New Anti-Fraud Law published

The law, which came into effect the day after its publication, includes important changes to a number of taxes. They include making sweeping amendments to the international fiscal transparency rules, replacing "tax haven" with "non-cooperative jurisdiction" and setting a 15% special levy on undistributed income under the "SOCIMI" regime. It also makes considerable amendments to the General Taxation Law, and changes the rules on the valuation of properties for the purposes of various taxes.

On July 10, 2021 the Official State Gazette published Law 11/2021, of July 9, 2021, on measures to prevent and combat tax fraud, on transposition of Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, and on amending various tax and gambling provisions.

Final provision seven states that the law **will come into force the day after the date it is published in the Official State Gazette (BOE), although specific rules are determined with regard to certain articles**, as we explain in detail below.

1. International fiscal transparency ("IFT")

1.1 Corporate income tax

One of the most important changes in the field of corporate income tax is the amendment of IFT legislation, to fulfill articles 7 and 8 of the **ATAD**[1], which should have been transposed into Spanish law by December 31, 2018.

The structure of the IFT regime (set out in article 100 of the Corporate Income Tax Law (Law 27/2014, of November 27, 2014) is similar to its current structure, although with significant amendments. Namely:

a. **<u>Holding companies</u>**: Two important measures are included in relation to the attribution of certain types of income (dividends, for example) obtained through those entities:

   i. Article 100.1 requires **<u>the mandatory attribution of certain types of income</u>** of the investee.

   This attribution must be made if a certain percentage ownership of the nonresident entity is achieved, whenever the entity pays an amount of tax (attributable to that income) below 75% of the tax determined under the corporate income tax rules.

[1] Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

Among the income to be attributed, the law includes dividends and shares in income and income derived from share transfers.

Until now, these types of income did not have to be attributed if they came from securities derived from an investment in the capital or in the equity of entities which granted, at least 5% of the investee's capital over, at least, a one year period; and if (i) the relevant organization of human and material resources to control and manage the investment exists, and (ii) the investee is not a holding company. Those organization and ownership requirements were determined by reference to the group companies as a whole.

This exception has now been removed. In other words, the dividends and interests in capital and income derived from the transfer will have to be attributed, in all cases, if the requirements in article 100.1 are fulfilled (ownership interest of 50% or more and the tax paid by the nonresident entity in respect of a tax identical or similar to corporate income tax is below 75% of the tax that would have been determined under the corporate income tax rules).

ii. Moreover, article 100.2 had previously required **attribution of all the nonresident entity's income** (in other words, not just certain categories of income) where the entity does not have an organization of human and material resources to carry on its activity.

In relation to dividends, shares in income and income derived from share transfers, however, a similar exception to that described above was provided, based on the ownership interest and the form of management of that investment.

The Anti-Fraud Law has removed this exception also. In other words, if the investee does not have an adequate organization of human and material resources, all of its income will have to be attributed, including dividends and income derived from share transfers, with no exception whatsoever for this last type of income.

b. **Non-business income:**

i. **New non-business income**: Two new types of non-business income have been defined (income that must be attributed if the requirements in letters g) and h) of article 100.1) are fulfilled).

They relate to (i) income from insurance and lending activities, finance lease transactions and other financial activities conducted by non-related parties (except where the activity concerned may be considered a business activity), and (ii) income derived from controlled transactions with nonresidents or permanent establishments in which the latter add "little or no value".

ii. **<u>Income from lending, financial, and insurance activities and activities for providing services conducted, directly or indirectly, with related resident individuals or entities</u>**: Until now, these types of income had to be attributed only if they exceeded 50% of the investee's revenues. This threshold has now been amended, making the attribution mandatory if the transactions with third parties do not account for, at least, two-thirds of the investee's aggregate revenues.

c. **<u>Permanent establishments</u>**: The material scope of the regime for non-business income obtained through permanent establishments abroad which have incurred a tax identical or similar to corporate income tax below 75% of the amount that would have been determined in Spain.

d. **<u>Tax base / dividends</u>**: The law continues to exclude from the tax base any dividends relating to income previously attributed under the IFT rules, or by increasing the acquisition cost of shares in nonresident entities if attributed income is not distributed (paragraph 9 and paragraph 11 of the new article 100); although the exclusion or the increase described are retained only with respect to 95% of the undistributed dividends or income mentioned, in line with the recent amendment of article 21.10 of the Corporate Income Tax Law (under which the exemption for dividends and gains on share transfers only applies to 95% of those types of income).

e. Lastly, an amendment has been made to the **<u>escape clause</u>** in article 100.15 for investees resident (or permanent establishments located) in the European Union (**EU**) (now also the European Economic Area **–EEA-**), which to date required that (i) the formation and operations of the investee had to be for valid economic reasons, and (ii) economic activities had to be carried on or it had to be a collective investment undertaking, as defined in the UCITS Directive. The Anti-Fraud Law removes the reference to formation and operations, leaving only the requirement to carry on economic activities.

Under final provision seven, these amendments will take **effect for taxable periods that commenced on or after January 1, 2021.**

1.2 Personal income tax

The appropriate amendments have been introduced to adapt the IFT rules to the corporate income tax provisions, as described above, with the expectable adjustments derived from the various pieces of applicable legislation and from the differences in the structure of the tax, for example, in relation to tax credits.

2. Non-cooperative jurisdictions

The term "tax haven" is replaced with "non-cooperative jurisdiction", which will cover any jurisdiction on the relevant list approved by ministerial order. Until this list is approved, the provisions in Royal Decree 1080/1991, of July 5, 1991, will apply.

The points to note in relation to the new term are as follows:

a. **Compatibility with tax treaties**: It is stated that the term non-cooperative jurisdiction is compatible with the existence of a tax treaty signed between Spain and that jurisdiction, as long as the treaty provisions are observed.

b. **List updates**: The list may be updated to add or remove jurisdictions, according to criteria determined by EU and OECD task forces (the Code of Conduct on Business taxation and the OECD Forum on Harmful Tax Regimes, respectively), or in line with the following three parameters:

   i. The fiscal transparency of the jurisdiction concerned, which will be determined by reference to:

      - Whether there is mutual assistance legislation regarding the exchange of tax information as set out in the General Taxation Law (**LGT**).

      - Whether there is an effective exchange of information with Spain.

      - The findings of peer reviews conducted by the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes.

      - Whether there is an effective exchange of information in relation to the beneficial owner, as defined in the Spanish anti-money laundering and counter-terrorist financing legislation.

   ii. Whether those countries facilitate the conclusion or existence of offshore arrangements or companies attracting profits without any real economic activity.

   iii. Low or zero taxation in those jurisdictions. This requirement will be fulfilled where a significantly lower effective level of taxation, including zero taxation, applies than the levels required in Spain, in respect of an identical or similar tax to personal income tax, corporate income tax or nonresident income tax.

   The definition of identical or similar tax is similar to the previously existing definition, and differs in relation to social security contributions which until now were not included.

3. Exit tax. Five year limit on deferred or split payments in respect of relocations or transfers to countries in the EU or EEA

3.1 Corporate income tax

The regime in force to date (article 19.1 of the Corporate income Tax Law) gives taxpayers the option to request for the payment of exit tax (capturing the difference between the market value and tax value of the assets of an entity which relocates its residence outside Spain) to be deferred until the assets are transferred to third parties, where the destination of the relocated assets is a country in the EU or EEA with which there is an effective exchange of information. In these cases, late-payment interest accrues and security must be provided under the rules set out in the General Taxation Law for cases involving deferral of the debt.

However, by reason of the transposition of the ATAD, however, and in effect **for periods that commenced on or after January 1, 2021**, taxpayers in any of the described scenarios may only elect to split payment of that exit tax (the calculation of which has not changed) into five equal annual installments; which, as was the case until now, accrue late-payment interest and require security to be provided for those split payments, where the existence of reasonable indications that collection of the debt could be unsuccessful or seriously impeded is substantiated.

This option must be elected on the tax return for the period brought to an end by reason of the change of residence. The first split payment must be made within the voluntary filing period for that return; and each of the other four annual split payments become due and payable (plus the late-payment interest accrued on each) successively after a year has passed from the end of the voluntary filing period for the tax return for the last taxable period.

That entitlement to split payment into five installments will cease to be valid in the following cases:

a. Where the assets concerned are transferred to third parties.

b. Where the assets concerned are transferred to a third country outside the EU or EEA.

c. Where the taxpayer relocates their tax residence to a third country outside the EU or the EEA.

d. Where the taxpayer goes into liquidation or becomes the subject of a collective enforcement procedure (insolvency or any equivalent proceeding).

e. Where the taxpayer fails to make payment within the time period stipulated in the split-payment arrangement.

In the first two scenarios (i.e. transfer/relocation of assets to third parties or outside the EU or the EEA), if the transfer/relocation is partial, entitlement to split payment will cease to be valid only in respect of the proportional part of the exit tax that has become due in respect of assets actually transferred.

Depending on the various scenarios for (full or partial) forfeiture of the entitlement to split payment, the law imposes late-payment interest and, in some cases, enforced collection surcharges, where the debt is not paid in the voluntary payment periods or within a month from when entitlement to split payment ceased to be valid, which varies from case to case.

To avoid double taxation scenarios, the law provides that, in the event of a change of residence or transfer to Spain of assets or activities which, under article 5 of the ATAD, have had an exit tax levied on them in an EU member state, the value determined by the member state will be treated as the tax value in Spain, unless it does not reflect their market value (which, should the case arise, must prevail).

As an exception to the comments made above, the taxable amount does not have to include the difference between the market value and the tax value of the transferred assets relating to the financing or provision of security, or for fulfilling prudential capital requirements, or for liquidity management purposes, whenever it is expected that those assets will be transferred again to Spain to be used in a permanent establishment located in Spain within a period of up to one year.

3.2 Nonresident income tax

In the nonresident income tax regime in force (article 18.5 of the Revised Nonresident Income Tax Law, approved by Legislative Royal Decree 2/2004, of March 5, 2004) there are only two cases in which it is mandatory to include in the taxable amount the difference between the market value and the value for accounting purposes of the assets:

a. Where the assets are used in a permanent establishment located in Spain which stops operating.

b. Where the assets which are used in a permanent established are relocated to another country.

However, by reason of the transposition of the ATAD, a third scenario is included in the Anti-Fraud Law: the assets must be used in a permanent establishment located in Spain and this establishment relocates its activity abroad.

As with corporate income tax, the option is maintained of deferring or splitting the debt where the relocation or transfer is made to the EU or EEA, into five equal annual installments.

The option has to be elected on the return for the tax relating to the taxable period in which the transfer of assets takes place or to the taxable period brought to an end by reason of the relocation of the activity, depending on each case; the Law contains the same rules as for corporate income tax in relation to the making of the first split payment and when each of the other four split payments becomes due and payable.

The same rules are also provided in relation to the requirement to pay late-payment interest and the obligation to provide security when the split payment option is elected (although only where the existence of reasonable indications that collection of the debt could be unsuccessful or seriously impeded is substantiated).

That split payment will not be possible, however, where the tax has to be paid by reason of the permanent establishment ceasing its activities (scenario in article 18.5.a) of the law).

The scenarios in which entitlement to split payment ceases to be valid are the same as those provided in relation to corporate income tax. In other words, entitlement to split payment will cease to be valid where the activity carried on by the permanent establishment is later relocated to a third country outside the EU or EEA, as well as in the scenarios involving transfers of assets to third parties, states of insolvency failure to make payment in the periods mentioned above.

Additionally, in line with the corporate income provisions:

a. In cases of (i) transfers of assets to third parties, or (ii) later relocations of assets to a third country outside the EU or EEA, if the relocation is partial, entitlement to split payment will cease to be valid only in respect of the proportional part of the exit tax that relates to the assets that are actually relocated.

b. The law determines that late-payment interest will be payable, along with an enforced collection surcharge, if applicable, where the debt is not paid in the voluntary payment periods or within a month from when the entitlement to split payment ceased to be valid, depending on each case.

c. If there is a transfer of assets to Spain or a relocation of activities which, under article 5 of the ATAD, have been subject to an exit tax in an EU member state, the value determined by the member state they leave will be treated as the tax value in Spain, unless it does not reflect the market value (which is presumed to prevail, for these purposes).

d. The taxable amount does not have to include the difference between the market value and the tax value of transferred assets related to the financing or provision of security, or for fulfilling prudential capital requirements, or for liquidity management purposes, whenever it is expected that those assets will be transferred again to Spain to be used in a permanent establishment located in Spain within a period of up to one year.

Lastly, the current regime (article 20.2 of the Revised Nonresident Income Tax Law) states that permanent establishments' taxable periods will be deemed to have ended in the following cases:

a. Where the permanent establishment ceases its activities or the investment made at the relevant time in respect of the permanent establishment is otherwise taken out.

b. Where the transfer of the permanent establishment to another individual or entity takes place .

c. Where the head office relocates its residence.

d. Where its owner dies.

The Anti-Fraud Law includes a new case for considering that the taxable period has ended: where the permanent establishment relocates its activity abroad.

4. Changes to the valuation of assets for tax purposes

All references in the transfer and stamp tax legislation and inheritance and gift tax legislation to “actual value” have been replaced with “value”.

As a general rule, the “value” of assets or rights is their “market value”, except in the specific cases explained below. The value that has to be taken for real estate is its “reference value” (*valor de referencia*) as provided in the legislation on the real estate cadaster. And, for determining the taxable amount, the “value reported” by the interested parties must always prevail if it is higher than the market value or reference value.

These amendments are summarized below.

4.1 Amendments in relation to inheritance and gift tax

These amendments relate to article 9 of the Inheritance and Gift Tax Law (Law 29/1987, of December 18, 1987), on the taxable amount, in which the reference to actual value (paragraph 1) has been removed, plus the following has been added (in the new paragraphs 2, 3, 4 and 5):

a. As a general rule, the “value” of the assets will be their “market value”, which is defined as the most likely price at which an asset free from encumbrances could be sold between independent parties.

b. This market value will be the taxable amount, unless the value reported by the interested parties is higher, in which case this figure must be taken.

c. For real estate assets, their values must equal to the reference values provided in the legislation on the real estate cadaster when the tax becomes due. Where no reference value exists or this value cannot be certified by the General Directorate for the Cadaster, the taxable amount must be the higher of the value reported by the interested parties and the market value, which is reviewable by the authorities.

d. The reference value may be challenged in an appeal in the event of an assessment by the tax authorities, or in relation to a request for correction of the self-assessment (under the procedures set out in the LGT).

   In this case, the tax authorities will issue a decision, following the stipulated binding report to be presented by the Directorate General for the Cadaster, which will confirm or correct the value of the real estate asset (in view of the pleadings and evidence produced by taxpayers). This body will also issue this stipulated binding report where one is requested by the tax authorities as a result of the bringing of economic-administrative claims.

   The report must substantiate the reference value by mentioning the decision from which it arises, as well as the average value modules, reduction factors and other elements needed to determine it, as approved in that decision.

In line with this, articles 12, 16 and 18 of the Inheritance and Gift Tax Law have also been amended, to replace the term “actual value” with “value”, in articles relating to the deductible encumbrances in mortis causa and inter vivos acquisitions and to the audit of reported values, respectively.

It is stated moreover that the tax authorities will not be able to commence an audit of reported values in relation to real estate assets if the taxpayer takes the reference value as the taxable amount or reports a higher value.

4.2 Amendments in relation to transfer and stamp tax

The taxable amount for the various transfer and stamp tax headings will no longer be determined by reference to the “actual value” of the acquired assets or rights, instead to their “value”, which will be their “market value” or their “reference value”, as applicable in each case.

For these purposes:

a. An amendment has been made to article 10 of the Revised Transfer and Stamp Tax Law (Legislative Royal Decree 1/1993, of September 24, 1993) to state that the taxable amount for transfer tax under the “transfers for consideration” heading will be the “value” of the transferred asset or of the right that is created or assigned.

   The amount that will be taken as the “value” of the assets and rights will be their “market value”, unless the value reported by the interested parties (the agreed price or consideration or both) is higher, in which case the highest of all these amounts must be taken as the taxable amount for transfer tax under the “transfers for consideration” heading.

   “Market value” will be the most likely price at which the asset or right (free from encumbrances) could be sold between independent parties. In the specific case of real estate assets, the amount that must be used (unless proven otherwise) is the “reference value” as set out in the legislation on the real estate cadaster.

   As with inheritance and gift tax, if a “reference value” does not exist or cannot be certified by the Directorate General for the Cadaster, the taxable amount for transfer tax under the “transfers for consideration” heading will be (although it is reviewable by the authorities), the greater of the following figures: (i) the value reported by the interested parties, (ii) the agreed price or consideration or (iii) the market value.

   The rules on challenging the reference value are similar to those explained in relation to inheritance and gift tax.

b. Amendments to the same effect have been made to article 13.3 (taxable amount for transfer tax under the “transfers for consideration” heading on concessions), article 17.1 (taxable amount for transfer tax under the “transfers for consideration” heading on the transfer of claims or collection rights in exchange for real estate assets under construction), article 25, points 2 and 4, (taxable amount for transfer tax under the "corporate transactions" heading); and article 30.1 (taxable amount under the stamp tax heading, notarial documents).

And the same type of amendment has been made to article 314 of the Revised Securities Market Law, approved by Legislative Royal Decree 4/2015, of October 23, 2015.

c. Article 46 has been amended, in the same way as for inheritance and gift tax, to state that the tax authorities will not be able to commence an audit of reported values in relation to real estate assets, where the taxpayer takes the reference value as the taxable amount or reports a higher value.

4.3 Wealth tax. Taxable amount for real estate assets

Until now, real estate assets had to be valued for wealth tax purposes at the higher of (i) their cadastral value, (ii) the value allowed by the tax authorities in relation to other taxes, and (iii) their price, consideration or acquisition value.

Now, the second of these values will be referred to as the value "determined or allowed" by the tax authorities.

4.4 Reference value for the purposes of the cadaster and procedure for correcting discrepancies

These measures are accompanied by a revision of the regulations on "reference value" issued by the Directorate General for the Cadaster.

That revision consists of an amendment of final provision three of the Revised Real Estate Cadaster Law, approved by Legislative Royal Decree 1/2004, of March 5, 2004, determining the rules for calculating this new "reference value" for real estate assets which, objectively and subject to a ceiling determined by their market value, must be calculated by reference to the prices communicated by public authenticating officers in real estate transactions.

The Directorate General for the Cadaster has to publish every year a report on the real estate market with conclusions drawn from an analysis of the data from previous transactions and a map of values, identifying zones with uniform values and assigning average value modules for representative products. It also has to approve a decision, which must be published on the Directorate General for the Cadaster's website before October 30 of the year before the year in which it is to take effect, containing the elements needed for determining the "reference value" of each real estate asset, according to the average value module and the reduction factors which will be implemented in regulations.

Lastly, a reduction factor will be determined by ministerial order for the values of assets in a same class, to ensure that their "reference value" does not exceed their market value.

It needs to be mentioned that, although these provisions implement the term "reference value" which had already been included in the Revised Real Estate Cadaster Law, by Law 6/2018, of July 3, 2018 on the General State Budget for 2018, the amendment continues to defer, two years later, to a transitional regime on application of the average value modules.

Namely, transitional provision nine ("Transitional regime for determining the reference value of all real estate assets"), contains the transitional rules for calculating the "reference value" of real estate assets, until implementing regulations are approved. The Directorate General for the Cadaster will have to approve, on the basis of an annual report on the real estate market, a decision defining the scopes of application for the basic modules for land and construction, stating the parameters and rules for calculating those modules, the land values for each zone, construction costs and fields of application for the relevant correction multipliers which, for urban real estate assets, must be adjusted to the provisions in the technical valuation rules and framework table of land values for determining the cadastral value.

In relation to the cadaster, the **procedure for correcting discrepancies** has finally been amended.

This cadaster procedure, defined in article 18 of the Revised Real Estate Cadaster Law, is initiated of their own motion by the authorities where they observe an inconsistency between the description on the cadaster and the actual characteristics of real estate and this discrepancy does not arise from a failure to report or notify information by the interested party.

The amendment it contains states that the effects of the correction procedure start from when the tax authorities had sight of the discrepancy between the description in the cadaster and the actual characteristics of the real estate, allows an adjustment to be made to bring them into line with each other, and prevents delays by the tax authorities while handling the procedure, which currently has an adverse effect on taxpayers in many cases.

5. Taxation on life insurance

Amendments have been made to the taxation on life insurance for personal income tax and wealth tax purposes.

5.1 Personal income tax: Life insurance policies in which the policyholder bears the investment risk

Under article 14.2.h) of the Personal Income Tax Law, in life insurance contracts in which the policyholder bears the investment risk, the difference between the net asset value of the assets assigned to the policy at the end and at the beginning of every tax period must be recognized as income from movable capital in each tax period. This timing of recognition rule is not applicable, however, where certain requirements are fulfilled, including the following:

a. The provisions must be invested in assets eligible for the investment of technical provisions, as set forth in Article 50 of the Private Insurance Regulations (Royal Decree 2486/1998, of November 20, 1998) with the exception of real estate assets and real rights in real estate.

b. The investments of each set of assets must comply with the diversification and dispersal limits established, in general, for insurance policies by the Revised Private Insurance Law approved by Legislative Royal Decree 6/2004, of October 29, 2004, its Regulations, and other provisions made for its implementation.

These references to the insurance legislation needed to be updated. The current insurance legislation does not contain express diversification and dispersal limits and the rules on investments of insurance companies are contained in article 89 of Royal Decree 1060/2015, of November 20, 2015, on the regulation, supervision and solvency of insurance and reinsurance companies.

This is why the requirements mentioned above have been replaced with those provided in this last mentioned article.

The provisions in the legislation have also been updated to be consistent with Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

5.2 Wealth tax

5.2.1 Life insurance policies not containing surrender rights

Life insurance policies that have a savings component usually give the policyholder a surrender right in relation to the investment value. There may be cases, however, where the policyholder does not have a surrender right when the tax becomes due.

Article17.one of the Wealth Tax Law (Law 19/1991, of June 6, 1991) states that the value of insurance policies must be calculated by reference to their surrender value when the tax becomes due.

To avoid non-taxation scenarios, that article 17.one has been amended to state that, in cases where the policyholder does not have the power to exercise the right to surrender the policy in full when the tax becomes due, the value of the insurance policy must be calculated by reference to the value of the mathematical provision on that date. This rule does not apply, however, to temporary insurance contracts that only include benefits in the event of death or disability and other additional risk coverage.

5.2.2 Fixed term and life annuities

The taxable amounts for fixed term and life annuities is currently calculated by reference to the present value of the annuities, under article 17.two of the law.

However, for life insurance contracts under which the consideration is received in the form of an annuity it may happen that the annuity does not include repayment of the full amount of contributed funds, where, for example, in addition to the receipt of an annuity, the insurance policy also provides for an additional benefit in the event of death.

In these circumstances, applying the rule in 17.two would determine the inclusion in the taxable amount of a lower amount than that relating to the aggregate rights to payment derived from the insurance contract.

To resolve this, it is now provided that, where fixed term or life annuities are received under a life insurance policy, their value must be calculated by reference to their surrender value when the tax becomes due and, in the absence of that value, to the mathematical provision on that same date.

6. Taxation on inheritance clauses

Amendments have been made to the liability for tax on inheritance clauses for personal income tax and inheritance and gift tax purposes.

6.1 Personal income tax

Until now, in inheritance agreements or clauses with an early inheritance covenant, it was considered that:

a. No capital gain or loss arose for the transferor (as if the assets had been acquired by inheritance).

b. The transferee updated the value of the received assets. As a result, in a subsequent transfer of the assets by the beneficiary under the inheritance clause, they were only taxed on the gain generated since the acquisition of the assets under the inheritance clause.

It is now provided that the transferee under an inheritance clause adopts the original owner's acquisition value and date for the assets, where the received assets are transferred within five years from when the inheritance clause is concluded or from the death of the original owner, if sooner. It therefore makes taxable the capital gain generated between when the asset was originally acquired and when it is transferred under an inheritance clause or agreement.

This amendment only applies to transfers of assets made after the Anti-Fraud Law comes into force.

6.2 Inheritance and gift tax

An amendment has been made to article 30 of the Inheritance and Gift Tax Law, with provisions on the accumulation of gifts, to include, as a new case of accumulation, acquisitions made under inheritance clauses or agreements executed between the same individuals.

7. Exchange traded funds (ETFs) - Extension of the treatment of Spanish ETFs or ETFs traded on a Spanish stock exchange to include ETFs traded only on foreign stock exchanges

The Personal Income Tax Law contains separate treatment for ETFs (listed funds and investment companies), with respect to the treatment applicable to other collective investment undertakings. This separate treatment consists of excluding ETFs from the option to elect the reinvestment deferral relief (known as the "**transfers relief**"), and from deducting withholding tax on any income derived from transferring them.

These specific rules are applicable to Spanish ETFs (under article 79 of the implementing regulations for Law 35/2003, of November 4, 2003, on collective investment undertakings, approved by Royal Decree 1082/2012, of July 13, 2012) and to harmonized foreign ETFs traded on Spanish stock exchanges.

The Directorate General for Taxes, concluded, however, in binding resolution V4596-16 that harmonized foreign ETFs, registered and marketed in Spain, although they are traded only on foreign exchanges, could elect the transfers relief if they fulfilled the necessary requirements and procedures to do so, in which case any capital gains obtained would not be subject to any withholding tax.

The reform has now excluded the option of claiming transfers relief in relation to ETFs similar to Spanish ETFs, regardless of the regulated market or multilateral trading facility on which they are traded and the composition of the index that they reproduce, replicate or take as reference.

A transitional regime is provided, however, which allows transfers relief to be claimed for ETFs not traded in Spain which were acquired before January 1, 2022, as long as the redemption or transfer value is not used to acquire other similar ETFs.

8. Open-end investment companies (SICAV): New requirements for claiming the 1% reduced rate and the transitional regime applicable to their liquidation and winding up

An amendment has been made to 29.4.a) of the Corporate Income Tax Law, which determines a 1% rate for open-end investment companies (SICAV, after their initials in Spanish) meeting the minimum shareholder threshold required in their governing legislation (100 shareholders as a general rule).

First, a number of new rules are laid down for determining the minimum number of shareholders, which start to apply on January 1, 2022:

a. The calculation only includes shareholders owning shares amounting to €2,500 or more (determined by reference to their net asset value on the acquisition date of the shares). Moreover, for compartmentalized open-end investment companies, only shareholders owning shares amounting to €12,500 or more have to be included to determine the minimum shareholder threshold for each compartment.

b. The requirement relating to the minimum shareholder threshold must be met for at least three quarters of the tax period.

These new rules do not apply to hedge fund companies (SIL), master feeder structures or ETFs.

Additionally, the tax authorities are given the power to review fulfillment of the new rules for determining the minimum shareholder threshold.

This amendment is accompanied by transitional rules for open-end investment companies which resolve on their winding up and liquidation in 2022 and carry out within following six months all the necessary steps until they are removed from the registry. This special tax regime has the following components:

a. The winding up process will be exempt from transfer tax under the “corporate transactions” heading.

b. The open-end investment company may continue claiming the 1% tax rate without fulfilling the new requirements between January 1, 2022 and the date of its removal from the registry.

c. Any capital gain arising on the liquidation of the open-end investment company will not be taxed in the hands of the shareholder (this is true if the shareholder is an individual or a legal entity resident in Spain, and if it is a nonresident individual or entity), as long as the funds or assets received in the acquisition or subscription to shares are reinvested in Spanish collective investment undertakings (financial investment funds or open-end investment companies which fulfill the new requirements). Any new shares/units acquired or subscribed will keep the acquisition date and value of the shares of the liquidated open-end investment company.

   The law does not allow partial reinvestment, although it does allow the investment to be made in one or more collective investment undertakings in the reinvestment period, which will be seven months from the end of the period for adoption of the resolution on its winding up with liquidation.

   In these circumstances, and if the other formal obligations laid down for the reinvestment are met, the shareholder will be relieved of the obligation to deduct personal income tax withholdings on amounts of income obtained from the liquidation.

d. An exemption from the financial transaction tax is allowed for taxable share purchases which took place as a result of the winding up with liquidation and reinvestment, as long as the reinvestment fulfills the same requirements as those explained in the preceding letter.

9. Taxation on SOCIMIs

In effect for tax periods commencing on or after January 1, 2021, an amendment has been made to article 9.4 of Law 11/2009, of October 26, 2009, on Listed Corporations for Investment in the Real Estate Market (*Sociedades Anónimas Cotizadas de Inversión en el Mercado Inmobiliario* or **SOCIMIs**).

The amendment introduces a special 15% levy on the amount of any gain obtained in the tax period which is not distributed, in any portion that comes from:

a. Income that has not been taxed at the standard corporate income tax rate.

b. Income not obtained from the transfer of eligible assets, after the three year holding period has run, which have been included in the three-year reinvestment period stipulated in article 6.1.b) of the law mentioned above.

   It needs to be remembered that this article 6.1.b) requires a minimum distribution of 50% of the income obtained from transferring real estate assets, and shares or units in eligible entities for the purposes of the SOCIMI regime, held for at least three years, as long as the other 50% is reinvested in eligible assets within three years following the transfer date.

This special levy will be treated as corporate income tax liability and will become due on the date of the resolution on the allocation of earnings for the year by the shareholders' meeting or equivalent body. The levy must be self-assessed and paid within two months from when the tax becomes due, by filing the form and in the format that will be approved for the purpose.

The disclosure obligations in the notes to financial statements have been amended to adapt them to the introduction of this special levy. The amendment involves a new obligation to disclose separately, within each item, the portion that comes from income subject to the 15% levy.

10. Inheritance and gift tax and wealth tax: Same treatment for citizens of third countries as for Spanish, EU or EEA citizens

a. In relation to inheritance and gift tax, the relevant autonomous community legislation is applied according to whether it is an inter vivos or mortis causa transfer. For example, for an inheritance, the legislation of the autonomous community where the deceased lived will be applied, and for a gift, that of the autonomous community where the recipient resides or the autonomous community where the real estate asset is located, if real estate is gifted.

In the past, however, the central government legislation was applicable, rather than the autonomous community legislation, in cases involving non-Spanish residents, which could be considered discriminatory, because a few autonomous community laws contain more favorable treatment than the central government legislation.

The difference in treatment between residents and nonresidents started to disappear following the judgment by the Court of Justice of the European Union on September 3, 2014. In this judgment, the court ruled that the difference in treatment for citizens resident in other EU member states entailed a restriction on the free movement of capital and was therefore precluded by the Treaty on the Functioning of the European Union.

Following this judgment, Spanish lawmakers amended the Inheritance and Gift Tax Law, through Law 26/2014, of November 27, 2014, and put an end to the discrimination for EU residents and also for residents of the EEA with respect to Spanish residents, although it did not remove that discrimination for residents of third countries.

Finally, the Supreme Court concluded in various judgments (including judgment 242/18, of February 19, 2018) that the effects of the principle relating to the free movement of capital must be extended to apply to third countries so that taxable persons residing outside the EU or outside the EEA may benefit from the same autonomous community reductions as residents in Spain, in the EU and in the EEA.

To apply this principle, the Anti-Fraud Law amends additional provision two of the Inheritance and Gift Tax Law to extend its scope of application to all nonresidents, regardless of whether they are resident in a member state of the EU or of the EEA or in a third country.

b. For wealth tax purposes, the discrimination for citizens resident in the EU or in the EEA was brought to an end in Law 26/2014, of November 27, 2014, and now in the Anti-Fraud Law, the treatment is broadened to apply to all non-Spanish residents. As a result, nonresidents will be entitled to apply the legislation of the autonomous community where their assets and rights with the greatest value among those that are reportable for wealth tax purposes are located.

11. Indirect tax on transfers by traders and professionals and on transfers of businesses

11.1 Transfers made by traders and professionals

It has been clarified that the transactions specified in the transfer and stamp tax legislation will not be subject to transfer tax under the “transfers for consideration” heading where the transferors are traders or professionals and the transaction is part of an economic activity, regardless of the characteristics of the person acquiring the assets or rights.

11.2 Transfers of businesses

Article 7 of the VAT Law (Law 37/1992, of December 28, 1992) originally provided that the transfer of the "whole set of business assets, rights and liabilities" of the taxable person was not subject to VAT. In parallel, article 7.5 of the Revised Transfer and Stamp Tax Law provided that the transfer of real estate forming part of the whole set of business assets, rights and liabilities would be subject to transfer tax under the "transfers for consideration" heading.

Law 4/2008, of December 23, 2008, amended that article 7 of the VAT Law, to state that the non-taxable transfers related to transfers of tangible, and, if applicable, intangible elements, which form part of the taxable person's business or professional assets and form or are able to form an "independent business unit" at the transferor (i.e., a going concern).

The term "independent business unit" refers to a set of assets able to operate by their own means from an economic standpoint at the transferor.

Following this amendment to the VAT Law, however, article 7.5 of the Revised Transfer and Stamp Tax Law was not amended. This lack of coordination between both taxes has raised the question of whether the transfer of an "independent business unit" made by traders or professionals (not subject to VAT), is subject to transfer tax under the "transfers for consideration" heading where it includes real estate assets, even if it does not involve the "transfer of a whole set of business assets, rights and liabilities" (the term referred to in the case subject to transfer and stamp tax). The authorities and a few courts and tribunals have found in favor of these types of transactions being subject to transfer tax under the "transfers for consideration" heading.

Now article 7.5 of the Transfer and Stamp Tax Law has been amended so as to state expressly that transfers of real estate assets in transactions which are not VAT taxable (in other words, where an independent business unit is transferred) will be subject to transfer tax under the "transfers for consideration" heading, and do not have to involve the transfer of the transferor's whole set of business or professional assets rights and liabilities.

12. Limit on cash payments

Amendments have been made to a number of subarticles in article 7 of Law 7/2012, of October 29, 2012, amending tax and budget legislation and adjusting financial legislation to step up efforts to prevent and combat fraud.

a. The general limit on cash payments is lowered from €2,500 to €1,000.

b. In line with Directive (EU) 2015/849 of 20 May 2005, on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, the limit on cash payments is lowered from €15,000 to €10,000 in the case of private individuals having their tax domicile outside Spain.

c. The provisions on the penalty proceeding in the rules on cash payment limits have been amended to adjust them to the rules in Law 39/2015, of October 1, 2015 and Law 40/2015, of October 1, 2015 (on the Common Administrative Procedure and the Legal Regime for the Public Sector), and the following additions have been made:

   i. A penalty has been specified consisting of a proportionate monetary fine equal to 25% of the base for calculating the penalty, which will be the amount paid in cash.

   ii. Specific rules on this penalty proceeding have been provided, notably including a 50% reduction to the penalty amount if it is paid any time after the penalty proposal, but before notification of the decision. This brings it into line with the rules on the reduction of fines contained in the legislation on traffic penalties.

   iii. A six month period has been set for completion of the proceeding (which differs from the three month period set, generally, for the ordinary administrative proceeding).

These amendments will apply to any **payments that are made after the law comes into force**, even if they relate to transactions arranged before the limit was set.

In relation to **amendments to the penalty proceeding, it is specified that the new regime will be applicable to any proceedings that commence on or after the date the law enters into force. However, the 50% reduction to the penalty amount in the case of payment will be applicable to penalties imposed before the law entered into force, if this percentage is more favorable** for the taxable person and the penalty has not become final.

That 50% reduction will also be applicable if: a) after the entry into force of the law and before January 1, 2022, the interested party substantiates to the competent authority that they have discontinued their appeal against the penalty; and b) the remaining amount of the penalty is paid within the voluntary period commenced with the notification that the authorities will make after the discontinuance.

13. Virtual currencies - reporting obligations

To strengthen tax control over taxable events relating to virtual currencies, new obligations to supply information to the tax authorities have been laid down in relation to the holding of those currencies and the transactions (purchases, transfers, exchanges, collections and payments) involving them. These currencies are also included in the information return on assets and rights abroad.

13.1 Reporting obligations on transactions with virtual currencies

a. Reportable transactions: All transactions involving virtual currencies (purchases, transfers, exchanges, collections and payments) must be reported.

b. Obligation holders: The reporting obligation will lie with:

   i. Spanish resident individuals and entities and permanent establishments in Spain of individuals or entities resident in other countries, which provide services on behalf of third parties to safeguard private encrypted keys and to hold, store and transfer virtual currencies, no matter whether that service is provided as a main service or in connection with another activity.

   ii. The following Spanish-resident individuals entities and permanent establishments in Spain:

      - Anyone providing exchange services between virtual currencies and money which is legal tender or between different virtual currencies, or intermediating in any way in the performance of those transactions.

      - Anyone making initial offerings of new virtual currencies (ICOs, in other words), which they deliver in exchange for the contribution of other virtual currencies or of money which is legal tender.

c. Information to be reported: The information has to include:

   i. A list of the names of the parties participating in the transactions, stating their addresses and taxpayer identification numbers.

   ii. Class and number of virtual currencies transferred.

   iii. Transaction price and date.

13.2 Return for assets and rights abroad

a. Reportable information: There is an obligation to report on the return for assets and rights abroad any virtual currencies located abroad and held by individuals or entities providing services to safeguard private encrypted keys on behalf of third parties and to hold, store and transfer virtual currencies.

b. Obligation holders: The reporting obligation will lie with anyone who is owner, beneficiary or authorized person or who, otherwise, has the power of disposal over virtual currencies; and with the beneficial owners, under article 4.2 of Anti-Money Laundering and Counter-Terrorist Financing Law (Law 10/2010, of April 28, 2010).

c. Penalty regime. The penalty that will be imposed for breaching this obligation is:

   i. A fixed monetary fine amounting to 5,000 for every item or set of data relating to each virtual currency considered individually, which should have been included on the return or which were provided but were incomplete, inaccurate or false, subject to a minimum of €10,000.

   ii. A monetary fine equal to €100 for every item or set of data relating to each virtual currency considered individually according to its class, subject to a minimum of €1,500, where the return was filed outside the time limit without a prior request from the tax authorities; or where the return was filed using media other than electronic, computer, or remote media and there is an obligation to file it using those media.

14. Amendments to the General Taxation Law

Numerous amendments are introduced to the General Taxation Law (Law 58/2003, of December 17, 2003), as summarized below:

14.1 Computer systems: New formal obligations and penalty rules for breaching them

A new formal obligation is introduced consisting of any computer or electronic systems used for accounting or business management processes and having to meet certain requirements that ensure the integrity, conservation, accessibility, readability, traceability and inalterability of the records. The technical specifications for these requirements may be further defined in implementing regulations, which may include having to obtain a certificate for them.

Specific penalty rules are laid down in relation to this new obligation. Namely:

a. The following have been defined as a new infringement: the manufacture, production and sale of computer systems which fail to meet the specifications laid down in the applicable legislation.

b. Several circumstances have been defined which will entail the commission of the infringement. Among them, (i) where the computer systems allow different accounting records to be kept, (ii) where they allow all or part of noted transactions not to be reflected fully or partially; (iii) where they allow transactions other than the noted transactions to be recorded or allow the noted transactions to be altered, or (iv) where they do not meet the technical specifications required in the General Taxation Law. An infringement will also exist where no certificate has been issued for the manufactured, produced or sold systems (if one if mandatory).

c. The infringements will be serious.

d. Most of the penalties specified range between €50,000 and €150,000, for each fiscal year.

These provisions will have to be supplemented with implementing regulations which will include the technical specifications along with the elements relating to the approval and certification of those systems and programs.

Under final provision seven, the new obligation, together with the related penalty rules will come into force within **three months after the law comes into force generally**.

14.2 Representation of nonresident individuals or entities

The rules on the representation of nonresidents is adapted to EU law. In this connection:

a. The nonresident's representative will not need to be domiciled in Spain, with a deferral to the provisions in each piece of tax legislation.

b. The mandatory nature of the representative is removed "where, due to the characteristics of the transaction or activity performed or due to the amount of the income obtained, the tax authorities so require".

14.3 Changes in relation to the debtors list

Several changes have been made in relation to the tax debtors list:

a. The threshold amount for inclusion on the list is lowered to €600,000 (from €1 million).

b. Jointly and severally liable parties are expressly required to be included on the list, together with the main debtors.

c. It is clarified that the period in which the tax debts and penalties must be paid so as not to be considered for inclusion on that list is the stipulated time period for payment in the voluntary period as determined by the law, a voluntary period that cannot be extended, for example, by filing requests for deferred or split payment in that original voluntary period.

d. It allows anyone who has fully paid the outstanding amounts in respect of debts and penalties to be excluded from the tax debtors list. For these purposes, the payments made until the end of the pleadings period after notification of inclusion on the list will be taken into account.

In relation to public disclosure of the list in 2021, rather than December 31, 2020 (the date that would be determined under article 95.4 of the General Taxation Law) the reference date that will be taken is the last day of the month immediately after the month of entry into force of the Anti-Fraud Law, and the amendments mentioned above are applicable.

14.4 Surcharges for late-filing without a prior request:

The rules on surcharges for late filing without a prior request have been amended:

a. On the one hand, the current system involving 5%, 10% and 15% surcharges (for the first 3, 6 and 12 months of delay, respectively), without late-payment interest, and the 20% surcharge for delays of twelve months or longer (in which case late payment interest becomes payable also from the end of that twelve month period) has been changed to the following rules:

   i. An incremental surcharge equal to 1% for each complete month of delay (with no late-payment interest) until the delay amounts to twelve months.

   ii. From the day following the end of that twelve month period, in addition to a 15% surcharge becoming due, late-payment interest will start to accrue.

b. Surcharges will not be imposed on anyone who makes an adjustment to their tax position based on principles from a prior administrative adjustment (in respect of the same item and under the same circumstances, but in respect of other periods), subject to four requirements: (i) the voluntary adjustment must be made within six months from notification of the prior assessment, (ii) the assessed amounts must be paid, (iii) no application for correction must be made and no appeal or claim must be brought against the assessment that the tax authorities will issue for these purposes; and (iv) the prior administrative adjustment must not have been accompanied with a penalty.

These amendments will have an **effect on the surcharges imposed before the entry into force of the new law**, if they are more favorable for the taxpayer and those surcharges have not become final.

Additionally:

a. It is specified that the surcharge rules will not be applicable to customs declarations. As stated in the preamble, this specification was necessary to clarify that the provisions are not compatible with the late-payment interest determined in the legislation applicable to customs debts.

b. It is determined that late-payment interest and surcharges for late-filing in relation to incorrect refunds are compatible (contrary to the conclusions that TEAC has adopted in various decisions). More specifically, late-payment interest will be charged where the taxpayer has obtained an incorrect refund, unless the taxpayer voluntarily adjusts their tax position, and it is stated that the accrual of interest will be fully compatible, if applicable, with any surcharges for late-filing under the general rules on those surcharges.

14.5 Court warrant to enter taxpayers' domiciles

Various amendments have been made in relation to entering taxpayers' domiciles, thereby preventing the impact of the Supreme Court's case law in relation to not being able to carry out searches without a specific purpose:

a. The request for a court warrant to enter a constitutionally protected domicile must have suitable justification and the purpose, need and proportionality of the search must be substantiated.

b. Both the application and the grant of the warrant may be made before the formal commencement of the relevant proceeding, as long as the entry decision contains the taxpayer's identity and the items and periods that are going to be examined and this is produced to the court with jurisdiction for issuing the warrant.

c. In relation to the auditors' functions, it is specified that where it is necessary to enter a taxpayer's constitutionally protected domicile, the application for a court warrant must include the entry decision signed by the competent public authority.

In line with the amendment of the General Taxation Law, an amendment has been made to the Judicial Review Law (Law 29/1998, of July 13, 1998) to grant powers to the judicial review courts in relation to warrants to enter a domicile and other constitutionally protected places, where this has been decided by the tax authorities as part of a step or proceeding for the application of taxes, even if it is carried out before they have formally commenced, where that access requires the consent of the owner and the owner objects or there is a risk of that objection.

14.6 Tax penalty rules

Numerous amendments have been made to the tax penalty rules (in addition to the points already mentioned in relation to the new obligation related to computer systems):

a. Infringing parties

   The parent company under the special VAT group scheme is included among the infringing parties. This unifies the treatment of infringing parties in corporate income tax and VAT groups.

b. Customs penalties

   The minimum penalty amount has been raised (from €100 to €600) if the infringing conduct (consisting of not filing self-assessments or declarations or filing them incorrectly, without a loss arising) occurs in relation to the entry summary declaration as defined in the Customs Code.

c. Penalty reductions

The penalty reduction related to notices of assessment with agreement is raised from 50% to 65% and the reduction for prompt payment, from 25% to 40%.

The reduction for agreement with the main adjustment, however, is retained at 30%.

The new penalty reduction percentages **will apply to penalties imposed before the entry into force of the law**, as long as they have not been appealed and have not become final.

The 40% reduction for prompt payment will also apply (even if the penalty or the assessment to which it relates has not been appealed) if (i) the filed appeal or claim (against the penalty or assessment) is discontinued before January 1, 2022 and (ii) the remaining amount of the penalty is paid in the voluntary period commencing on the notification by the tax authorities after that discontinuance has been substantiated.

d. Penalty proceeding: time limit for commencement

The time limit for commencement of a penalty proceeding initiated in relation to assessments or decisions issued in certain proceedings for applying taxes is lengthened from three to six months.

14.7 Other amendments

Other notable amendments are:

a. In relation to the principles relating to the regulation and application of the tax system, a **prohibition of extraordinary tax adjustment mechanisms** is introduced which may reduce the tax debt.

b. An amendment has been made to the provisions on **late-payment interest payable to the taxpayer**, to expressly recognize that interest will not accrue on **refunds under the legislation on each tax and on incorrect tax payments in specific periods** (delays not attributable to the tax authorities and extended audit periods).

c. A new case allowing **suspension of the time period for audits** has been added while certain instruments (notifications) are being implemented, directed at facilitating cooperation and coordination between central government tax authorities and those of the provinces with special “foral” regimes (Navarra, Álava, Guipúzcoa and Vizcaya) in the conduct of those audits.

d. To prevent **suspension procedures** with security other than that necessary to obtain automatic suspension, or with a fully or partial exemption from that security, being used for fraudulent purposes, the option has been added of adopting **injunctive remedies** while they are conducted.

e. An amendment has been made to the **grounds for terminating the management proceeding initiated as a result of a declaration** with respect to levies that are assessed on **imports of goods**, to bring them into line with the customs legislation on import duties. It is stated that these proceedings may end if it is later decided to initiate a limited review or audit on the same subject matter as the proceeding (or any component of that subject matter).

   In the final wording of the law the provision in the bill on the invalidity of a declaration of expiry of those proceedings has been removed.

f. **The mandatory nature of the disagreement report is removed** where **assessments are issued with disagreement**, except where this is necessary to complete the information contained in the assessment.

g. In the rules on **collection in the enforcement period**, it is specified that reiterated requests for deferred, split or netted payments which have already been rejected (and the relevant payment has not been made) does not prevent commencement of the enforcement period.

   Moreover, because there is a single voluntary payment period, it is clarified that this period cannot be affected by an insolvency order.

h. In relation to the **procedure for seeking joint and several liability**, it is specified that the voluntary payment period for debts is the original payment period, and any alterations that have occurred in relation to the main debtor, such as suspensions or deferrals, must not be transferred to the proceeding conducted with the liable party.

i. The principle determined by the Court of Justice of the European Union has been recognized, which **prevents the enjoyment of tax benefits that are state aid under EU law by anyone who has not repaid** state aid declared illegal and incompatible with the internal market by the European Commission, until that aid has been repaid.

j. Legal coverage has been given to the option for **economic-administrative tribunals not to admit requests for suspension with full or partial exemption from the provision of security**, where it may be inferred from the documents in the case file that the requirements stipulated for allowing the request are not fulfilled.

   Also, for the purpose of avoiding fraudulent practices consisting of taking advantage of the difficulties arising in the handling of certain requests for suspension, in cases where the debt is in the enforcement period, the authorities' option of continuing the proceedings is granted primary legislation status.

k. An amendment has been made to point 6 of additional provision twenty-two on reporting and due diligence obligations relating to financial accounts with the field of **mutual assistance**, **by extending the document retention period** for financial institutions to the end of the fifth year (until now, the fourth year) following the year in which the information must be supplied in relation to those accounts.

l. Additional provision six of the General Taxation Law sets out a number of **consequences of revocation of the taxpayer identification number of individuals and legal entities**.

Now, where the tax identification numbers of legal entities are revoked, it is specified that notaries must refrain from authorizing any public instrument relating to declarations of intent, legal acts implying the giving of consent, contracts or legal transactions of any type, together with barring access to public registers. They will only be allowed to carry out the steps needed to remove the note in the margin as required in relation to the revocation of a taxpayer identification number.

Moreover, that revocation must appear on all certificates issued by the registry on the entity holding the revoked number.

15. Other amendments

15.1 Limit on temporary suspensions of statute of limitations periods for actions and rights due to COVID-19

By reason of the state of emergency, additional provision nine of Royal Decree-Law 11/2020, of March 31, 2020, stipulated a temporary suspension of statute of limitations periods for actions and rights under tax law. This suspension was to be in effect from the entry into force of Royal Decree 463/2020, of March 14, 2020, declaring the state of emergency (March 14, 2020) until May 30, 2020.

The Anti-Fraud Law limits the effects of this suspension. This is done by stipulating that, in the case of statute of limitations periods, the suspension will only apply to periods which, without including that suspension, end before July 1, 2021.

15.2 Corporate income tax

15.2.1 Tax credit for investments in productions of films, audiovisual series and live performing arts and musical shows

Article 36.2 of the Corporate Income Tax Law states that any producers registered on the register (*Registro Administrativo de Empresas Cinematográficas*) held by Instituto de la Cinematografía y de las Artes Audiovisuales who are responsible for the making of a foreign production of feature films or of audiovisual works which enable the creation of a physical medium prior to their serialized industrial production are allowed to claim a tax credit in respect of the expenses incurred in Spain:

a. Equal to 30% on the first million euros in the tax credit base and to 25% on any excess over that amount. This tax credit requires expenses to be at least €1 million; except for animation production expenses, for which the stipulated limit is €200,000 euros.

   The components of the tax credit base are (i) personnel expenses in respect of creative personnel who are tax resident in Spain or in any member state of the EEA, subject to a limit equal to €100,000 per person, and (ii) expenses derived from the use of technical industries and other suppliers.

   The tax credit is subject to €10 million limit for each production made and, in all cases, the tax credit amount, together with the other types of aid received by the company, cannot go above 50% of the production cost.

b. Equal to 30% of the tax credit base, where the producer is responsible for visual effects services and the expenses incurred in Spain are below €1 million.

The requirements that must be fulfilled by producers responsible for foreign productions of feature films to be able to claim the credit are also specified. Namely:

a. The production must obtain a certificate evidencing its cultural nature in relation to its content, or its relationship with Spanish or European cultural reality, issued by Instituto de Cinematografía y de las Artes Audiovisuales, or by the relevant autonomous community body with powers in this area. This requirement is not laid down for claiming the tax credit described in letter b) above.

b. The closing credits for the production must mention:

   i. that the tax credit has been claimed;

   ii. the collaboration, if applicable, of the Spanish government, or autonomous community governments, the Film Commissions or the Film Offices that have participated directly in the filming or other production processes carried out in Spain;

   iii. the specific filming locations in Spain and, for audiovisual animation works, the location of the studio that provided the production service.

c. The rights owners must authorize use of the title of the work and of graphic and audiovisual press material, expressly including the specific places where filming or any other production process carried out in Spain took place, to facilitate the performance of activities and the preparation of promotion materials in Spain or abroad in relation to culture or tourism, by central, autonomous community or local government entities with powers in relation to culture, tourism and the economy, as well as by the Film Commissions or Film Offices that have participated in the filming or production.

The requirements described in letters b) and c) above will not apply for foreign feature film productions and audiovisual works with respect to which the contract for the production has been signed before the entry into force date of the Anti-Fraud Law.

15.2.2 Provisional removal from the entities list

Letter a) of article 119 of the Corporate Income Tax allowed provisional removal "where the entity's tax debts with the central government public finance authority are delinquent under the General Collection Regulations, approved by Royal Decree 939/2005, of July 29, 2005".

Because the term "*fallido*" (delinquent in Spanish) cannot be used for claims, but for debtor entities a technical correction has been made to it.

15.3 The Canary Islands Economic and Tax Regime (REF)

Effective for periods that commenced on or after January 1, 2021, the following amendments are introduced.

15.3.1 Limits on tax credits for investments in productions of films, audiovisual series and live performing arts and musical shows made in the Canary Islands

As had already been done in Royal Decree-Law 12/2021, of June 24, 2021, for taxable periods that commenced in 2020, an amendment has been made to additional provision fourteen of Law 19/1994, effective for taxable periods that commence in or after 2021, to raise from 5.4 to 12.4 million the limit on the corporate income tax credit for investments in film productions and audiovisual series made in the Canary Islands.

15.3.2 Tax regime for vessels and shipping companies

a. Special register for vessels and shipping companies

The option has been added for the vessels of shipping companies entered on the Special Register for Vessels and Shipping Companies which are registered in another member state of the EU or EEA to be treated as if they were entered on the Special Register, if they fulfill the same requirements and conditions as are laid down for other vessels to be entered.

b. Requirements and limits for claiming tax incentives

An amendment has been made to the requirements and limits set out in the REF for vessels and shipping companies to claim tax incentives in relation to corporate income tax, personal income tax, nonresident income tax and transfer and stamp tax and the excise tax on certain modes of transport, which now have the characteristics specified below:

i. The entity must have the necessary accounting records to be able to determine the, direct or indirect, revenues and expenses, relating to the activities for which the regime had been elected; as well as in relation to the assets used in them.

ii. The vessels have to be seaworthy and used for the carriage of goods, passengers, salvage or other services which must be provided at sea.

iii. With respect to the activity:

   - For vessels used for towage, more than 50% of the activity actually performed in the taxable period will have to relate to carriage by sea.

   - For vessels used for dredging activities, more than 50% of the activity actually performed in the taxable period will have to relate to the carriage and depositing of extracted materials on the sea bed, with the regime only applying to this part of their activities.

iv. The amount of the tax incentives, together with the other types of aid for carriage by sea received by the entity, cannot exceed the limit provided in EU directives on state aid for carriage by sea.

v. The tax regime will also be claimable for vessels used under chartering arrangements, where the sum of their net tonnage is not in excess of 75% of the aggregate figure for the company's fleet or, if applicable, the fleet of the group of companies (within the meaning of article 42 of the Commercial Code).

vi. Where the regime is claimable by taxpayers with vessels not registered in Spain or in another member state of the EU or of the EEA, an increase in the percentage that the net tonnage of those vessels bears to the aggregate figure for the fleet of the company claiming the special regime, whatever the reason for it, will not stop them from being eligible for the regime on condition that the average figure for the percentage that the net tonnage of vessels registered in Spain or in other member states of the EU or of the EEA bears to the aggregate figure for the year before the year in which that increase occurs is kept over a subsequent period of 3 years. This condition does not apply where the percentage figure for the net tonnage of vessels registered in Spain or in another member state of the EU or of the EEA is at least 60%.

c. Reduction to the corporate income tax liability

The REF allows a 90% reduction to the resulting corporate income tax liability after deducting any double taxation tax credits under Chapter II of the Corporate Income Tax Law. This reduction is made from the tax base that comes from the operations carried on (i) by shipping companies providing scheduled services among the Canary Islands and between the Canary Islands and mainland Spain, or (ii) by the vessels of shipping companies entered on the Special Register or on a register of another member state of the EU or of the EEA.

Now a limit is required for claiming the reduction, under which, where the portion of the taxable amount that comes from the performance of activities closely related to carriage by sea exceeds the portion of the taxable amount resulting from the activities generating the right to claim the special regime, the reduction cannot be made from the tax liability relating to that excess. This restriction will apply in relation to every vessel generating the right to a reduction in relation to its operation.

d. Corporate income tax loss carryforwards

Tax loss carryforwards derived from activities generating the right to claim the tax regime for vessels and shipping companies will not be able to be offset against the tax bases derived from the company's other activities, in either the current period or later periods.

15.4 Personal income tax: Real estate income

The law allows a 60% reduction in relation to determining net real estate income, for residential leases.

A new provision has been added stating that this reduction will only be claimable on the net income calculated on the taxpayer's self-assessment, which will have to be filed before a data verification, limited review or audit process is commenced, which includes a review of those amounts of income. The reduction will not be claimable either on the amounts of income calculated by the tax authorities which derive from revenues that had not been included or expenses deducted incorrectly by the taxpayer, even if the taxpayer accepts the adjustment.

15.5 Nonresident income tax

Amendments have been made to article 9.4 (joint and several liability) and articles 10.1 and 10.2 (nonresidents' representatives) to exclude cases of taxpayers resident in the EU or in a country in the EEA which comes under the mutual assistance legislation (namely, Iceland or Norway, but not Liechtenstein).

15.6 VAT and Canary Islands general indirect tax (IGIC)

15.6.1 Liability system

a. Liability of customs representative

In relation to the rules on the liability of customs representatives, it is specified that secondary liability for the payment of VAT for customs representatives includes individuals (who need not be customs agents) acting for and on behalf of the importer under article 87.Three of the VAT Law.

b. Liability of the owners of tax warehouses

The case of the secondary liability for payment of the tax debt for the owners of warehouses other than customs warehouses in respect of the exit or abandonment of the goods from those warehouses, has been extended to include goods subject to excise taxes, which until now had been excluded.

However, for products subject to the excise tax on alcohol and alcoholic beverages and to the excise tax on hydrocarbons, the owner of the warehouse is exempted from liability where the exit or abandonment of the goods is carried out by a remover or by an individual or entity authorized to do so who is entered on the new register of removers that will be created for the purpose and their legislation defers to subsequent implementing regulations.

15.6.2 Penalty rules for the special regime for VAT groups

The scope and nature of the specific obligations in the VAT group regime have been clarified, and if the regime is breached the parent company may be the infringing party.

Namely, it is stipulated that the parent company's liability includes the obligations relating to (i) payment of the tax debt, (ii) requesting an offset or the refund resulting from the aggregate self-assessment return; and (iii) the truthfulness and accuracy of the amounts and categories provided by the subsidiaries included in the aggregate self-assessment return.

In line with this, as we had anticipated, the General Taxation Law includes the parent companies of groups claiming this special regime on the list of potential infringing parties.

15.6.3 Penalty regime for the Canary Islands general indirect tax, in relation to Immediate Information Sharing (IIS)

The obligation to keep Canary Islands general indirect tax records on the website of the Canary Islands Tax Agency entered into force and became effective on January 1, 2019, although to date no specific penalty rules had been approved.

The Anti-Fraud Law stipulates that it is a serious tax infringement to delay fulfillment of the obligation to keep Canary Islands general indirect tax records on the website by sharing invoicing records. The penalty will consist of a monetary fine equal to 0.5% of the amount of the invoice to be recorded, with a minimum fine of €300 per quarter and a maximum of €6,000.

15.7 Tax on economic activities

The Local Finances Law (Legislative Royal Decree 2/2004, of May 5, 2004) allows an exemption from the tax on economic activities for specific taxable persons having a net revenues figure below €1,000,000. It is stipulated, for these purposes, that, where the company is part of a group within the meaning of article 42 of the Commercial Code, the net revenues figure must relate to the group, for which purpose it defers to the cases set out in section 1 of chapter I of the rules on the preparation of consolidated financial statements.

To strengthen the anti-evasion measures set out in the law and prevent failure to apply the rule on aggregation of the net revenues figures of the members of a business group, which determines the liability for the tax, the provisions in the law in relation to determining that a group of companies exists have been amended and it is clarified that the rule for calculating the net revenues figure will have to be applied regardless of whether there is an obligation to file consolidated financial statements.

Moreover, to prevent discrepancies with EU law, it is stipulated that the exemption from the tax for individuals applies to residents and nonresidents alike.

15.8 Excise and special taxes

15.8.1 Suspension arrangement for excise manufacturing taxes

To prevent the suspension arrangement being applied incorrectly, an amendment has been made to the definition of “tax warehouse”, in the chapter on common provisions, to clarify that, for the owner of a tax warehouse to obtain the relevant authorization to operate as such, it is necessary for actual warehousing, receipt, dispatch or processing operations on the products subject to excise manufacturing taxes to be performed in that establishment.

15.8.2 General infringements and penalties

a. Differences in raw materials and products.

   A new infringement is defined in respect of the existence of differences in the form of fewer raw materials, products in process or finished products at factories or tax warehouses which exceed the percentages authorized in the legislation, and come to light in inventory counts made by the tax authorities.

   The infringement will be subject to a monetary fine equal to 50% of the excise tax liability that would be determined for the finished products on which the difference was identified or to the finished products that could have been obtained from the products in process or the raw materials in relation to which that difference was found, calculated by applying the tax rate in force on the date of discovery of the infringement, subject to a €300 minimum amount.

b. Failure to substantiate the use or purpose

A second new infringement has been defined for a breach of the requirements and conditions set out in the law and in its implementing regulations to claim the exemptions or reduced rates allowed in that legislation, where no substantiation is provided of the use or purpose given to the products to which the benefits relate.

The penalty will consist of a proportionate monetary fine equal to 50% of the tax relief claimed for the products with respect to which the requirements and conditions established in primary or secondary legislation were not fulfilled. The penalty must be increased by 25% where tax infringements are repeated. This must be found to exist where the infringing party, within two years before the new infringement was committed, had had a penalty imposed on them in a final decision in the administrative jurisdiction for infringing any of the prohibitions that are classed as serious tax infringements.

c. Failure to fulfill requirements for tax relief

A new infringement has been defined for failure by taxpayers to fulfill the requirements and conditions laid down in the law and in its implementing legislation to be able to claim entitlement to an exemption or a reduced tax rate by reason of the purpose of the products subject to excise taxes, where that failure does not qualify as a serious tax infringement.

The infringement is subject to a penalty equal to 10% of the tax relief claimed for the products with respect to which the taxable person has failed to fulfill the requirements and conditions laid down in primary or secondary legislation.

15.8.3 Infringements and penalties for specific taxes

a. Alcoholic beverages and tobacco products with irregular fiscal marks

The minor tax infringement category has been extended to include the holding, for commercial purposes, of alcoholic beverages or tobacco products bearing fiscal marks without fulfilling the requirements laid down in the regulations in this respect.

Another element that has been included is the penalty applicable to rolling tobacco, which is set at a fine amounting to €90 for every kilogram of tobacco, subject to a €600 minimum for every infringement.

b. Infringements and penalties in relation to the coal tax and electricity tax

In relation to the coal excise tax and the electricity tax those infringements are defined from the standpoint of a breach of the requirements and conditions set out in the law and in its implementing legislation for claiming the exemptions or reduced rates under the legislation, where the use or purpose of the coal or electricity to which the benefits relates is not substantiated.

Similar penalties to those described above are defined:

i. Proportional monetary fine equal to 50% of the tax relief claimed for the products with respect to which the requirements and conditions laid down in primary or secondary legislation have not been fulfilled where the infringement is classed as serious.

ii. Proportional monetary fine equal to 10% of the tax relief claimed for the products the tax relief claimed for the products with respect to which the requirements and conditions laid down in primary or secondary legislation have not been fulfilled where the infringement is classed as minor.

15.8.4 Excise tax on certain modes of transport

With effect until December 31, 2021, a change has been made to the official CO_2 emissions limits determining the class in which vehicles are taxed, as summarized in the following table:

Class	Former limits	New limits
1	Up to 120 g/km	Up to 144 g/km
2	Above 120g/km and below 160 g/km	Above 144g/km and below 196 g/km
3	Above 160 g/km and below 200 g/km	Above 196 g/km and below 240 g/km
4	Above 200 g/km	Above 240 g/km

15.9 Gambling provisions

To contribute to strengthening the prevention and fight against fraud, an amendment has been made to Law 13/2011, of May 27, 2011, on gambling.

The most notable approved measures (due to their possible tax implications) are described below.

a. Authorized operators must prepare and use a **manual** which must include descriptions and measures designed to identify the various fraud scenarios and the treatment that will be given to them.

b. A duty is imposed on operators to **report to the supervisory authorities** any identified fraudulent activities and the identities of the players performing them.

c. Two new **powers are granted to the National Gambling Commission**:

    i. To request information from the providers of gambling services regarding both the transactions performed and the services ceased to be provided.

    ii. To contribute and cooperate with the competent authorities in the prevention and fight against fraud in sports betting.

d. The **General Directorate for Gambling** is allowed to access the information held by Spanish sports which is necessary to ensure that the parties listed in article 6.2 of the Gambling Law (i.e. athletes, club managers, referees, etc.) do not participate in the gambling activities falling under the law.

e. Additionally, the range of **serious and minor infringements** is increased:

    i. *Serious infringements*: two new types of infringements have been added to prevent the use of illegal operators or advisors or intermediaries who promote the use of gambling platforms that are not authorized in Spain:

        - Failure to fulfill the requirements and obligations contained in the legislation to achieve responsible gambling and the protection of established players.

        - Enabling the participation in Spain in games on websites other than those of the authorized operators.

    ii. *Minor infringements*: a minor infringement is defined consisting of the participation from Spain, using IP address masking techniques, in regulated games on websites other than those that have been legally authorized.

f. To make the penalty rules more effective, **every final and nonappealable penalty** imposed will be published on the **Directorate General for Gambling's website**, as happens with the finance authority's debtors list. It also requires publication of the **list of websites offering games that do not have the required enabling instrument**.

g. Lastly, there is a **special duty of collaboration between Sociedad Estatal de Loterías y Apuestas del Estado, ONCE and AEAT** (the Spanish government-owned lottery and betting company, the Spanish organization for the blind and the Spanish tax agency). This arrangement remains to be implemented in a contract which will have to be signed, but the law already sets out the obligation to supply **tax relevant information** monthly (i.e. date of the draw, identity of the recipient or of their legal representative, date of payment of the prize, method of payment, amount of withholding tax deducted, etc.).

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