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Spain

Arm's length principle

Spanish transfer rules are embodied in the new Corporate Income Tax Law (CITL) and the Corporate Income Tax Regulations (CITR). The new CITL was approved by Law 27/2014, of 27 November, effective as of 1 January 2015, whereas the new CITR was approved by Royal Decree 634/2015, of 10 July 2015.

There are no systems other than the arm's length principle applicable in Spain.

Transfer pricing methods

The consideration in transactions between related parties must be valued on an arm's length basis under article 18 of the CITL.

Article 18(4) of the CITL expressly refers to the methods to be used to determine arm’s length values as provided in the 2010 OECD Guidelines. The former CITL in force until 31 December 2014 established a hierarchy of the methods to value the considerations of a transaction at arm's length. However, the current CITL removes the preference for the comparable uncontrolled price (CUP), cost-plus and resale price methods over the profit split and the transactional net margin method (TNMM). This non-hierarchy is in line with the OECD Guidelines.

Facts and figures as presented are correct at time of writing: February 2017

Scope of legislation

The Spanish transfer pricing rules cover any kind of transactions between related parties, as described in article 18(2) of the CITL, regardless of whether they are purely domestic or cross-border. In addition, and according to the current CITR, transactions with persons or entities resident in a tax haven jurisdiction for Spanish purposes must be valued at arm's length and are subject to the documentation requirements set forth in article 18(3) of the CITL.

Parties are taken to be related where the parties are (article 18.2 of the Corporate Income Tax Law, LIS):

(1) an entity and its participants or directors (or their relatives)

(2) two companies forming part of the same group of companies for accounting purposes (article 42 of the commercial Code (CCo)

(3) a parent holding indirectly at least 25% of the capital of the subsidiary

(4) two companies participated, directly or indirectly, by the same shareholders (or their relatives) in at least 25% of the capital

(5) a resident company and its permanent establishments abroad, or

(6) two companies where one controls the other. Where the relation is between a company and its shareholders (case (1)), a minimum shareholding of 25% is required to establish the relationship.

Reporting requirements

Under the current CITR, any transactions with individuals or entities resident in a tax haven for Spanish purposes (except those located in the European Union and carried out for sound economic reasons in the context of a business activity) must be reported. Additionally, Spanish entities involved in transactions with tax residents of tax haven jurisdictions must identify the entities and their directors, or the individuals, involved in such transactions as part of the documentation obligations.

The CITR has strengthened the documentation obligations of transactions with non-related parties that are residents in a tax haven. These obligations are now the same as for related-party transactions with regard to country-by-country reporting, group documentation and taxpayer residence in a tax haven with which the taxpayer carries out transactions.

Failing to identify the counterparties with residence in a tax haven has a penalty of €1,000 per counterparty.

Country-by-Country reporting

With effect from 1 January 2016, article 14 of the RIS includes a country-by-country reporting requirement, in line with the OECD Base Erosion and Profit Shifting (BEPS) project. The characteristics of this requirement are the following:

- It applies to any Spanish-resident entity which is the parent company of a group (as defined in article 42 of the Commercial Code), and is not also the subsidiary of another, resident or non-resident entity
- The requirement also applies to Spanish resident entities which are directly or indirectly the subsidiaries of a non-Spanish resident entity which is not also the subsidiary of another, or to permanent establishments of non-resident entities, meeting any of the tests listed in the RIS and which make up for absence of disclosure scenarios
- Any Spanish-resident entity which is part of a group subject to reporting requirements must notify the tax authorities, before the end of the tax period to which the information relates, of the identity and the country or territory of residence of the entity required to prepare that information
- The information must be submitted within 12 months after the end of the tax period and on the form approved for the purpose

- • The requirement applies where the net revenues of all the persons or entities forming part of the group in the 12 months before the beginning of the tax period is equal to or above €750m.

The information that must be reported, in relation to the parent company's tax period, on an aggregate basis for each country or jurisdiction, and in euro, will be as follows:

- The group's gross revenues, broken down into those obtained with related parties or with third parties
- Earnings before corporate income tax (or an identical or similar tax)
- Corporate income tax (or an identical or similar tax) satisfied, including the withholdings paid
- Corporate income tax (or an identical or similar tax) that has fallen due, including withholdings
- Amount of the capital stock figure and other shareholders' equity existing on the end date of the tax period
- Average headcount
- Property plant and equipment and investment properties other than cash and collection rights
- List of resident entities, including the permanent establishments, and the primary activities carried on by each of them
- • Any other information considered necessary and an explanation, if needed, of the data included in the information.

The country by country report is an instrument that may be used for assessing the risks in the transfer pricing policy of a corporate group, but may not under any circumstances serve as a basis for the tax authorities to make pricing adjustments.

Automatic Exchange of CbC Reports – Signed by 31 Jurisdictions

On 27 January 2016, Spain and 30 other jurisdictions signed to a Multilateral Competent Authority Agreement (MCAA) (2016) on the automatic exchange of Country-by-Country (CbC) reports. The signing ceremony marks an important milestone towards implementation of the OECD/G20 BEPS Project and a significant increase in cross-border co-operation on tax matters.

The agreement was developed within the scope of the OECD's BEPS project on corporate taxation. It describes the type of information to be exchanged between states on the activities of multinationals in their territories.

The signatory countries comprise Australia, Austria, Belgium, Chile, Costa Rica, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Malaysia, Mexico, Netherlands, Nigeria, Norway, Poland, Portugal, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland and the United Kingdom.

Documentation requirements

According to the CITR, required documentation can be classified into two categories, namely (i) documentation relating to the group to which the taxpayer belongs and (ii) documentation relating to the taxpayer itself.

Under the new CITR, more detailed information is demanded regarding both the group and the taxpayer itself. Despite the fact that Royal Decree 634/2015 has been in effect since 1 January 2015, the provisions regarding country-by-country reporting (contained in article 14 of the CITR), as well as the new group and taxpayer documentation requirements (contained in articles 15 and 16 of the CITR) will only come into effect for periods beginning on or after 2016, with the exception of simplified requirements applicable to groups and taxpayers with a turnover lower than €45m. Therefore, as a rule, for tax periods beginning in 2015, the provisions contained in Royal Decree 1777/2004 should be taken into account with respect to documentation requirements. This documentation must be prepared in the Spanish language and can be provided in a free format.

Law 36/2006 provided for a specific penalty regime that was effective three months after the CITR entered into force, which is 19 February 2009. Law 27/2014 has modified these provisions making the penalty regime less burdensome. In this regard, failure to comply with the documentation requirements constitutes a tax violation that is subject to penalties. These penalties are determined as follows (article 18(13) of the CITL):

- If the tax authorities do not modify the taxpayer's valuation, the penalty consists of a fixed amount of €1,000 per item and €10,000 per group of items with regard to each one of the documentation requirements that is not complied with or which is improperly complied with, under the CITR; when the persons or entities mentioned in article 18(2) are not exonerated from the documentation requirements, the penalty imposed will be limited to the lower of (i) the 10% of the amount of the overall transactions that, in the relevant tax period, are subject to CIT, non-resident income tax or individual income tax, or (ii) the 1% of the turnover
- If the tax authorities modify the taxpayer's valuation, the penalty is 15% of the amounts resulting from any corrections made.

No penalty will be imposed, even if the taxpayer's valuation is modified, when the taxpayer has followed the documentation requirements and has valued a transaction based on the transfer price derived from such documentation.

Cost sharing

The Spanish legislation does not provide for a definition of cost contribution agreements (CCAs). However, contributions made under CCAs are specifically regulated in article 18(7) of the CITL and article 18 of the CITR. The Spanish CITL does not limit the scope of CCAs.

Under article 18(7) of the CITL, in order for a deduction to be allowed for the charges derived from contributions to a CCA, the CCA must meet some requirements. In this sense, contributions made by each member must be valued as a function of the expected benefits for each member, based on a rational criterion. The contributions must therefore be determined from quantitative (expected benefits) and qualitative criteria (the rationality).

There is no further guidance from the Spanish tax authorities and no specificities in relation to the criteria of the OECD Guidelines in this regard.

Interaction between customs valuation and transfer pricing

As a general rule, the customs value is established based on the price actually paid for the imported merchandise, and must include packaging, commissions and other expenses established in the EC Customs Code, in its regulations and in Instruction 1/2004 of 27 February 2004.

The general rule may be challenged by the tax authorities if the buyer and seller are deemed to be related parties, although this fact per se does not exclude the validity of the actual price of the transaction. Instruction 1/2004 provides an exclusive list of the eight cases in which two parties will be deemed to be related for customs purposes.

The tax authorities may challenge the actual price established by the parties only if the relationship between the parties has been a deciding factor in establishing such price. The valuation of the transaction must be calculated by taking into account the value of identical goods sold for export by the seller to unrelated parties at the same time or close to the same time.

Dispute resolution

The mutual agreement procedure, which may be initiated to apply the relevant correlating adjustments, is regulated in the Regulation on the Mutual Agreement Procedures Concerning Direct Taxation, approved by Royal Decree 1794/2008, of November 3, and which has been modified by Royal Decree 634/2015, of July 10. The mutual agreement procedure is initiated by a resident of the contracting state appealing to the tax authorities for adjustment of the taxable base.

If the residence state is willing to change the taxable base because it agrees with the arguments presented by the taxpayer, it should immediately adjust or refund the amounts claimed. If the residence state does not agree with the criteria applied by the other state, a mutual agreement procedure would be commenced by contacting the authorities of the other state.

In Spain, unilateral, bilateral and multilateral Advance Pricing agreements (APAs) can be obtained. However, the most common approach is to begin APA processes for unilateral APAs.

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