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Recent Developments in International Taxation

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A state of emergency was declared in Spain on 13 March 2020. Since then, the Spanish Government has been issuing and approving new measures according to the development of the Covid-19 situation. Additionally, the Spanish autonomous regions have passed certain tax measures within their competences (mainly on local taxes).

Currently, the Spanish political parties are working on the approval of the Spanish Budget Act for 2020. In this context, the tax agenda for 2020 promises to be active once this act is passed and relevant tax reforms may be approved affecting individual and companies' taxation.

Tax treaties/tax agreements

Spain-United Kingdom (Gibraltar)

In February 2020, the Council of Ministers approved and forwarded to the Spanish Parliament the Tax Treaty on Gibraltar, signed in March 2019.

Spain-United States

In July 2019, the Senate voted in favour of ratifying the new protocol amending the income tax treaty and existing protocol between the US and Spain, entering into force by November 2019. Thus, the new protocol was in force for the 2020 tax year.

The new protocol includes a provision that is intended to provide relief to individuals who participate in a pension plan based in one country while working in the other country. Relevant changes were also made to the treatment of cross-border investment income (interest, dividends, royalties and capital gains).

Other tax treaties have been signed or entered into force in 2019–2020:

- a new tax treaty between Spain and Belarus, published in the Spanish Official Gazette on 12 June 2020; and
- a new tax treaty between Spain and the Republic of Cape Verde, published in the Spanish Official Gazette on 6 April 2020.

Additionally, the following tax treaties were renegotiated in 2019/2020:

- Spain/Japan;
- Spain/US;
- Spain/India; and
- Spain/Romania.

Impact of the Covid-19 crisis on treaty-related issues

Due to the Covid-19 crisis, individuals could have been locked down in Spain, even if it was not their usual place of work, and this may have an impact on their tax residence status for 2020, for instance, for the so-called 'presence test' (ie, spending more than 183 days in the Spanish territory).

Some countries (UK, Australia and Ireland) have introduced measures in order not to take into account the exceptional circumstances due to limited mobility during this crisis.

However, the Spanish tax authorities held a strict position on this regard in the past. For instance, in binding tax ruling V2516-15, dated 5 August 2015, the tax authorities held the view that a tax resident of the Isle of Man that was held in Spain for more than 183 days due to a health condition should be considered tax resident in Spain for failing the presence test for that year.

Following that same line, on 17 June 2020, the General Directorate for Taxes issued a binding criterion that the days spent in Spain due to lockdown restrictions should also be computed as 'Spanish days' for the day counting.

Inheritance and gift tax (IGT)

Some autonomous regions have introduced changes to their regional regulations for inheritance and gift tax purposes. In Catalonia, for instance, among other changes, as of 1 May 2020, it is no longer possible to apply the following together: the material tax benefits applicable in the case of receiving a family business with other tax reliefs applicable to family relatedness; the taxpayer has to choose between the two. This requires careful estate planning for those cases in which Catalan rules regulate inheritance and gift tax.

Additionally, it is worth mentioning that recent judgments of the Spanish Supreme Court from 2020 changed the criteria for computing the personal trousseau (*ajuar doméstico*) for the purpose of the IGT's taxable base, concluding that it should not be computed for these purposes on the money, real estate or movable assets of the deceased. This could lead to relevant refund requests by taxpayers affected by the former broader interpretation.

Due to Covid-19, the deadline for filing and paying IGT was suspended during the state of emergency and resumed on 1 July 2020. An extension of the voluntary period to pay both inheritance and gift tax has also been approved in all the autonomous regions of Spain.

Personal income tax (PIT)

Spanish tax residents are taxed for their work income according to a progressive scale; the current maximum tax rate (applicable in Catalonia) is 48 per cent for income higher than €175,000.

Catalonia has modified the brackets for tax rates within its competences and, although the top rate remains 48 per cent, the corresponding progressive tax rate has increased for the following incomes:

- between €90,000 and €120,000, 46 per cent (two per cent higher than the previous rate); and
- between €120,000 and €175,000, 47 per cent (one per cent higher than the previous rate).

Spanish pensioner migrating to Portugal (Directorate General for taxes, V3533-19)

For its relevance, it is worth highlighting that this binding ruling states that the provisions stipulated in the double tax treaty in force between Spain and Portugal cannot be claimed by individuals who are resident in Portugal but not fully subject to taxation in this country (eg, because of having applied for the special regime for non-habitual residents). This would also include the treaty residence tie-breaking rules of Article 4.

Non-resident income tax (NRIT): Brexit

This tax contains specific provisions applicable to residents of other EU Member States, which will no longer be applicable to taxpayers resident in the UK after the end of the transitional period, that is, from 1 January 2021 onwards.

Mandatory disclosure of assets and rights held abroad (form 720)

Since 2012, just after the tax amnesty, Spanish tax residents have had to annually disclose certain categories of assets and rights held abroad (eg, real estate, bank accounts and shares), once predetermined thresholds are exceeded. The penalties for failing to fulfil this formal obligation (and for late filing of the form) are extremely material.

The European Commission opened an infringement procedure against Spain (procedure 2014/4330) and concluded that these penalties infringed the free movement of people and workers, the freedom of establishment, the freedom to render services and the free movement of capital for being disproportionate. Even when this reasoned opinion was issued in February 2017, it was not until recently that it was released to the public.

In October 2019, the European Commission brought an action against Spain determining that the penalties imposed are disproportionate and represent a breach of the fundamental freedoms under the Treaty on the Functioning of the European Union (TFEU). The procedure was submitted before the EU court. By December 2019, a summary of the appeal made before this court was published in the European Official Gazette.

In addition, the Spanish Supreme Court is also reviewing these measures that have been recently judged as disproportionate by lower courts and contrary to EU principles.

Wealth tax (WT)

WT payers have benefitted from 100 per cent relief since 1 January 2008. However, due to the economic crisis, the Spanish Government temporarily suspended this relief (and, therefore, re-established the liability for this tax for 2011 and 2012). As of 2013, 100 per cent relief was supposed to be fully operative again. However, the temporary suspension of the application of this relief has been extended every year since then.

As in previous years, the Legal Royal Decree 18/2019 has ruled that the relief is still suspended for 2020. Consequently, since 2011, Spanish tax residents have been liable for this tax on their worldwide wealth, whereas Spanish non-residents have been liable for the Spanish-based assets they own. Madrid is currently the only Spanish region that is not levying WT.

There is an annual €700,000 exemption, as well as a 100 per cent exemption for assets (including shares in companies) qualifying as family businesses, among other tax benefits. Additionally, the tax due can be reduced by 80 per cent in certain circumstances.

Withholding tax exemption on dividend payments

The Central Administrative Spanish Court made reference, for the first time, to the doctrine resulting from the Court of Justice of the EU in the so-called 'Danish cases' to deny the withholding tax exemption on dividend payments to EU parent companies controlled by shareholders resident in non EU-countries (in this case, a sovereign fund of Qatar).

In the case analysed, dated 8 October 2019, the Central Administrative Court denied the exemption applied by a Spanish subsidiary to a dividend distributed to a Luxembourg company arguing that: (1) the Luxembourg company did not qualify as the beneficial owner of said dividends; and (2) it was not incorporated under valid economic reasons.

For the same reasons, the treaty benefits of the treaty signed between Luxembourg and Spain were also denied.

Digital economy: the Spanish digital services tax (DST)

On 18 January 2019, the DST bill was approved by the Spanish Government and submitted to the Spanish Parliament. The bill was expected to be passed in September 2020.

The DST bill almost replicates the content of the European Commission proposal for a directive on a common system of a DST, dated 31 March 2018 (2018/0073 CNS). Only big companies with a minimum worldwide turnover of €750m and a 'significant digital footprint' in Spain of more than €3m are liable for this tax.

The target services can be generally categorised as: (1) online advertising; (2) online intermediation; and (3) data transfer. The tax rate is set at three per cent over the gross revenues arising in Spain out of these services (net VAT). The nexus with Spain is set based on the geolocalisation of the user's devices.

It is expressly defined as an 'indirect' tax and, therefore, it is out of scope of the tax treaties signed by Spain. Double taxation issues are most likely to arise from its application. Although it was not expressly stated, there is a consensus that this tax will be a deductible expense for corporate income tax (CIT) purposes.

Even when the tax accrues transaction by transaction (similar to VAT), there is a quarterly obligation to file the corresponding return. There are new formal obligations applicable to taxpayers and a material penalty system for non-compliance.

Its collection will be postponed to the end of 2020.

Financial transactions tax (Tobin tax)

On 18 February 2020, the Spanish Council of Ministers approved the decision to lay before Parliament bills creating a financial transaction tax.

The Tobin tax is intended to levy a 0.2 per cent tax on certain types of transactions for acquiring the shares of listed Spanish companies with market capitalisation above €1,000m, regardless of the place of residence of the agents acting in those transactions.

The taxable person will be the financial intermediary that transmits or executes the purchase order, and the assessment will be monthly.

It is expected that the bill will be finally passed by the Spanish Parliament during the last quarter of 2020.

VAT

In February 2020, the Spanish tax authorities started preparing pre-filled VAT returns, PRE303, for certain taxpayers based on the data received via the nearly real-time reporting system (Suministro Inmediato de Información or SII).

In addition, for VAT purposes, a Council Directive (EU) was transposed into Spanish law in February 2020 that provided for VAT 'quick fixes' in four areas, entering into force between January and March 2020.

Due to Covid-19, certain temporary measures were approved, with exemptions on key Covid-19-related products (acquisitions of medical equipment such as masks) and reductions (reduced VAT rate of four per cent applies to books, newspapers and magazines in electronic format, provided they do not contain advertising).

Unconstitutional minimum CIT prepayment

The legal regime for CIT advanced payments was modified, with effect from 1 January 2016, for companies whose net turnover for the 12 months prior to the beginning of a tax period exceeds the €10m threshold. At that time, a Royal Decree introduced the new concept of a 'minimum CIT advanced payment' by which the amount to prepay in each period could not be lower than 23 per cent of the accounting benefits of this period.

The Constitutional Court recently judged that such a minimum prepayment, introduced by a Royal Decree, was unconstitutional and, therefore, null. This enables affected taxpayers to claim a refund for the late payment interest for the prepayments incorrectly claimed by the tax authorities for the periods 2016–2017 that are not firm.

Mandatory disclosure and exchange of cross-border tax arrangements ('DAC 6')

The Spanish Government published a draft bill in June 2019 implementing the EU Directive on the mandatory disclosure and exchange of cross-border tax arrangements, which requires intermediaries and, in some situations, taxpayers, to report certain cross-border arrangements to the relevant EU Member State's tax authority. In May 2020, the Spanish Government published a revised bill that has been sent to the Congress and Senate to be voted upon.

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