

RocaJunyent Informs

Tax Law Department
6 September 2023



Recent pronouncements of the CEAC and the Supreme Court regarding new administrative criteria in relation to the determination and accreditation of tax residence in Spanish territory of individuals

The analysis of the tax residence of the taxpayer has become a hot topic in Spanish taxation. Good proof of this are the recent pronouncements of the Supreme Court (hereinafter, “**SC**”), or the Central Economic Administrative Court (hereinafter, “**CEAC**”).

The Double Taxation Treaty (hereinafter, “**DTT**”), refer first to Law 35/2006, of 28 November, Personal Income Tax Law (hereinafter, “**PITL**”), which establishes - in its article 9 - the criteria for determining when an individual taxpayer is a tax resident in Spain. These are:

- ☒ Criterion of staying *more than 183 days, during the calendar year, in Spanish territory* [Article 9.1.a) PITL]
- ☒ Location of the *main core or base of economic activities or interests* in Spanish territory [Article 9.1.b) PITL]

Time has shown that both rules are in themselves sometimes insufficient to locate the tax residence of individuals. A consequence of the difficulties arising is the CEAC's novel doctrinal development of both criteria.¹

Development and interpretation by the CEAC of the criterion of staying in Spanish territory

In relation to the first of the criteria classified by the PITL [Article 9.1.a)], the CEAC issued, on 25 April 2023, resolution 00/04812/2020/00/00, in which it differentiated three categories or groups of days for the purposes of calculating the subject's stay in Spain:

Days of certified presence	Those in which, reliably, the physical presence of the subject in Spanish territory can be reliably proven.
Presumed days	Those which, in terms of <i>reasonable</i> calculation, pass between two days of certified presence of the subject in Spanish territory.
Sporadic absences	An element to be added to the days of effective ² presence in Spanish territory. They will be integrated into the calculation of days provided that the subject cannot be reliably located in a third country on specific dates.

Days of certified or accredited presence

The calculation of a day of certified presence in Spain requires that the State Tax Administration Agency (hereinafter, "**STA**"), be able to prove the location of the subject in Spanish territory.

For these purposes, the CEAC, in its resolution 00/04045/2020/00/00, of 28 March 2023, has determined that certified presence does not require the subject to remain for a certain number of hours, but that *when the taxpayer is present in a State for part of a day, no matter how small, the day will be considered as a day of presence in said State for the purposes of calculating the 183-day period.*³

The CEAC admits circumstances of a varied nature as items that prove certified presence in Spain, such as card transactions (at physical locations), use of means of transport, health and medical visits, performance of actions before a notary, access to sports, banking venues, and any other kind, payments with Via-T, contract signatures,

¹ Resolutions **00/04045/2020/00/00, of 28 March 2023**, and **00/04812/2020/00/00, of 25 April 2023**, of the CEAC, analyse and develop the criterion of permanence in Spanish territory regulated in Article 9.1.a) PITL. For their part, in resolutions **00/02008/2019/00/00, of 22 February 2021**, or **00/04549/2020/00/00, of 23 February 2023**, the CEAC analyses and develops the criterion of the main core or basis of economic activities and interests regulated in Article 9.1.b) PITL.

² The days of effective presence are made up of the set of days of certified presence, and presumed days of presence in Spanish territory.

³ Comment 5 on Article 15 of the Model of the Convention of the Organisation for Economic Cooperation and Development.

presence in courses, car parking in public car parks, cash withdrawal at physical cash machines, etc.⁴

Presumed days

Predictably, the main areas of conflict will arise in the different assessment of the presumed days by the STA and the taxpayer, respectively, due to the high degree of uncertainty that they may present.

The interpretation of the CEAC is that the set of days that “reasonably” elapse between two dates of certified presence in Spanish territory, must – unless otherwise proven – be calculated as days of presence in Spain.⁵

The introduction of the requirement of the “reasonableness” of the calculation may cause conflict, since it turns the category of *presumed days* into an eminently indeterminate concept.

Depending on the circumstances, the length of the stay and the time of year in which the stay occurs, the assessment of reasonableness may vary.

Thus, an interpretation could be acceptable in which the STA establishes the presumed presence in Spain of an individual during the days that elapse between a brief space of time; for example, between a Friday and a Sunday (presuming the stay on the Saturday), or between a Monday and a Friday (presuming the stay during the intermediate working days). However, such a presumption may not be so reasonable for longer periods of time.

In our view, this is not only an issue of time, but also of the peculiarities of the dates of presence, or the distance between the relevant countries. If, for example, a period of 15 days elapses between two dates of certified presence of the subject in Spain - the latter being 23 December, and on 7 January - it could be reasonable to classify as presumed days those that elapse between both dates, taking into account the specific characteristics of Christmas. On the other hand, it could be more debatable to make this same interpretation at any other time of the year. Likewise, if - for example - the country in conflict with Spain is Portugal, the discussion would be greater than would take place in the event that the latter is the United States, due to the existing distance and the consequent ease of private travel.

Either way, the CEAC accepts proof of presence in a third country during the possible period of presumed presence as *an element of rupture*. Thus, if the subject reliably proves their presence in foreign territory at any time between two days of certified presence in Spain, the STA could not calculate these dates as effective presence in Spanish territory.

⁴ Resolution **00/04045/2020/00/00, of 28 March 2023**, of the CEAC. The aforementioned means of evidence have already been widely accepted by the contentious-administrative jurisdiction (*STSJ Seville Contentious Administrative Chamber 7 April 2022*, appeal 411/2020, and *STSJ Madrid Contentious Administrative Chamber of 14 November 2017*, appeal 153/2016).

⁵ “(...) the taxpayer is located in Spain when it has demonstrated, through direct evidence, that the taxpayer is in Spain on two non-consecutive days and there is no evidence of their presence abroad.

And this CEAC thinks that they are. These are the so-called “presumed days” on which, when it is known by certified evidence that the taxpayer was in Spain on day X and the subsequent day X+Y, the days between are measured (Y)”.

Sporadic absences

With regard to sporadic absences, the SC gave ⁶ the concept a notably time-based character through its resolutions 1829/2017, 1834/2017, 1850/2017, and 1860/2017, of 28 November 2017. Thus, for any taxpayer, who - temporarily - leaves Spanish territory for a few days, such absences could be counted as time spent in Spain.

Sporadic absences constitute a reinforcement of what is concluded about staying in Spanish territory or abroad, not being strictly essential to the extent that the days of effective presence have already reached, on their own, the threshold established in the PITL (183 days) to qualify the taxpayer as a tax resident in Spain.

Certificate of tax residence as a means of evidence required for the application of a DTT

The SC has been strengthening the evidentiary validity of the tax residence certificate issued by the tax authorities of another country for the purposes of proving residence abroad, and the obtaining of the benefits arising from the application of a DTT.

In this way, and in accordance with the criteria of the SC⁷, the national administrative or judicial bodies are not competent to judge the circumstances in which a tax residence certificate has been issued by a third country, nor, consequently, can they dispense with the content of a tax residence certificate issued for the purposes of the DTT by the tax authorities of a country that has signed a DTT with Spain.

For its part, the CEAC has concluded in its resolution 00/04549/2020/00/00, of 23 February 2023, that for the purposes of obtaining the benefits arising from the application of a DTT, the possession by the taxpayer of a certificate of tax residence for the purposes of the DTT issued by the tax authorities of third country will be essential.⁸

⁶ “The concept of sporadic absences must exclusively relate to the objective data of the duration or intensity of the stay outside Spanish territory, without the presence of a volitional or intentional element being linked to its verification so that it gives priority to the taxpayer’s wish to establish themselves occasionally outside Spanish territory, with the clear intention of returning to the place of departure.”

⁷ **STS 2735/2023, of 12 June 2023**, confirms that, if there is compliance with any of the two requirements regulated in Article 9.1 PITL, and the taxpayer holds a certificate of tax residence issued by the tax authorities of a third country for purposes of a DTT:

“1. The national administrative or judicial bodies are not competent to judge the circumstances in which a certificate of tax residence has been issued by another State nor, consequently, may they dispense with the content of a certificate of tax residence issued by the tax authorities of a country that has signed a Double Taxation Agreement with Spain, when said certificate has been issued for the purposes of the Agreement.
2. For the purposes of analysing the existence of a conflict of residency between two States, the validity of a residency certificate issued by the tax authorities of the other contracting State regarding the Double Taxation Agreement must be presumed, and its content cannot be rejected, precisely because the aforementioned Agreement has been signed.”

⁸ In resolution **00/04549/2020/00/00, of 23 February 2023**, the CEAC confirms the possession of a tax residence certificate issued for purposes of the DTT by the tax authorities of a third country as an essential element for accessing the benefits of applying the DTT:

“(…) the taxpayer takes advantage of an exemption from the agreement and, however, does not provide the means of proof legally required for its application: the certificate of tax residence for the purposes of the DTT”.