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The International Comparative Legal Guide to:

Private Client 2019

8th Edition

A practical cross-border insight into private client work

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FOREWORD

Welcome to the 2019 edition of The International Comparative Legal Guide to Private Client which I am delighted to introduce this year. The Guide covers a comprehensive and diverse range of articles that would pique the interest of any domestic or international practice client adviser. The publication is designed to provide readers with a comprehensive overview of key issues affecting private client work, particularly from the perspective of a multi-jurisdictional transaction.

The Guide is divided into two sections and the first section contains seven general chapters. Each topical chapter is written by a different firm which will be most helpful for advisers with international clients.

The second section contains insightful country question and answer chapters. These provide a broad overview of common issues in private client laws and regulations in 35 jurisdictions.

As an overview, the Guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of private client work. The articles are provided by some of the most authoritative and respected advisers in the private client industry and I trust that you will find them just as valuable.

George Hodgson, CEO, STEP (Society of Trust & Estate Practitioners)

Spain

Ernesto Lacabra



Marc Urgell



Cases & Lacabra

1 Connection Factors

1.1 To what extent is domicile or habitual residence relevant in determining liability to taxation in your jurisdiction?

In Spain, tax liability is determined by tax residence and the definition of tax residence is analysed in further details later on in question 1.4. The tax residence is key to determining the personal liability of direct taxes. Domicile is just an indication of habitual residence.

1.2 If domicile or habitual residence is relevant, how is it defined for taxation purposes?

Individuals have an habitual residence in Spain when they stay in Spain for more than 183 days per calendar year. Occasional absences are accounted for in this residence period calculation.

1.3 To what extent is residence relevant in determining liability to taxation in your jurisdiction?

Tax residence is key to determining either the tax liability of an individual or legal persons and entails the obligation to include all the income obtained worldwide or what the law defines as tax liability by personal obligation. As mentioned, this rule is applicable for both individuals and companies, and is regulated by the Personal Income Tax Act and the Corporate Income Tax Act.

1.4 If residence is relevant, how is it defined for taxation purposes?

Regarding individuals, Spanish IRPF sets forth two rules and a presumption to consider an individual as a tax resident in Spain:

- (i) “Permanence test” applies when the individual stays for more than 183 days per calendar year in Spain. Occasional absences shall be included to calculate the period of residence, except when individuals prove that they have their tax residence in another country.
In other words, in order to calculate the days in the territory of Spain, sporadic absences will be assessed as time spent in Spain unless the individual can prove that his tax residence is located in another country.
- (ii) “Centre of economic interest test” applies when the main or central place of business or when the majority of the investment of the individual is directly or indirectly located in Spain.

Finally, unless there is clear evidence from the tax payer demonstrating otherwise, the law presumes that if the husband or non-separated spouse and dependent minor children reside in Spain (presumption applicable), the individual will be considered as resident in such jurisdiction.

1.5 To what extent is nationality relevant in determining liability to taxation in your jurisdiction?

Nationality is not relevant in determining liability to taxation in Spain according to domestic law. However, nationality is normally an important criterion as a tie-breaking rule, in case of conflict of residence on the basis of the double tax treaties signed by Spain, considering article 4 of the model of Convention of the OECD commonly included by Spain in all the double tax treaties concluded with third countries.

1.6 If nationality is relevant, how is it defined for taxation purposes?

Considering the above (question 1.5) the definition of Spanish nationality follows the rules provided for in Spanish Civil Code. In this respect, nationality is originally acquired on a *ius sanguinis* basis (i.e. Spanish-nationals-born descendent). However, other factors also enable the acquisition of Spanish nationality (residence, affiliation/ adoption bonds and discretionary measures – naturalisation card – “*carta de naturaleza*”).

1.7 What other connecting factors (if any) are relevant in determining a person’s liability to tax in your jurisdiction?

Non-tax resident individuals or legal entities in Spain have a limited tax liability if they obtain a certain kind of income or hold assets located in Spain. Nonetheless, a huge number of exemptions to this rule are legally regulated.

2 General Taxation Regime

2.1 What gift or estate taxes apply that are relevant to persons becoming established in your jurisdiction?

The main direct taxes to individuals with tax residence in Spain, apart from Personal Income Tax, are Wealth Tax and Inheritance and Gift Tax.

Inheritance and Gift Tax levies upon the occurrence of three different taxable events:

- (i) *Mortis causa* lucrative acquisition.
- (ii) Sums received by beneficiaries under life insurance contracts.
- (iii) *Inter vivos* lucrative acquisition.

Inheritance and Gift Tax is a progressive tax (maximum tax rate – 34%). However, this tax has some deductions and tax allowances on certain assets or in case of family relationships. Autonomous Regions partially regulate tax rates and deductions and, therefore, its tax treatment could be significantly different depending on the specific region.

Wealth tax is applicable to individual tax residents in Spain and is partially regulated by Autonomous Regions. Please see question 2.3 for further details.

2.2 How and to what extent are persons who become established in your jurisdiction liable to income and capital gains tax?

Individual tax residents will be subject to Personal Income Tax on capital gains at 19% for the first €6,000, at 21% between €6,001 up to €50,000, and at to 23% for the excess. Worldwide capital gains are taxed regardless of their location.

Non-resident individuals will be subject to Non-Resident Income Tax at a 19% tax rate.

In any case, capital gains will be estimated, on a general basis, as 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 to taxes and expenses incurred by the transferor.

2.3 What other direct taxes (if any) apply to persons who become established in your jurisdiction?

Wealth Tax taxes global wealth, estimated as the difference between the global assets and global liabilities.

Autonomous Regions can partially regulate this tax, and, in some cases, they can exempt, either totally or partially, the tax base. The progressive applicable tax rates are from 0.2% to 2.5%. The minimum exempt is €700,000, unless the Autonomous Region has established another amount.

Additionally, some assets could benefit from a relevant reduction (e.g. 95% reduction for family businesses).

2.4 What indirect taxes (sales taxes/VAT and customs & excise duties) apply to persons becoming established in your jurisdiction?

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

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%) would apply if it is a newly constructed property and transfer tax in other cases. In this regard, transfer tax is partially regulated by Autonomous Regions (tax rates range from 6% to 11%).

2.5 Are there any anti-avoidance taxation provisions that apply to the offshore arrangements of persons who have become established in your jurisdiction?

The Personal Income Tax Act and Corporate Income Tax Act establish controlling foreign corporation rules (CFC rules), applicable when foreign companies do not have material and human resources, and in addition, the following requirements are met:

- (i) Control test: holding, at least, 50% of the capital of the foreign company.
- (ii) Low taxation regime: the foreign subsidiary company's tax burden must be less than 75% of the Spanish corporate income tax rate.
- (iii) Income nature: only certain positive income will be imputed.

2.6 Is there any general anti-avoidance or anti-abuse rule to counteract tax advantages?

The Personal Income Tax Act, Corporate Income Tax Act and Non-Residents Income Tax Act provide for some anti-avoidance rules applicable to tax havens.

The most relevant implications are:

- (i) related operations with persons resident in tax havens must be exhaustively documented;
- (ii) these operations have to be valued at fair value (as linked operations);
- (iii) certain special regimes are not applicable if there are persons involved with tax havens (e.g. holding regime, patent box regime, etc.); and
- (iv) in case of changes of residency from Spain to countries considered as a tax haven, Spanish Personal Income Tax will be applying in the change year and four subsequent years (only for Spanish nationals).

2.7 Are there any arrangements in place in your jurisdiction for the disclosure of aggressive tax planning schemes?

Nowadays there are no arrangements for the disclosure of aggressive tax planning schemes in force. However, Spain, as a member of EU, will apply the Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

3 Pre-entry Tax Planning

3.1 In your jurisdiction, what pre-entry estate and gift tax planning can be undertaken?

Individuals who reside in Spain or who currently hold investments in Spain bear important taxes such as Wealth Tax, Inheritance and Gift Tax or Personal Income Tax.

However, the Spanish legal system foresees different tax planning alternatives to reduce the tax burden to invest as an individual, which are specially related to family businesses (so-called “family business reduction”).

If certain requirements are met, individuals are entitled to apply for family business exemptions on Wealth Tax and Inheritance and Gift

Tax. Family business exemption requirements may vary depending on the Autonomous Region where the shareholders or beneficiaries are located.

Subject to the fulfilment of certain conditions, the mere ownership and transfer of shares of a holding company (or any Spanish company) may benefit from a 95% tax allowance on Inheritance and Gift Tax and 100% allowance on Wealth Tax.

Donation of specific assets prior to the acquisition of Spanish tax residency may also be advisable. However, this will depend on the previous tax residence and its tax system.

3.2 In your jurisdiction, what pre-entry income and capital gains tax planning can be undertaken?

Subject to fulfilment of certain conditions, setting up a Spanish Holding could be an efficient instrument to invest in different companies, real estate or other investments. Dividends and capital gains derived from share transfers could benefit from the participation exemption regime. Its main requirements are the follows:

- (i) Holding, at least, 5% of the subsidiary during the previous year uninterruptedly or, alternatively, holding a participation with an acquisition value would be higher than €20,000,000.
- (ii) In case of foreign subsidiaries, subjection and non-exemption of such subsidiary to the corporate income tax, at least, at a 10% standard tax rate.

Additionally, before establishing tax residency in Spain, it is recommendable to realise capital gains and to update tax value(s) of their investment(s).

3.3 In your jurisdiction, can pre-entry planning be undertaken for any other taxes?

This is not applicable in Spain.

4 Taxation Issues on Inward Investment

4.1 What liabilities are there to tax on the acquisition, holding or disposal of, or receipt of income from investments in your jurisdiction?

Income derived from investments in Spain is subject to Personal Income Tax (please see question 2.2). However, if an individual is investing through a holding company and the investment met the requirements stated in question 3.2, the abovementioned tax allowance at the level of the holding company could be applicable (for further information please see question 3.2).

In addition, the holding or the disposal of these investments will be taxable under Wealth Tax, unless the holding company can benefit from “family business reduction” (please see questions 2.3 and 3.1).

4.2 What taxes are there on the importation of assets into your jurisdiction, including excise taxes?

Spanish VAT on importation is applicable hereof. Please see question 2.4.

Importation of non-EU goods are taxable under custom duties. However, there are free trade zones and specific exemption on personal goods are also available in case of change of residence.

4.3 Are there any particular tax issues in relation to the purchase of residential properties?

There are no particular tax issues levied in this sense. Please see question 2.4.

However, in terms of Wealth Tax and Gift and Inheritance Tax, it could be more efficient to carry out the acquisition of residential properties through foreign companies.

5 Taxation of Corporate Vehicles

5.1 What is the test for a corporation to be taxable in your jurisdiction?

Regarding legal entities, Spanish Corporate Income Tax sets forth three different criteria to be considered as tax resident in Spain:

- (i) If the company has been incorporated under Spanish law.
- (ii) If the company has its registered offices in Spanish territory.
- (iii) If the company has its centre of effective management in Spain.

It is worth noting that double tax treaties entered into by Spain expressly recognise the predominance of this third criteria.

5.2 What are the main tax liabilities payable by a corporation which is subject to tax in your jurisdiction?

The main tax liability payable by a corporation that is a tax resident in Spain is Corporate Income Tax. The general tax rate applicable is 25%. Nevertheless, the effective tax rate can be lower in some cases as a result of application of deductions and tax incentives. A reduced tax rate (15%) is applicable to recently incorporated companies upon completion of certain requirements.

5.3 How are branches of foreign corporations taxed in your jurisdiction?

Branches of foreign corporations are normally considered permanent establishments in Spain by the internal regulations related to non-resident income tax. The general tax rate applicable is 25% on profits allocated in the branch. On a general basis, branches are taxed as a Spanish corporation with some specialities.

The Non-Resident Income Tax Act considers that non-resident companies or professionals operate through a permanent establishment when they have, on a regular basis, a place of business in Spain through which the entity does all or part of its activity. Nevertheless, in case of a tax treaty to avoid double taxation in force with Spain, such provisions may vary the definition of permanent establishment.

6 Tax Treaties

6.1 Has your jurisdiction entered into income tax and capital gains tax treaties and, if so, what is their impact?

Spain has an extensive network of double taxation treaties (approximately 100). Specifically, this network has been useful to

connect EU countries with Latin American countries in terms of international tax planning, since Spain is the EU country with the highest volume of double taxation agreements with South American countries.

6.2 Do the income tax and capital gains tax treaties generally follow the OECD or another model?

Spanish double taxation treaties generally follow the OECD model.

6.3 Has your jurisdiction entered into estate and gift tax treaties and, if so, what is their impact?

Yes, Spain has a few estate and gift tax treaties. Specifically, with Greece, France and Sweden. Their impact, generally, is not relevant for our domestic legislation.

6.4 Do the estate or gift tax treaties generally follow the OECD or another model?

The Spanish estate/gift tax treaties do not follow the OECD model. When Spain signed these tax treaties the OECD model did not exist (the OECD Model dates back to 1982 and the last Spanish treaty – entered into with Sweden – was signed in 1963). In addition, Spain does not appear to have any interest in increasing its gift tax treaties network.

7 Succession Planning

7.1 What are the relevant private international law (conflict of law) rules on succession and wills, including tests of essential validity and formal validity in your jurisdiction?

Regarding international private law, the Spanish Civil Code provides that inheritance will be governed by the personal law of the deceased at the time of death. However, elective provisions stated in will, in accordance with the national law of the deceased, will remain valid, except in terms of forced heirship.

7.2 Are there particular rules that apply to real estate held in your jurisdiction or elsewhere?

No specific rules apply in matters of inheritance of real estate in Spain. However, if a non-tax resident inherits real estate located in Spain, Inheritance Tax will be applied (according to the real tax liability and only for real estate located in Spain).

Noteworthy, if non-tax residents inherit foreign companies with real estate located in Spain, inheritance tax does not apply.

7.3 What rules exist in your jurisdiction which restrict testamentary freedom?

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 1/3 of non-disposal of the deceased (forced heirship). Such non-disposal estate is allocated to the descendants of the deceased and, on 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% of the inheritance, instead of 1/3 foreseen in the Spanish Civil Code.

8 Trusts and Foundations

8.1 Are trusts recognised/permitted in your jurisdiction?

Spain has not ratified The Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition and, thus, trusts are not recognised under Spanish law. However, Spanish tax-residents can establish commercial relations with foreign trust structures.

8.2 How are trusts/settlers/beneficiaries taxed in your jurisdiction?

As trust structures are not recognised under Spanish law and do not have legal entity, the trust assets will be considered property of the settlor or the beneficiaries on a case-by-case basis. As a consequence, income derived from trust assets will be allocated to the settlors or beneficiaries. On a general basis, trusts are transparent for Spanish tax purposes (i.e. look through principle).

8.3 How are trusts affected by succession and forced heirship rules in your jurisdiction?

Trusts are not recognised under Spanish law, in consequence they are not relevant in terms of succession.

8.4 Are private foundations recognised/permitted in your jurisdiction?

Under Spanish law, Private Foundations are non-lucrative entities the social object of which follows a public interest purpose. They are regulated by “Law 50/2002, 26 December of Foundations”.

Private foundations as a vehicle to manage assets for private purposes, as may exist in other jurisdictions, are not recognised under Spanish law. However, Spanish tax-residents can be founders or beneficiaries of this kind of foreign private foundations. We consider this kind of private foundations in answer to subsequent questions 8.5 and 8.6.

8.5 How are foundations/founders/beneficiaries taxed in your jurisdiction?

Foreign private foundations are generally considered legal entities, and they are a separate economic unit from beneficiaries.

Should the founders maintain direct or indirect rights of any kind on the foundation assets, the value of such right or assets would be subject to Wealth Tax. Conversely, if the founders do not have such rights, no Wealth Tax would be triggered.

Incomes, goods or rights received by Spanish resident beneficiaries derived from private foundation are deemed as a gift and consequently subject to estate and gift tax.

8.6 How are foundations affected by succession and forced heirship rules in your jurisdiction?

Private foundations cannot circumvent forced heirship rules, e.g. legal forced heirship rules cannot be avoided by statutory provisions of a private foundation.

9 Matrimonial Issues

9.1 Are civil partnerships/same-sex marriages permitted/recognised in your jurisdiction?

Based on Spanish Civil Code, civil marriages and partnerships are permitted/recognised in Spain, and they will have the same requirements and effects when two spouses are of the same-sex.

9.2 What matrimonial property regimes are permitted/recognised in your jurisdiction?

Some Autonomous Regions have their own Civil Code so they can regulate their general marriage regime applicable.

In accordance with Spanish Civil Code, the matrimonial general regime recognised is the marital property regime (i.e. joint participation in acquired property). It will be applicable unless otherwise elected by the marriage. However, the property of estate regime is recognised too, and in some Autonomous Regions is applicable as a general regime.

9.3 Are pre-/post-marital agreements/marriage contracts permitted/recognised in your jurisdiction?

The Spanish Civil Code provides that married couples can stipulate, modify or substitute the general matrimonial regime applicable through the pre-nuptial agreement, which must be raised into the status of public document before a notary public to be valid.

9.4 What are the main principles which will apply in your jurisdiction in relation to financial provision on divorce?

The main effects of divorce are: (i) termination of the legal effects of the marriage; (ii) dissolution and liquidation of the marriage's community, meaning that goods acquired during the marriage shall be distributed between the members; (iii) in case of children, a maintenance allowance for them shall be stipulated; and (iv) in the event that the spouse depends economically/partially of the other, a compensatory allowance shall be stipulated to correct the imbalance.

10 Immigration Issues

10.1 What restrictions or qualifications does your jurisdiction impose for entry into the country?

Spain does not request any visas for EU and EEE jurisdictions, most Latin American jurisdictions, and other jurisdictions such as Israel, Singapore, United States or South Korea, among others. A tourist visa in Spain lasts 90 days from arrival.

10.2 Does your jurisdiction have any investor and/or other special categories for entry?

Spain passed in 2013 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, €1,000,000 in bank deposit, securities or investment funds, or €2,000,000 in Spanish public debt.

The scope of the golden visa includes relatives of the applicant. The spouse and descendants under 18 may apply, jointly, 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, unmarried, as well as to the economically dependent ascendants of the applicant.

10.3 What are the requirements in your jurisdiction in order to qualify for nationality?

A Golden Visa does not allow Spanish citizenship to be obtained. 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 of individuals with Sephardic ancestors.

10.4 Are there any taxation implications in obtaining nationality in your jurisdiction?

There are no taxation implications arising from the mere fact of obtaining Spanish nationality.

10.5 Are there any special tax/immigration/citizenship programmes designed to attract foreigners to become resident in your jurisdiction?

Please see question 10.2.

11 Reporting Requirements/Privacy

11.1 What automatic exchange of information agreements has your jurisdiction entered into with other countries?

Since 2017, Spain has applied the "Common Reporting Standard" of ODCE and exchanges financial information automatically between other countries and jurisdictions.

In addition, Spanish financial entities reached the US Foreign Account Tax Compliance Act (FATCA) agreement with the Internal Revenue Service (IRS). Consequently, Spanish financial entities are subject to reporting obligations derived from FATCA.

11.2 What reporting requirements are imposed by domestic law in your jurisdiction in respect of structures outside your jurisdiction with which a person in your jurisdiction is involved?

Domestic Spanish law provides two different reporting requirements in this sense:

Wealth Tax: individuals must declare all their goods and rights, including those outside of the Spanish jurisdiction. This tax form will only need to be submitted in case of surpassing the minimum exemption of the wealth tax (this minimum exemption depending on the Autonomous Regions).

Declaration of foreign assets (tax form 720): the Spanish law request to provide to the Spanish tax authorities information about offshore accounts, offshore investments and real estate located abroad.

Filing of this tax form is required in the following cases:

- (i) Offshore bank accounts with a balance higher than €50,000.
- (ii) Values, rights (e.g. insurances, investments, etc.) with a value higher than €50,000.
- (iii) Real estate or rights on real estate located abroad with acquisition value exceeding of €50,000.



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He is a regular speaker at international business schools on international taxation matters and bilateral investments between the Middle East and Spain.

11.3 Are there any public registers of owners/beneficial owners/trustees/board members of, or of other persons with significant control or influence over companies, foundations or trusts established or resident in your jurisdiction?

In Spain there is a public mercantile register where owners, board members and companies are registered.

In addition, the ultimate beneficial owner (or controlling person) of the company is registered and must file their financial statements within the mercantile register. This new obligation is regulated by Order JUS/319/2018, dated 21 March and motivated by Directive (EU) 2015/849 of 20 May 2015 “*Directiva (UE) 2015/849 del Parlamento Europeo y del Consejo de 20 de mayo de 2015, relativa a la prevención de la utilización del sistema financiero para el blanqueo de capitales o la financiación del terrorismo*”.



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Marc Urgell is a Senior Tax Associate at Cases & Lacambra in the Principality of Andorra. He has solid experience in tax and corporate matters with a keen focus on cross-border operations. He has advised important multinational groups in Andorran tax matters and has worked on international tax planning for Spanish and Andorran companies. He also has experience advising high-net-worth individuals and family business groups.

He is a lecturer in Master's programmes in tax planning in Spain and Andorra and is a regular speaker at conferences on tax matters.

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