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Spain

Ernesto Lacambra, David Navarro & Cristina Villanova
Cases & Lacambra

Overview of corporate tax work over the last year

Types of corporate tax work

This year, Spain has consolidated its position as a key player in the M&A market, experiencing a very positive evolution and increase in operations involving private equity (PE) houses, as well as real estate transactions, this being the centre of Spain's transactional industry.

The post-COVID situation was uncertain, but Spain's recovery path has been very positive and it has become an attractive investment market (both nationally and internationally). Proof of this is the fact that the number of M&A transactions has increased by more than 20% since 2020, mainly due to the increase of multinational companies investing in the Spanish market and the re-boost of the tourism and renewable energy industries.

2022 was a year full of geopolitical threats and economic uncertainty (e.g., break out of the war in Ukraine, slowdown in GDP growth of Western and developed countries, increase of inflation and interest rates, etc.), circumstances that had an evident impact on the M&A market and led to a downturn in activity and to more limited and challenging opportunities.

Even though the economic perspective is still uncertain in 2023 and knowing that M&A activity is very sensitive to volatility, the outlook is positive since times of economic downturn give rise to interesting opportunities. Additionally, Spain aims to become a reference for startups and entrepreneurs (for innovation in general) as a means of attracting foreign capital and talent, having approved, with effect from 1 January 2023, the so-called "Startup Law", offering tax benefits (among others) to both startup companies and individual entrepreneurs.

That being said, Spanish tax authorities have also increased their scrutiny, paying special attention to the following points for fiscal year 2023:

(i) Corporate tax:

- Control action on taxpayers who report an irregular or abnormal evolution of stock/inventory that is not consistent with their activity. The aim is to detect hidden sales.
- Files with tax loss carryforwards and tax credits still pending offset/application.
- For tax groups, Spanish tax authorities have announced a specific tax control plan including tax loss carryforwards and legal requirements for the integration of entities in the group. They will also analyse in depth the fact that the residence of the entity representing the group might be located in a territory to artificially condition the development of the Administration's competences.
- Intense control of non-residents' income tax to avoid lower tax payments and/or tax elusion in Spanish territory. Particular control on withholdings paid on account of

interests, dividends and royalties paid to taxpayers with no permanent establishment in Spain – especially with the aim of detecting who is the effective beneficiary.

- As referred to in last year’s edition, Spain has a very attractive regime for Spanish real estate investment trusts (“SOCIMI”, due to its name in Spanish), with concrete requirements to be able to benefit from its tax advantages. Spanish tax authorities have announced increased control on investment requirements and dividend distribution.

(ii) Transfer pricing:

- Spanish tax authorities continue with their so-called “360° strategy”: an automated risk analysis system based on all available information on related-party transactions (Forms 232 and 200, Country-by-Country Reports, etc.). The objective is to establish indices and parameters for early detection of risky behaviour.
- When it comes to corporate restructuring, the authorities will focus on the valuation of intra-group transfers and deductions that lower the taxable base.

(iii) VAT:

- Administrative actions to verify correct and timely compliance with SII obligations will take place (SII is the Immediate Supply of Information system, which means an in-time electronic supply of invoicing records through the tax authorities’ website, mandatory for corporations).
- The constitution and use of entities for the sole purpose of accessing the right to deduce VAT payments will be prosecuted and will be one of the main focuses of Spanish authorities with the aim of avoiding tax fraud.

Based on the above, in order to prevent and manage risks of tax audits and controversies, the following recommendations should be considered:

- An updated tax review (covering all the applicable taxes), as well as correct tax planning regarding transactions and restructuring.
- An effective and updated accounting system, keeping all relevant documents as a defence file for potential tax audits.
- All controverted matters should be properly covered with sufficient evidence and legal arguments, taking into account the most recent precedents and resolutions.

Significant deals and themes

Startup Law

On 23 January 2023, the new Law 28/2022 of 21 December 2023 on the promotion of the startup ecosystem came into force. This law, known as the “Startup Law”, offers tax incentives to entities that fall within its scope of application according to the definitions given in the law itself. With the approval of this law, Spain wants to appear on the radar of countries that encourage and promote innovation, seeking to be as competitive and attractive as other neighbour EU countries.

According to this law, emerging entities (i.e., startups) will benefit from certain tax benefits provided they comply with the following requirements:

- Be newly created or, if not, no more than five years must have elapsed since the date of registration/incorporation in the corresponding register.
- The creation of the entity cannot be a result of a merger, spin-off or transformation of non-emerging companies.
- Must not distribute or have distributed dividends or returns.
- Not be listed in a regulated stock market.
- At least 60% of their workforce must be contracted in Spain.
- Develop an innovative entrepreneurship project with a scalable business model.

When an entity complies with the above-mentioned requirements, the following tax-saving opportunities will apply:

- A 15% tax rate instead of the 25% standard rate for the first tax year in which the taxable base is positive and the following three. A key condition is that the referred requirements must be complied with in each year.
- Tax payment deferral of the first two periods in which the taxable base is positive. The deferral will be of 12 and six months, respectively, from the end of the voluntary payment deadline. In order to request the deferral, the company must be up to date with all its formal tax obligations. No late payment interests will accrue. Taxpayers requesting such deferral will not be required to make instalment payments.

In addition, and despite the fact that it affects individuals to a greater extent, we would like to point out that the Startup Law also modified the Spanish in-patriate regime, more commonly known as the Beckham Law.

This regime provides that individuals who acquire their tax residence in Spain as a result of moving to Spanish territory may opt to be considered non-residents for tax purposes, with some particularities. Under this regime, the tax rate applicable to earned income is 24% for the first EUR 600,000 and 47% on the excess.

The Startup Law incorporates new situations in which the special regime may be applied, such as carrying out entrepreneurial activity, highly qualified professionals hired by startups, or being appointed as a director of a company that is not considered an asset-holding entity, regardless of the shareholding held in such entity.

Tax havens

With effect from 2023, the Spanish Treasury has approved the Ministerial Order establishing the list of countries, territories and tax regimes considered tax havens. With this, Spain has updated its list of uncooperative countries (a total of 24), including six new jurisdictions (American Samoa, Barbados, Guam, Palaos, Samoa, and Trinidad and Tobago) and excluding 14 other jurisdictions (including Liberia and Panama).

The reason for these changes is that Spain has updated its definition of uncooperative jurisdictions according to OECD standards.

Non-residents investing in Spanish real estate via foreign entities

Until Law 38/2022 was approved in December (see below for further details), Spanish non-resident individuals who owned real estate in Spain indirectly, i.e., through foreign entities, were, under certain circumstances, not subject to wealth tax.

However, this law introduced a modification to article 5 of the Spanish Wealth Tax Law, including a new taxable event for non-resident taxpayers subject to wealth tax (and, by extension, to the newly approved temporary solidarity tax on high-net-worth individuals): participation in entities not listed in regulated stock markets whose assets consist of at least 50%, directly or indirectly, in real estate located in Spain. The reason behind this modification was to equalise the taxation of non-residents who owned real estate directly to those who owned it indirectly, since, as mentioned, the latter was (in principle) not a taxable event for wealth tax purposes.

Due to the broad wording of this amendment, several queries have been raised. Briefly, it refers to real estate in general without differentiating between dwellings and properties used for economic activity. Additionally, it does not consider the purpose of the acquisition (economic investment vs personal use) nor the percentage of ownership on the entity acquiring the real estate. Hence, the impact in practice shall be very wide. As an example,

non-residents who participate in a foreign investment fund that invests in real estate in Spain (at least 50% regardless of the location of the rest of the assets) could fall within the scope of wealth tax (note that only individuals exceeding certain wealth value limits are actually subject to pay wealth tax).

Of course, this will require a case-by-case analysis since further features will need to be taken into account, such as, but not limited to, applicable Double Tax Treaties (not all treaties include a wealth clause), the total value of the non-resident's wealth in Spain, etc.

Professional entities

Professional entities continue to be a “hot topic” for Spanish tax authorities. Individuals, especially non-residents aiming to invest in Spain, interpose professional entities for the development of their professional/investment activities. In their goal of fighting tax elusion through intermediary companies, Spanish tax authorities focus on the following two points:

- (i) Substance analysis: do entities have sufficient material and human resources to develop the corresponding activity? Do resources used to provide the service really belong to the company or to the professionals as individuals?
- (ii) Professional entities carrying out a real service: it is worth bearing in mind that the tax authorities, when challenging the use of a professional entity, must use either the figure of the “sham of law” or the “conflict in the application of the tax law”. Otherwise, the use of the professional entity would be triggered based on the arm's length principle applied to the relationship between the professional and the entity.

According to Spanish courts, the use of the two legal figures referred to above is very restrictive and shall be used in exceptional cases only, not as a general rule.

Key developments affecting corporate tax law and practice

Domestic – cases and legislation

On 23 December 2022, the Spanish General Budget Law for 2023 was passed and published the next day in the Official State Gazette. The principal tax measures concerning corporate taxation can be summarised as follows:

- A reduced 23% tax rate for companies with a turnover under EUR 1 million in the year before. This rate does not apply to equity companies. When it comes to corporate groups, the turnover of all companies will be taken into account.
- For tax purposes, certain investments in new vehicles that qualify as FCV, FCHV, BEV REEV or PHEV will benefit from an accelerated depreciation method (maximum depreciation rates in tables multiplied by two).

As for VAT, the most relevant amendments are:

- Simplification of the localisation rules for the provision of certain services subject to VAT, such as: (i) substantial limitations to the use and enjoyment VAT location rule for B2B services (applicable only to insurance or financial services that do not generate the right to offset input VAT, and to vehicle rentals in order to avoid tax fraud); (ii) following the use and enjoyment VAT location rule, it will be extended to B2C supplies of intangible services when the consumption of the service takes place in Spanish VAT territory; and (iii) the general VAT location rule will now apply to mediation, electronic, broadcasting and television services (i.e., taxed at destination).
- The procedure for the recovery of VAT in case of bad debts or bankruptcy is simplified and made more flexible, following EU law standards.
- New cases of inversion of the VAT taxpayer are regulated (i.e., supplies of plastic waste, scrap or cuttings) and some are excluded. For instance, the reverse charge mechanism

will no longer apply to taxable and non-exempt leases of real estate by non-established VAT taxpayers nor to real estate leasing brokerage services provided by non-established taxpayers.

On 27 December, Law 38/2022 was approved and published the next day in the Official State Gazette. It regulates, among other taxes and tax matters, temporary taxes on energy and on credit institutions and financial credit establishments. The main amendments concerning corporate taxation are:

- The taxable income of tax groups will be the sum of all the companies in the group plus 50% of their negative taxable income. The unused negative taxable income will be recovered throughout the following 10 years starting on (or after) 1 January 2024.
- The limit for tax deductions related to investment in cinematographic production of Spanish and foreign audio-visual series has been increased to EUR 20 million (compared to the previous EUR 10 million). In some cases, the tax credit will be determined per episode and the limit will be EUR 10 million for each episode produced. With this amendment, taxpayers who finance some or all of the production cost of Spanish feature films and short films, audio-visual series and live and musical performances can benefit from a tax deduction. Finally, when both the company participating in the financing and the taxpayer generating the tax deduction are related parties, they will not qualify for the deduction.
- Two new temporary taxes have been approved for tax years 2023 and 2024:
 - *Tax on credit institutions and credit financial establishments* whose sum of interest and commission income for the year 2019 was equal to or greater than EUR 800 million. This amount will be equal to 4.8% of the sum of the net interest income and fee and commission income and expenses derived from the activity carried out in Spain corresponding to the year 2022 (for tax year 2023) and to the year 2023 (for tax year 2024). This tax will not be considered a tax-deductible expense for corporate tax purposes.
 - *Energy tax*, which will require the main operators of the electricity, natural gas, fuels and liquefied petroleum gases sectors to have a net turnover in fiscal year 2019 equal to or greater than EUR 1 billion and net turnover in 2017, 2018 or 2019 derived from an activity that qualified them as the main operator of an energy sector exceeding 50% of their total net turnover of that year. This amount will be equal to 1.2% of the net turnover derived from the activity that the taxpayer carries out in Spain and that appears in the profit and loss account of the calendar year prior to the one to which the tax refers. That is to say, the net turnover of the year 2022 will be taken into consideration for 2023, and that of 2023 for 2024. This tax will not be considered a tax-deductible expense for corporate tax purposes.

BEPS, CJEU cases and EU legislation developments

The EU Directive (2022/2523) to approve a global minimum taxation rate on large companies and groups has been published in the EU Official Journal and entered into force on 23 December 2022. Its goal is to ensure that large groups (annual turnover exceeding EUR 750 million) operating within the EU (nationally or internationally) are taxed at a 15% minimum global effective rate.

With this Directive, the EU is fulfilling its compromise to implement the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting agreement on global tax reform (OECD Pillar Two Model Rules).

The Spanish Treasury has launched the corresponding public consultation for the transposal of the Directive. All Member Countries must transpose the Directive by 31 December 2023.

Further to this, Spain published the European Directive to implement the European Union Public Country-by-Country Reporting in the Official State Gazette on 22 December 2022. It will affect the parent companies of multinational groups domiciled in Spain (ultimate parent companies), as well as the Spanish subsidiaries and branches of multinational groups whose ultimate parent company is non-EU domiciled and whose turnover exceeds EUR 750 million during two consecutive tax periods. The obligation is extended to those entities that, in accordance with the applicable regulations, do not constitute a group.

This new obligation, applicable from 22 June 2024 onwards and similar in content to the current Country-by-Country Report, means that relevant information will be disclosed on the group's website and in the annual accounts, such as, but not limited to, activities of the multinational group, number of employees, revenues and profits, accrued and paid taxes, etc.

Tax climate in Spain

Spanish tax authorities continue with their campaign to increase control over fraud and the submerged economy, with a particular focus on companies with net operative losses generated repeatedly, the shadow economy, related-party transactions, intermediary companies constituted by individuals, etc.

With the help of technology and due to a material improvement of their systems, Spanish tax authorities have increasing access to information (nationally and internationally), which allows them to increase their scrutiny of tax audits. It is evident that they have intensified their activity by opening many more files and inspections of taxpayers.

In addition to this, the Spanish Government's goal in 2022 was to increase revenue from taxes in general (especially corporate tax), and the number of tax audits has increased considerably. In the past few years, Spain has been one of the OECD countries in which the tax pressure/burden has increased the most, especially on corporations. As a matter of fact, 2022 broke the tax revenue record with EUR 254,000 million (also because of increasing inflation rates).

Despite this, the Spanish Government is willing to position Spain as a competitive and attractive country for foreign talent and capital, therefore approving measures such as the Startup Law (which also foresees important advantages for individuals such as the special tax regime for inbounds or the carried interest regime at a personal income tax level).

Developments affecting the attractiveness of Spain for holding companies

Holding companies

No relevant amendments or tax regimes have been approved with effect from 2023 concerning holding entities. As mentioned in last year's edition, Spain offers a very attractive tax regime for holding companies with non-resident subsidiaries: the ETVE (*entidad de tenencia de valores extranjeros* or foreign securities holding company) Regime.

Any Spanish entity may opt to apply for this regime as long as certain requirements are complied with. ETVE companies will have the right to apply for a 95% participation exemption on dividends and capital gains from foreign subsidiaries and no withholding tax would apply on the distribution from the ETVE company to its shareholders. In particular, the main benefits of this regime are:

- The 95% exemption applicable to dividends and capital gains obtained by the ETVE from its shareholding in non-resident subsidiaries.
- The non-Spanish taxation applicable to ETVE non-resident shareholders.

Industry sector focus

Automotive, pharmaceuticals, chemical, life sciences, engineering, and R&D

The automotive industry is one of the key drivers of the Spanish economy, being one of the main employment-generating sectors.

The pharmaceutical industry is another main contributor to the Spanish economy. In 2021, it generated revenue of over EUR 26 billion, making it one of the largest pharmaceutical markets in Europe.

The expectation is for these industries to continue to be drivers and pillars of the Spanish economy.

Real estate

One of the catalysts of Spanish economic recovery has been the significant increase in real estate operations. The real estate market continues to be buoyant, with significant transactions taking place throughout 2022.

The year ahead

In line with the approval of the General State Budget, it is expected that there will be continuous efforts by the Spanish Government to increase the revenue from corporate income tax, as discussed above, by way of amendments to the corporate income tax law or by way of tax review works primarily focused, for instance, on the field of transfer pricing for multinational entities.

Even though it will be a year marked by uncertainty (economically and geopolitically speaking), the expectation is positive for the Spanish M&A market due to opportunities and due to Spain being a secure legal country with a stable and sound economy. As a reference, 2022 saw the country's largest number of M&A transactions. Furthermore, the life sciences and TMT sectors appear to be gaining more and more relevance. Additionally, Spain has become an attractive country to invest in and is positively evolving to become a reference in the innovation (i.e., startups, VCs, etc.) sector. The expectation is to attract international talent that will be able to benefit from the recent tax regimes and advantages that have been approved for tax year 2023.

On the other side, Spanish tax authorities will continue with their scrutiny strategy by increasing cutting-edge technology, which will allow them to improve their control duties and access to taxpayers' information. It will therefore become even more important to have a solvent and coherent tax policy covering all the mentioned aspects.



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