

International Bar Association

Recent Developments in International Taxation

Spain

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Establishment of new temporary levies on energy companies and on credit institutions as well as a new temporary solidarity wealth tax for high-net-worth individuals

a) High-net-worth individual's tax

A temporary levy on large fortunes has been introduced for FY22 and FY23 on individuals with assets exceeding EUR 3 million.

It is a central government tax that will apply to all autonomous communities in Spain and it is supplementary to Net Wealth Tax (NWT). The definition of taxpayers, taxable income and exemptions follows the NWT regulations.

The tax rates range from 1.7% for assets between EUR 3 million and EUR 5,347,998, 2.1% until 10,695,996 and 3.5% for assets exceeding the latter amount.

There is a tax-free allowance of EUR 700k and a joint limitation similar to the one already existing for Personal Income Tax (PIT) and NWT may also be applied.

In order to avoid double taxation, the NWT paid in the autonomous communities will be claimed as a tax credit from the large fortunes levy. Therefore, the new levy will have a higher impact on the taxpayers that are resident in the autonomous communities where NWT is non-existent or very reduced.

Non-resident taxpayers that are not resident in another member state of the European Union or in the European Economic Area must appoint a representative (individual or legal entity) resident in Spain.

On 25 March 2023 the Spanish Official Gazette announced that the Constitutional Court had admitted to processing the appeal of the Andalusian regional government against article 3 of Law 38/2022 which introduced the large fortunes levy. The Court declared the appeal admissible but has not suspended the tax collection.

b) Windfall tax on energy companies

A temporary windfall tax on energy companies was established for FY23 and FY24 and is due on 1st January of each year. The amount of tax is 1.2% of the net turnover excluding, among others, the domestic regulated business, foreign operations and the hydrocarbon tax as recorded in the profit and loss account of the year prior to the one to which the tax refers.

The tax will apply to main operators on the electricity, gas, fuel and liquefied petroleum gas sectors with a net turnover equal or exceeding EUR 1 billion in FY19 and their net turnover in any of FY17, FY18 or FY19 derived from the energy activity exceeds 50% of its total net turnover of the year as well as to entities carrying out crude oil or natural gas production, coal mining or oil refining activities that in the previous year to FY23 generated, at least, 75% of its turnover from economic activities in the field of extraction, mining, oil refining or the manufacture of coke products.

The tax is not deemed to be tax deductible for corporate income tax purposes.

c) Windfall tax on credit institutions

The windfall tax on banks and financial institutions is also due on FY23 and FY24 and apply to the entities that operate in Spain whose income from interest and commissions in FY19 is equal or higher than EUR 800 million.

The tax rate is 4.8% on net interest income and net commissions.

The tax is not deemed to be tax deductible for corporate income tax purposes.

On March 6 2023 Spanish bank associations filed a legal challenge on such windfall tax before the National Court.

Amendments of Corporate Income Tax (CIT) Act

a) Negative taxable base limitation on consolidated tax groups

CIT Act has been amended for FY23 regarding the entities that fall within the scope of the consolidation tax regime. Specifically, the tax losses of subsidiaries that consolidate can only be deducted by 50% of the total amount.

Before such an amendment, the tax consolidation regime allowed the aggregation of the individual tax bases, either positive or negative, to determine the taxable base. Therefore, the amendment will increase the consolidated group taxation as the positive individual taxable base will be aggregated in full whereas the negative will only be aggregated by 50%.

The negative amount limited will be included in the aggregated taxable base in the subsequent 10 years by 1/10 each year.

b) Reduced tax rates

For FY23 onwards CIT rate is reduced from 25% to 23% for entities with a turnover of less than EUR 1 million in the previous taxable period as long as the taxable company is not deemed to be passive income entity.

At the same time 15% tax rate is set for start-up entities for the first four years provided some requirements are met and the taxable base is positive.

c) ATAD limitation of interest deduction

For the taxable periods beginning on 1st January 2024 and onwards entities subject to CIT will be able to deduct net interest expenses up to 30% operating profit (EBITDA) with a minimum deduction of EUR 1 million. However, expenses and income that has not been included in the CIT taxable base will be excluded from EBITDA. It is the case, for instance, of qualifying exempt dividends and capital gains or income derived from Permanent Establishments. For FY23 they still will be included in the EBITDA but not for FY24.

Such limitation shall not be applicable to the deductibility of net interest expenses of credit institutions, insurance companies and certain asset securitization funds.

Non-cooperative jurisdictions list update

On February 10th 2023 the Ministry of Finance updated the list of non-cooperative jurisdictions for Spanish tax purposes.

Pursuant to the updated list, the following countries are deemed to be non-cooperative for Spanish tax purposes: Anguilla, Emirate of the State of Bahrain, Barbados, Bermuda, Dominica, Fiji, Gibraltar, Guam, Guernsey, Isle of Man, Cayman Islands, Falkland Islands, Mariana Islands, Solomon Islands, Turks and Caicos Islands, British Virgin Islands, Virgin Islands of the United States of America, Jersey, Palau, Samoa - with respect to the harmful tax regime (offshore business), American Samoa, Seychelles, Trinidad and Tobago and Vanuatu.

The following countries has been excluded from the previous list: Antigua and Barbuda, Brunei, Cook Islands, Grenada, Grenada, Jordan, Lebanon, Liberia, Liechtenstein, Macau, Mauritius, Monaco, Montserrat, Nauru, Saint Vincent and the Grenadines and Saint Lucia. It has included Barbados, Guam, Palau, American Samoa, Trinidad and Tobago and Samoa with respect to the harmful tax regime (offshore business).

Environmental taxes: New tax on single-use plastic packaging

On January 1st, 2023, the new Special Tax on non-reusable plastic packaging (PPT) came into effect in Spain.

It is an indirect tax intended to tax the consumption of non-recycled, non-reusable plastic packaging that is applied throughout the territory of the Spanish State, including traditionally exempt areas from general indirect taxation such as the Canary Islands, Ceuta, and Melilla.

PPT is a non-harmonized tax at the European level.

It is levied at a single stage of the production-distribution process, namely manufacturing. However, due to territorial requirements, intra-community acquisitions and imports of the taxed goods are also subject to taxation.

Its scope includes non-recyclable, non-reusable plastic packaging, whether empty or filled with the packaged product. Additionally, certain semi-finished products used to obtain the packaging and the necessary elements for closure or packaging are also subject to taxation.

The tax rate is €0.45 per kilogram of non-recycled plastic and taxpayers are individuals, legal entities, or entities without legal personality who carry out the following operations: (i) manufacturing of non-reusable plastics (ii) intra-community acquirers of plastic products (iii) importers of plastic products. The taxpayers must register in the corresponding territorial registry.

The tax returns must be filed quarterly or monthly, based on the same frequency as the taxpayer's VAT obligations.

It is possible to ask for the plastic tax borne to be refunded if the plastic packaging ultimately leaves Spain.

EU Directives' transposition – amendments

a) Implementation of tax dispute resolution mechanisms EU Directive

In January 2023 the European Commission urged Spain to correctly transpose the Tax Dispute Resolution Mechanism Directive. In this regard, Spain had transposed such Directive in February 2020 but it has not been correctly transposed until May 2023 through the Non-Resident Income Tax (NRIT) Act amendment clarifying that (i) the agreement reached within the Directive's scope shall apply regardless of the time limits provided for in Spanish domestic law and (ii) members of the advisory commission or of the alternative resolution commission shall be considered as authorities for the purposes of the legal liabilities for breach of the duty of confidentiality that may arise under Spanish law.

b) DAC 6 amendment

In April 2023 the Spanish Supreme Court, following the ECJ Court decision of 8th December 2022, published a decision whereby accepted a suspension of the disclosure duty to other intermediaries by lawyers exempted from reporting by the obligation of professional secrecy and on 25th of May 2023 the Spanish General Tax Law was amended establishing that lawyers subject to professional secrecy will only have to communicate the waiver of their information obligation to their clients, but not to all intermediaries. Therefore, the Spanish transposition of the DAC 6 has been aligned with the abovementioned ECJ Court decision.

c) DAC 7 implementation

In May 2023 Spain enacted a law implementing DAC 7 with effect from 1st of January 2023. In this regard, it regulates the digital platforms operator's obligation to provide certain information related to the activity carried out through the platforms they operate. However, the regulation regarding the reporting obligations is still pending to be approved.

d) CbC reporting being public

As a transposition of the Accounting Directive into national legislation, for financial years starting on or after 22nd of June 2024 Spanish based multinational enterprises as well as branches or subsidiaries on non-EU based multinational enterprises with a total consolidated revenue of EUR 750 million in the last two consecutive financial years will have to publicly disclose the CbC report. Such report must be approved and published within a period of 6 months from the financial year's closing date to which they refer and must be deposited in the commercial registry alongside with the financial accounts.

Start-up's Law

In December 2022 the Spain enacted the Start-up law which, among other developments, clarified the **taxation of the "carried interest"**. In this regard, from 1st of January 2023 the carried interest is qualified as employment income but only 50% of such remuneration is taxed for Personal Income Tax (PIT) purposes. That special regime will be applied to managers or employees of collective investment institutions for income derived, directly or indirectly, from interest or other rights, including success fees, that grant special economic rights in some specific entities such as Alternative Investment Funds regulated by the 2011/61/EU Directive and other analogue institutions.

It has also improved the stock options' taxation at the employee's PIT level by increasing the current exemption from 12k to 50k and extending such exemption to non-resident individuals. There is also a deferment of the taxation as the 50k excess that it is subject to taxation is effectively taxed once there is a transfer of the shares or the entity is listed or after 10 years of the share's acquisition.

Finally, the commonly known as Beckham's regime (impatriates special tax regime) has also been amended to be more accessible for non-residents who become Spanish tax residents in order to attract foreign talented individuals.

The amendment broadens the scope of the regime's application since some contractors, entrepreneurs and investors will also be eligible to apply it.

The requirement of not being Spanish tax resident during the last 10 years has been reduced to 5 years and the law also includes the "digital nomads" (not included before).

Also, the requirement of not owning 25% stake on the company where the individual become the director disappears so, as a general rule, there will be no limitation for the investors that come to Spain be a general manager of companies they are invested in.

Highly-qualified individuals will also be able to apply this special tax regime provided that some requirements are met and the spouse and children of an individual who can apply the regime will also be entitled to insofar some requirements are met.

Taxation of indirect tenants of real estate assets in Spain

Non-resident individuals are subject to Spanish NWT only to the extent that they have assets or rights located, exercised or fulfilled in the Spanish territory.

Historically there has been quite a lot of litigation regarding whether or not non-resident individuals holding shares in a non-resident entity that, in turn, directly or indirectly owned real estate assets located in Spain, were subject to NWT. The domestic NWT Act would not set forth this obligation for indirect holding of real estate assets in Spain.

However, from 1st of January onwards, NWT Act was amended to set forth that interest in non-listed entities whose assets consist, directly or indirectly, of at least 50% of real estate located in Spanish

territory, are deemed to be situated in Spain and, therefore, subject to NWT. For the purpose of calculating the 50%, it is established that the net accounting values of the recorded assets shall be replaced by their market value on the date of tax accrual, and in the case of real estate, its net accounting value shall be replaced by the value resulting from the provisions of Article 10 of the NWT Act.

It must be highlighted that the provision subjects the entire holding of shares in the non-resident entity to Wealth Tax, even if not all of its value is derived from such real estate.

In case there is a tax treaty between the State of residence of the non-resident taxpayer and Spain, the provisions of the tax treaty should be reviewed in order to determine whether or not Spain has taxing rights regarding the indirect holding of real estate assets.

Spanish case law

a) Spanish NRIT withholding taxes on dividends distributed to foreign hedge funds

On 5th April 2023 the Spanish Supreme Court issued a sentence whereby a French alternative investment fund was entitled to a refund of non-resident income tax (NRIT) withholding taxes on the grounds that the French hedge fund was comparable to the Spanish hedge funds (*Fondos de inversión libre*).

The French entity was subject to a 15% withholding tax in Spain whereas the Spanish hedge funds can benefit from a 1% Corporate Income Tax rate. Therefore, the Supreme Court allowed the hedge fund to be refunded the excess of NRIT withholding tax arguing that it implied an infringement of the EU free movement of capital.

b) The burden of proof for NRIT anti-abuse clause regarding withholding taxes on dividends lies with the Tax Authorities

On 8th June 2023 the Spanish Supreme Court issued a sentence that established as a doctrine that the burden of proof for the anti-abuse clause that prevents the application of the exemption in the NRIT Act regarding withholding taxes on the dividend distributions lies with the Tax Authorities.

Based on the ECJ case law, the Supreme Court dismisses the appeal of the Tax Administration against a National Court ruling that ruled in favour of a company that did not withhold any amount for the NRIT on a dividend distribution to its Luxembourg parent company. Previously, the Spanish Tax Authorities had issued a tax assessment to the company claiming the amount of withholding taxes corresponding to the dividend distribution since the company had failed to demonstrate the existence of valid economic reasons for the establishment of the parent Luxembourg company.

The Supreme Court ruling considers that it is the Spanish Tax Authorities and not the taxpayer, the one that must prove the requirements in order to apply the anti-abuse clause as it has various means of information such as tax treaties or the DAC Directive.