

Private Client 2020

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Published by

Law Business Research Ltd

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First published 2012

Eighth edition

ISBN 978-1-83862-179-7

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



Private Client 2020

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Lexology Getting The Deal Through is delighted to publish the eighth edition of *Private Client*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology 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 Guernsey and Jersey.

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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.

Lexology 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.



London

November 2019

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This article was first published in December 2019

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TAX

Residence and domicile

1 | How does an individual become taxable in your jurisdiction?

An individual is liable to tax in Spain whenever he or she is considered a tax resident in Spain and whenever he or she, not being resident in Spain, obtains Spanish source income.

Residents

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

The permanence test applies when the individual remains for more than 183 days per calendar year in Spain. Occasional absences are considered when calculating the period of residence, except when individuals can prove they have their tax residence in another country. In other words, to determine the period spent in Spanish territory, sporadic absences would be computed as time spent in Spain unless the individual can prove his or her tax residence in other country. With regard to countries or territories classified as tax havens according to 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 is applicable to an individual's worldwide income, which includes employment income, salary as a member of a board of directors, dividends, capital gains, interests and rental income. The Spanish Personal Income Tax Act applies and, depending on the personal and family status of an individual, allowances may be given.

In Spain, wealth tax subjects an individual's worldwide net assets (minus liabilities) to taxation. However, the Wealth Tax Act provides for an exemption of €300,000 for permanent domicile and €700,000 on net assets. However, 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 rate of wealth tax may vary depending on the autonomous region where the individual is tax resident.

Inheritance and gift tax is also partially transferred to the autonomous regions of Spain and the final tax rate substantially changes depending on the tax residence of the individual and the beneficiaries.

Non-residents

Non-residents income tax (NRIT) applies to Spanish source income and capital gains obtained by individuals who are not considered residents in Spain according to the above criteria. Spanish source income and capital gains include:

- income obtained through a permanent establishment (PE);
- income obtained without a PE but derived from economic activities, services or other activities carried out in Spain;
- labour income that derives, directly or indirectly, from a personal activity carried out in Spain;
- interest and royalties;
- dividends;
- income derived from real estate located in Spain; and
- capital gains.

In addition to NRIT, non-residents in Spain are subject to wealth tax on their assets and rights that are located, can be exercised or must be complied with in Spain, considering a €700,000 exemption.

Inheritance and gift tax is also applicable to non-residents in Spain for the acquisition of goods and rights that are located, can be exercised or must be complied with in Spain, as well as for the receipt of amounts derived from life insurance contracts when the contract has been formalised with Spanish insurance companies or has been formalised in Spain with foreign insurance companies, with some particularities.

Income

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

Residents

Spanish personal income tax allocates some income to the savings tax base and some to the general tax base. The main difference is the tax rates: 19, 21 and 23 per cent for the savings tax base, while progressive tax rates are limited to 48 per cent for the general tax base.

Dividends, interests and capital gains will generally be 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 a rate of 19 per cent and to any other sort of income at a rate of 24 per cent (eg, employment income, deemed income and rental income). If the non-resident resides in the European Union, 19 per cent withholding tax will also apply to rental income and deemed income.

Capital gains

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 for the first €6,000, 21 per cent for up to €50,000 and 23 per cent for over €50,000. Non-resident individuals will be subject to non-resident income tax at 19 per cent. Additionally, under certain specific circumstances, capital gains can be taxed according to the general tax base.

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.

Lifetime gifts

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 level on 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, these tax rates can be reduced depending on the autonomous region. For instance, in Catalonia, lifetime gifts can be taxed at 5, 7 or 9 per cent if they are formalised in a public deed and are gifted between descendants. In other autonomous regions, such as Madrid, gifts may effectively be exempt.

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

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

Inheritance

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. This 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 regarding the 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 to 34 per cent for inheritances equal to or greater than €797,555. If the deceased was tax-resident in Spain but the beneficiaries are tax resident in the EU or the 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 the EEA, the state legislation will apply.

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

Real property

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

Direct ownership of a property in Spain by an individual involves payment of the following taxes:

- wealth tax with an exemption of €300,000 (permanent domicile), plus up to €700,000 exemption as a general allowance;
- real estate tax;
- personal income tax on the deemed income for the mere ownership of the property;
- rental income; and
- other minor local taxes.

Non-cash assets

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 has special taxes for boats, cars and paintings, among others. In addition, value-added tax (VAT) may also apply to the transfer of ownership of such assets at a 21 per cent general tax rate (lower rates may apply depending on the asset).

Other taxes

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

Trusts and other holding vehicles

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 to invest in different companies, real estate or other investments. In this regard, investing or holding assets through a holding company allows for the application of two different tax allowances if certain requirements are met, namely:

- Spanish holding tax: there is a 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 period, among others); and
- 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 a 100 per cent allowance on wealth tax.

Charities

10 | How are charities taxed in your jurisdiction?

In Spain, charities may 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 a 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.

Anti-avoidance and anti-abuse provisions

11 | What anti-avoidance and anti-abuse tax provisions apply in the context of private client wealth management?

Spanish general tax law has a general anti-abuse rule that applies to all Spanish taxes whenever a taxable event is totally or partially avoided or the tax due is reduced as a consequence of the taxpayer: (i) carrying out a notoriously artificial or unsuitable act or business for the achievement of this result; or (ii) establishing an act or a business that does not result in significant legal or economic effects other than saving tax.

Additionally, the Spanish Personal Income Tax Act and the Corporate Income Tax Act establish controlling foreign corporation (CFC) rules, which apply to non-resident subsidiaries of Spanish taxpayers that do not have human and material resources, and:

- hold more than 50 per cent of the capital of the foreign company, and
- for which the corresponding personal or corporate income tax is less than 75 per cent of the tax that would have been due in accordance with Spanish rules.

Only certain income is considered in the application of the CFC rules, such as income from assurance activities and real estate that is not considered as a business activity.

The Personal Income Tax Act provides for an exit tax on unrealised capital gains from a Spanish tax resident arising from a change in his or her tax residence if he or she has been a Spanish tax resident for at least 10 of the 15 years preceding his or her change of residence, and if the market value of his or her shares exceeds €4 million, or €1 million if holding more than 25 per cent of the shares. If the individual moves to an EU country or a country with an effective exchange of tax information, exit tax will only be required if within 10 years the individual transfers his or her shares, changes his or her tax residency out of the EU or violates the obligations of information exchange.

Finally, Spanish legislation provides for anti-avoidance rules applicable to tax havens.

TRUSTS AND FOUNDATIONS

Trusts

12 | 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.

Private foundations

13 | Does your jurisdiction recognise private foundations?

The Spanish legal system recognises different legal forms equivalent to foreign private foundations, such as foundations, associations and federations.

In this regard, a special tax regime is 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 subject to corporate income tax at a rate of 10 per cent.

SAME-SEX MARRIAGES AND CIVIL UNIONS

Same-sex relationships

14 | 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 a form of legal union.

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

Heterosexual civil unions

15 | 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 couples other than marriage or a civil union.

SUCCESSION

Estate constitution

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

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

Disposition

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

Individuals have full freedom of disposition over their estate during their lifetime.

18 | 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 Spanish Civil Code. One of these matters is succession.

In this regard, the Spanish Civil Code provides that at least one-third of an individual's estate on death is not freely disposable (forced heirship). The non-disposable estate is allocated to the descendants of the deceased and, in some circumstances, the surviving spouse has the usufruct of other assets.

However, in certain autonomous regions, the Spanish Civil Code will not apply because a regional civil code is in place. For example, the Catalan Civil Code provides that non-disposable assets of the deceased will amount to 25 per cent of the inheritance rather than the one-third foreseen in the Spanish Civil Code.

Intestacy

19 | 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 his or her estate, the legislation 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 will be 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 usufruct in favour of the spouse.

Adopted and illegitimate children

20 | 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.

Distribution

21 | 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 Regulation (EU) No. 650/2012, the applicable legislation in terms of distributing an individual's estate will be determined by the habitual residence of the deceased.

Formalities

22 | 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 a 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.

Foreign wills

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

The beneficiary of a foreign will must have the will legalised for it to be valid for Spanish legal purposes. It will normally be necessary to obtain a sworn translation of the will to execute it before a Spanish notary.

Administration

24 | 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 beneficiaries of the will should all agree to distribute the estate or, in absence of an agreement, appoint an executor. If the beneficiaries do not reach an agreement to appoint an executor, they are entitled to request a judiciary executor.

25 | 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. The beneficiaries then submit the title deed of acceptance of the inheritance to register their ownership of the assets before banks, the property registry and the corporate registry.

Challenge

26 | Is there a procedure for disappointed heirs and/or beneficiaries to make a claim against an estate?

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

CAPACITY AND POWER OF ATTORNEY

Minors

27 | 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 is entrusted to his or her parents or legal representatives, who are bound by the general rules of guard and custody.

Age of majority

28 | 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 this activity.

Loss of capacity

29 | 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, which usually involves 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

Visitors' visas

30 | 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 other jurisdictions including Israel, Singapore, the United States and South Korea.

31 | 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.

High net worth individuals

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

In 2013, Spain launched its golden visa programme, which allows qualified investors to reside in Spain for one year. If the investor wishes to stay longer, he or she must qualify for a residency permit, which is valid for two years and is renewable. Permanent residency, subject to certain conditions, can be obtained after five years. The investor is required to carry out a qualified investment in Spain, namely an investment of €500,000 in real estate, €1 million in bank deposits, securities or investment funds, or €2 million in Spanish public debt.

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

The scope of the golden visa programme 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 include the partner of the applicant, children of legal age who are economically dependent on the applicant and who are not married, and ascendants who are economically dependent on the applicant.

34 | 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 one year, the applicant may apply for a residency permit, which is valid for two years and is renewable. Permanent residency, subject to certain conditions, can be obtained after five years.

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

The golden visa programme does not enable an individual to obtain Spanish citizenship. However, among other channels, the Spanish Civil Code allows individuals to obtain Spanish citizenship under specified circumstances, namely 10 years of residence, or two years of residence for individuals from Ibero-American jurisdictions, including Andorra, the Philippines, Equatorial Guinea and Portugal, and individuals with Sephardic ancestors.

Individuals who reside in Spain or who currently hold investments in Spain will be subject to the relevant taxes, such as wealth tax, inheritance and gift tax and 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 provides for different tax planning alternatives to reduce the tax burden of investment 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. Requirements for family business exemptions and allowances 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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UPDATE AND TRENDS

New legislation and current developments

36 | Are there any proposals in your jurisdiction for new legislation or regulation, or to revise existing legislation or regulation, in areas of law relevant to high net worth individuals, particularly those coming to or investing in your jurisdiction? Are there any other current developments or trends relevant to such individuals that should be noted?

The Spanish general state budget has not yet been approved as there is no formed government to date.

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