

GETTING THE
DEAL THROUGH 

Private Client 2019

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Forsters LLP

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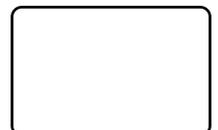
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Preface

Private Client 2019

Seventh edition

Getting the Deal Through is delighted to publish the seventh edition of *Private Client*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Andorra, Colombia, Ireland, Netherlands, Panama, Singapore and Spain.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Anthony Thompson and Nicole Aubin-Parvu of Forsters LLP, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
October 2018

Spain

Ernesto Lacambra and Marc Montserrat

Cases & Lacambra

Tax

1 How does an individual become taxable in your jurisdiction?

The Spanish Personal Income Tax Act sets forth two rules and a presumption to consider an individual as tax resident in Spain.

The permanence test applies when the individual stays more than 183 days per calendar year in Spain. Occasional absences shall be considered to calculate the period of residence, except when individuals prove they have their tax residence in another country.

In other words, to determine the period spent in the Spanish territory, sporadic absences would be computed as time spent in Spain unless the individual could prove its tax residence in other country. In the case of countries or territories classified as tax havens according to the Spanish legislation, the Spanish tax authorities may request proof of residence in the tax haven for 183 days per calendar year.

The centre of economic interest test applies when the main or central place of business of the individual is directly or indirectly located in Spain.

Finally, unless there is evidence to the contrary, an individual shall be deemed to be a resident of Spain if, in accordance with the aforementioned criteria, his or her legally non-separated spouse and dependent minor reside in Spain (presumption applicable).

The main direct taxes to individuals with tax residence in Spain are personal income tax, wealth tax and inheritance and gift tax.

Personal income tax includes the individual's worldwide income: employment income, salary as member of a board of directors, dividends, capital gains, interests, rental income, etc. The Spanish Personal Income Tax Act applies and allowance is dependent on the personal and family status of the individual.

In Spain, wealth tax subjects to taxation the individual's worldwide net assets (assets minus liabilities). However, the Wealth Tax Act foresees an exemption of €300,000 for permanent domicile, and €700,000 on net assets. However, it is important to mention that wealth tax is partially transferred to the autonomous regions of Spain, which have the right to regulate exemptions and tax rates (ie, exemption on family business). As a consequence, the final taxation on wealth tax may vary depending on the autonomous region where the individual is tax resident.

Inheritance and gift tax are also partially transferred to the autonomous region of Spain and the final taxation substantially changes depending on the tax residence of the individual and the beneficiaries.

2 What, if any, taxes apply to an individual's income?

Residents

Spanish personal income tax distinguishes income allocated to the savings tax base and the general tax base. The main difference resides with the tax rates (19, 21 and 23 per cent for the savings tax base, and progressive tax rates limited to 48 per cent for the general tax base).

Dividends, interests and capital gains will be generally allocated to the savings tax base. Employment income, business activities as an individual, rental income and deemed income will be allocated to the general tax base.

Non-residents

Generally, non-resident income tax will apply to dividends, interest and capital gains at 19 per cent tax rate, and 24 per cent tax rate to any other

sort of income (employment income, deemed income, rental income, etc). If the non-resident resides in the EU, 19 per cent withholding tax will also apply to rental income and deemed income.

3 What, if any, taxes apply to an individual's capital gains?

Tax-resident individuals will be subject to personal income tax on capital gains at 19 per cent: the first €6,000, 21 per cent up to €50,000, and the exceeding amount to 23 per cent. Non-resident individuals will be subject to non-resident income tax at 19 per cent tax rate.

For both resident and non-resident individuals, capital gains will be assessed on the difference between the market value of the asset transferred, and its acquisition cost. Depending on the asset being transferred, the market value and the acquisition cost will be adjusted for taxes and expenses incurred by the transferor.

4 What, if any, taxes apply if an individual makes lifetime gifts?

Lifetime gifts will be subject to inheritance and gift tax and, under certain circumstances, to personal income tax at the donor's level for the difference between the market value of the gift and its acquisition cost.

The beneficiary of a lifetime gift will be subject to inheritance and gift tax in accordance with the taxation of the autonomous region of his or her residence (which generally rises up to approximately 34 per cent for lifetime gifts equal to or greater than approximately €779,000). However, such tax rates can be reduced depending on each Spanish autonomous region. For instance, in Catalonia, gifts could be taxed from 5, 7 to 9 per cent if the lifetime gift is formalised in a public deed and it is between descendants, or be effectively exempt in another autonomous region (ie, Madrid).

If the beneficiary of the lifetime gift is not tax resident in Spain, the state legislation will apply, which foresees tax rates up to 34 per cent. If the beneficiary is tax resident in the EU or EEA, the taxpayer will be entitled to apply the state or autonomic legislation. Nevertheless, the Spanish Supreme Court pronounced in favour of allowing non-residents in the EU or EEA to apply for the autonomous region's legislation.

Notwithstanding the above, if the lifetime gift is a property, the legislation of the autonomous region where the asset is located will apply. Under certain circumstances, if such property is donated to constitute the permanent domicile of the beneficiary, exemptions would apply.

The donor will include in his or her personal income tax any capital gains derived from the difference between the market value of the gift, and its acquisition cost (cash donations are not subject to personal income tax).

5 What, if any, taxes apply to an individual's transfers on death and to his or her estate following death?

As a general rule, inheritances will be subject to inheritance and gift tax. The taxable event of inheritance and gift tax is regulated by the state legislation. However, autonomous regions have the right to legislate in terms of exemptions, allowances and tax rates. Consequently, inheritance and gift tax may substantially differ depending on the autonomous region.

Residents

An autonomous region's legislation of residence of the deceased will apply. If the autonomous region has not legislated in this regard, tax

rates usually range from 7.65 per cent up to 34 per cent for inheritances equal to or greater than €797,555. If the deceased was tax resident in Spain but the beneficiaries tax resident in the EU or EEA, they would have the right to choose between the state legislation or the autonomous region's legislation. If the beneficiary is not tax resident in Spain, the EU or EEA, the state legislation would apply.

Certain exemptions and allowances will apply on succession as explained below.

6 What, if any, taxes apply to an individual's real property?

The mere direct ownership of a property in Spain by an individual involves payment of the following taxes: wealth tax with an exemption from €300,000 (permanent domicile), plus up to €700,000 as general allowance, real estate tax, personal income tax on deemed income for the mere ownership of the property, rental income and other minor local taxes.

7 What, if any, taxes apply on the import or export, for personal use and enjoyment, of assets other than cash by an individual to your jurisdiction?

Taxes will differ depending on the asset because the Spanish tax system foresees special taxes for boats, cars and paintings, among others. In addition, VAT may also apply to the transfer of ownership of such assets at 21 per cent general tax rate (lower rates may apply depending on the asset).

8 What, if any, other taxes may be particularly relevant to an individual?

For an individual who plans to invest in Spain the most relevant taxes would be related to real estate investments. As an example, if an individual acquires a residential property, VAT (10 per cent) would apply if the property is brand new, and transfer tax if the property is not brand new. In this regard, transfer tax is partially regulated by autonomous regions (tax rates range from 6 per cent to 11 per cent).

9 What, if any, taxes apply to trusts or other asset-holding vehicles in your jurisdiction, and how are such taxes imposed?

Trusts are not recognised under Spanish law.

In Spain, it is very common to set up Spanish holding companies in order to invest in different companies, real estate or other investments. In this regard, investing or holding assets through a holding company allows the applicability of two different tax allowances if certain requirements are met:

- Spanish holding tax (ETVE). Participation exemption on dividends and capital gains if certain requirements are met (holding at least 5 per cent of the subsidiary, one-year holding or maintenance, among others).
- 95 per cent or 100 per cent family business allowance. If certain requirements are met, the mere ownership and transfer of shares of a holding company (or any Spanish company) will benefit from a 95 per cent tax allowance on inheritance and gift tax and 100 per cent on wealth tax.

10 How are charities taxed in your jurisdiction?

In Spain charities could be organised under different legal forms, the most common being associations and foundations.

Both types of charities pursue a general interest and are based on non-profit principles. These entities will be subject to 10 per cent corporate income tax rate but income derived from their donors or from assets will be tax exempt if certain requirements are met.

Trusts and foundations

11 Does your jurisdiction recognise trusts?

No. Trusts are not recognised in the Spanish legal system and their legal and tax treatment is directly applicable to individuals.

12 Does your jurisdiction recognise private foundations?

The Spanish legal system recognises different legal forms equivalent to foreign private foundations (such as foundations, associations or federations, among others).

In this regard, a special tax regime is foreseen applicable to non-profit entities that carry out public interest activities. This tax regime allows these entities to benefit from a full exemption on income or gains derived from its assets or donations from third parties. Any other income will be taxed at 10 per cent corporate income tax.

Same-sex marriages and civil unions

13 Does your jurisdiction have any form of legally recognised same-sex relationship?

The Spanish legal system confers same-sex marriages the same legal status as opposite sex marriages. Civil unions are also recognised as form of legal union such as marriage.

Although civil unions equal marriage in many aspects, they have a specific legal status in certain areas such as succession and tax (ie, the possibility to be taxed jointly, alimony, widowhood pension, etc). These aspects are often regulated by each autonomous community.

14 Does your jurisdiction recognise any form of legal relationship for heterosexual couples other than marriage?

There are no other forms of legal relationship for heterosexual and homosexual individuals other than marriages or civil unions.

Succession

15 What property constitutes an individual's estate for succession purposes?

All assets and rights under an individual's legal ownership.

16 To what extent do individuals have freedom of disposition over their estate during their lifetime?

Individuals have full freedom of disposition of their estate during their lifetime as long as the 'right of food' is respected. This right consists of the obligation that any individual has towards his or her relatives in certain circumstances (health, survival, scholarship in case of underage descendants, etc).

However, if the beneficiaries have applied for a 95 per cent tax allowance on the succession of the family business, a 10-year holding period could apply to maintain such tax benefit.

17 To what extent do individuals have freedom of disposition over their estate on death?

Each autonomous region of Spain has the right to legislate on different matters of the Civil Code. One of these matters is succession.

In this regard, the Spanish Civil Code foresees at least one-third of non-disposal of the deceased (forced heirship). Such non-disposal estate is allocated to the descendants of the deceased and, in some occasions, the survivor spouse has the right of usufruct on different assets.

However, in certain autonomous regions the Spanish Civil Code does not apply because a regional civil code is in place. As an example, in the Catalan Civil Code it is foreseen that non-disposal assets of the deceased will be 25 per cent of the inheritance, instead of one-third foreseen in the Spanish Civil Code.

18 If an individual dies in your jurisdiction without leaving valid instructions for the disposition of the estate, to whom does the estate pass and in what shares?

In Spain, if an individual dies without leaving valid instructions for the disposition of the estate, the legislation foreseen in the autonomous region of his or her residence will apply. The applicable legislation usually allocates the estate to the descendants of the deceased. If the deceased does not have any descendants, the estate is allocated to his or her parents, spouse, brothers or sisters, nephews or nieces.

It is also very common that the estate is allocated to the descendants of the deceased with the right of use (usufruct) in favour of the spouse.

19 In relation to the disposition of an individual's estate, are adopted or illegitimate children treated the same as natural legitimate children and, if not, how may they inherit?

Yes. They are considered as natural legitimate children with the same rights.

20 What law governs the distribution of an individual's estate and does this depend on the type of property within it?

Since the entering into force of EU Regulation 650/2012, the applicable legislation in terms of distributing an individual's estate will be determined by the habitual residence of the deceased.

21 What formalities are required for an individual to make a valid will in your jurisdiction?

The beneficiaries of a will should proceed to appear before notary and sign a public deed in which they accept to receive the assets and liabilities. When liabilities are predictable, it is advisable to accept under a precedent condition of previous assessment of liabilities. If the liabilities turn out to be higher than the assets, the heirs can waive the will.

22 Are foreign wills recognised in your jurisdiction and how is this achieved?

The beneficiaries of a will should proceed to legalise foreign wills in order to be valid for Spanish legal purposes. It will normally be necessary to obtain a sworn translation of the will to execute if before a Spanish notary.

23 Who has the right to administer an estate?

The deceased has the right to appoint an executor of the estate to distribute it in accordance with the deceased's will and to fulfil the remaining duties and obligations. If the deceased has not appointed an executor, the said beneficiaries of the will should commonly agree to distribute it or, in absence of agreement, appoint an executor. If the beneficiaries do not reach an agreement to appoint such executor, they are entitled to request a judiciary executor.

24 How does title to a deceased's assets pass to the heirs and successors? What are the rules for administration of the estate?

In most inheritances, the notary executes the will of the deceased and the beneficiaries sign the title deed of acceptance of the inheritance in accordance with the provisions set out in the will. Later, the beneficiaries submit the title deed of acceptance of the inheritance to register before banks, property registry and corporate registry their ownership of the assets.

25 Is there a procedure for disappointed heirs and beneficiaries to make a claim against an estate?

Yes. Disappointed heirs or beneficiaries may file a claim against an estate in order to exercise the rights they are entitled to (ie, the payment of the non-disposed estate to certain beneficiaries, disagreement with the reasons argued by the deceased to disappoint heirs or challenge the testator's disability).

Capacity and power of attorney**26 What are the rules for holding and managing the property of a minor in your jurisdiction?**

As a general rule, the management of the property of a minor would be entrusted to their parents or legal representatives, who are bound by the general rules of guard and custody.

27 At what age does an individual attain legal capacity for the purposes of holding and managing property in your jurisdiction?

Legal capacity for patrimonial purposes is granted when individuals reach legal age (18 years old in Spain). However, if the underage person is 16 and develops his or her own professional activity, he or she will be able to hold assets and rights derived from such activity.

28 If someone loses capacity to manage their affairs in your jurisdiction, what is the procedure for managing them on their behalf?

After the loss of legal capacity, the custody and protection of the incapacitated person may be guaranteed through the appointment of a guardian, curator or custodian. The appointment procedure requires a judge to approve the custody, usually involving a hearing with the closest relatives of the person concerned. Once appointed, management must be carried in the best interest of the incapacitated person, and except for some specific powers that would be require a judge's authorisation, it would be performed under the criteria of the guardian, curator or custodian.

Immigration**29 Do foreign nationals require a visa to visit your jurisdiction?**

Spain does not request visas from EU and EEA jurisdictions, most Latin American jurisdictions, and jurisdictions such as Israel, Singapore, the United States or South Korea, among others.

30 How long can a foreign national spend in your jurisdiction on a visitors' visa?

A tourist visa in Spain lasts 90 days from the date of arrival.

31 Is there a visa programme targeted specifically at high net worth individuals?

In 2013, Spain passed its own Golden Visa programme, which allows qualified investors to reside in Spain for a one-year period renewable for two years and, ultimately, for five years.

It is required to carry out a qualified investment in Spain: €500,000 in real estate, €1 million in bank deposit, securities or investment funds, or €2 million in Spanish public debt.

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32 If so, does this programme entitle individuals to bring their family members with them? Give details.

The scope of the golden visa includes relatives of the applicant. The spouse and offspring under 18 may apply, jointly and simultaneously or subsequently, for the authorisation and the visa. This scope has been extended to the partner of the applicant, children of legal age economically dependent who are not married, and ascendants economically dependent on the applicant.

33 Does such a programme give an individual a right to reside permanently or indefinitely in your jurisdiction and, if so, how?

Having obtained a residence visa for a one-year period, the applicant may apply for a residence authorisation for at least two renewable years, which may be extended for another five years.

34 Does such a programme enable an individual to obtain citizenship or nationality in your jurisdiction and, if so, how?

The Golden Visa does not permit Spanish citizenship. However, among other channels, the Spanish Civil Code allows individuals to obtain Spanish citizenship under the following circumstances: 10 years of residence, or two years of residence for individuals from Ibero-American jurisdictions including Andorra, Philippines, Equatorial Guinea, Portugal and individuals with Sephardic ancestors.

Individuals who reside in Spain or who currently hold investments in Spain will be subject to relevant taxes such as wealth tax, inheritance and gift tax or personal income tax. In addition, taxation and succession is quite complex depending on the legislation of different autonomous regions of Spain.

However, the Spanish legal system foresees different tax planning alternatives to reduce the tax burden to invest as an individual.

If certain requirements are met, individuals are entitled to apply for family business exemptions on wealth tax and relevant allowances on inheritance and gift tax. Family business exemptions and allowances requirements may vary depending on the autonomous region where the shareholders or beneficiaries are located.

In addition, Spanish holding companies could be incorporated to channel inbound and outbound investments. Under certain conditions, Spanish holding companies will be entitled to apply for the participation exemption on dividends and capital gains.

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