions of service with recipients located both inside and outside Spanish territory. Therefore, three *ad hoc* rules are established, that allow the "Spanish" part to be separated within the service provided.
- The tax rate is 3%.
- When filing tax returns, taxpayers not based in the European Union must designate a tax representative in Spain.
- The inevitable transitional issues:
 - If the tax goes into effect on 16 January 2021, at what point will the thresholds of 750 million and 3 million be reported? The 750 million will be those from 2020 and the 3 million will must be calculated (Sole Transitory Provision) from the entry into force, 16/01/2021, until the end of each calendar quarter, raising the result to the calendar year.
 - The surprising Fourth Final Provision of the Act governs the last day of the period (20/12/2020) of the 2020 second and third quarter returns. Either it is an error, or this provision does not enjoy excessive legal grounds; therefore, it would have to do with the obligation to enter tax liabilities corresponding to services provided at times before the Act comes into force. We will have to wait for regulatory development or the simple correction of BOE (Boletín Oficial Española [Official Spanish Gazette]) errors.
- Finally, some additional comments:
 - The Act is not forthcoming with regards to the possibility of taxpayers to charge output tax. Their right/obligation to do so is neither established nor impeded.
 - If the tax levied on services is expressly charged and its provider is also a VAT taxpayer at the same time, said provider must include the former in the VAT tax base. Likewise, and this could affect many VAT taxpayers who fall into that category by applying the taxpayer investment rule, if the taxpayer decides to assess it, its recipient must include this amount in the VAT base.

Taxes on Financial Transactions

As we stated, we are faced once again with an indirect tax, although in this case, it is not the result of frustration due to the inability to properly put together a direct tax. Put simply, an already-existing tax ability is tackled.

The VAT exemption for securities transfers opens up the possibility of their being subject to a special indirect tax, the same as what occurred in 1996 with the *Tax on Insurance Premiums*.

Their essential elements are:

- Only acquisitions of shares that meet a triple condition are subject to taxation:
 - They have been issued by Spanish companies.
 - The company has its shares admitted to trading in a Spanish, European market, or a market equivalent to a third country.
 - The company's market capitalisation is, as of 1 December of the year prior to the acquisition, greater than €1 billion. For greater security, the AEAT (Agencia Estatal de Administración Tributaria [State Tax Administration Agency]) shall publish the list of companies that meet this last condition.
- The chapter on exemptions is verbose with the following being noteworthy:
 - The exemption on the acquisition of shares issued on the primary market, i.e., the acquisition of newly issued shares. This can be extended to certificates of deposit.
 - Shares acquired as a result of execution of a takeover bid.
 - Acquisition of shares derived from transactions between entities of the same group.
 - Acquisition of shares effected within a transaction to which the Special Merger Regime is applicable (Chapter VII of Heading VII of the Corporate Income Tax Act).
 - Acquisitions from the treasury stock.
 - Acquisitions in execution of an employee stock option plan.
 - Other acquisitions regulated by the Act that are meant to avoid duplication or submission to taxation of instrumental transactions between financial intermediaries.
- The taxpayer is the acquirer, even though he or she shall only be the taxpayer of the tax, and, therefore, required to pay the tax to the Treasury, when it is an investment service company or a credit institution that acts on its own behalf. Otherwise, the acquirer may be its jointly responsible party, if, being required to provide necessary information to settle the taxpayer's tax, he or she had been provided inaccurate or erroneous information.

The Act defines different scenarios of a taxpayer's substitute taxpayer:

- If the transaction takes place at a trading facility, the member of the market executing the acquisition shall be the taxpayer. If there are several participants, the one who is closest to the acquirer.
- If it occurs within the activity of a systematic internaliser, the taxable person shall be the systematic internaliser.

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- If the transaction is carried out apart from the previous two areas, the financial intermediary who receives the order to acquire the shares shall be taxed.
 - If none of the above circumstances occurs, the depositary will be taxed.
 - The tax base is the amount of the consideration paid by the acquirer for the acquisition of shares, without including transaction fees. Special regulations are established for certain special cases.
 - The tax rate is 0.2%.
 - The declaration may be filed through a central depository of securities based in Spanish territory. The settlement period shall be monthly.
 - This provision will come into force 3 months after publication, i.e., 16 January 2021.
 - As a transitional element, for share acquisitions occurring from the moment of coming into force, the market capitalisation threshold of €1 billion shall be reported in 2020. The AEAT shall publish the list of affected companies.

CONCLUSION

The above regulations will affect a large number of persons, whereby as they are indirect taxes that tax certain transactions, they will end up having an effect on the acquisition costs of affected services and securities, whether from express assessment or through their inclusion in transaction prices. In the case of *Tax on Certain Digital Services*, that will also most likely mean a greater amount of VAT to be charged.

Now, this being said, there will be few taxpayers directly affected by the tax obligation, either because it falls on large entities, and, therefore, a smaller number, or because it exclusively affects certain financial intermediaries.