

**Change of criteria in the application of the exemption on capital gains linked to the transfer of SPV's addressing renewable energy projects.**

The Spanish General directorate for Taxation (the "GDT") has published a recent new binding tax ruling (v2200-23) by means of which it shifts its previous criteria on the application of the general exemption set forth in section 21.3 of the Spanish Corporate Income Tax ("CIT") Law on capital gains derived from the transfer of shares (the "Exemption"), for specific cases where the shares transferred are shares of SPVs addressing renewable energy projects.

In September 2021, the GDT published a binding ruling issued in August 2021 (v2265-21) in which it restricted the application of the Exemption in the transfer of shares in SPVs involved in renewable energy projects in a development phase prior to obtaining permits and licenses to construct the relevant facilities (ready to build) on the basis that those entities did not carry out an economic activity for CIT purposes.

The administrative criterion set forth in the binding ruling v2265-21 has now been modulated and broadened by admitting the application of the Exemption in certain cases where the relevant SPVs are in a pre-development phase (even previous to the obtaining of the required administrative licenses and permits to construct the renewable energy facilities) on the basis that those entities carry out a promoting and development activity (as so ruled by the Spanish Supreme Court, National Court and Economic-Administrative Court in the context of establishing doctrine and jurisprudence on the concept of "economic activity" for CIT purposes) instead of a non-initiated and therefore inexistent promoting and development activity, as pointed out by the GDT in the binding ruling v2265-21.

Although the change in criteria is a very good news for the renewable energy sector, it shall be highlighted that the GDT introduces a qualification in the binding ruling 2200-23. Indeed, the GDT states that the fulfillment of the requirement of carrying out an economic activity for CIT purposes is a matter of fact that shall be analyzed and confirmed on a case-by-case basis and at the same time, it alleges that in every case it must be evidenced the existence of enough material and human resources aimed at participating in the production and distribution of goods and services, at the level of either the SPVs or the parent entity that intends to apply for the Exemption or, alternatively, by means of third-party service providers hired by the latter.

In summary, the binding ruling v2200-23 provides for a clearer and safer tax framework for operators of the renewable energy industry and more widely to a vast array of operators of the infrastructure market who tend to use similar structuring for their projects and that need a foreseeable legal and tax framework to effectively operate and compete in their respective markets.

Having said this, it should not be overlooked the need to carefully review each structure and try to get specific comfort beyond the binding ruling v2200-23 prior to the transfer of the shares in SPVs, since nuances are of extreme relevance when tackling tax issues.

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