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The International Comparative Legal Guide to:

# Corporate Tax 2018

**14th Edition**

A practical cross-border insight into corporate tax work

Published by Global Legal Group, with contributions from:

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URL: www.glgroup.co.uk

**GLG Cover Design**
F&F Studio Design

**GLG Cover Image Source**
iStockphoto

**Printed by**
Ashford Colour Press Ltd
November 2017



**ISBN** 978-1-911367-83-3
**ISSN** 1743-3371

**Strategic Partners**



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## Country Question and Answer Chapters:

# Spain


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## 1 Tax Treaties and Residence

### 1.1 How many income tax treaties are currently in force in your jurisdiction?

Spain currently has approximately 93 tax treaties with several countries in force. In addition, Spain currently has, in different procedural phases, tax treaties with Azerbaijan, Bahrain, Belarus, Cape Verde, Montenegro, Namibia, Peru, Qatar and Syria. Finally, Spain has recently renegotiated tax treaties with Austria, Belgium, Canada, Finland, India, Mexico, Romania, the United Kingdom and the United States.

### 1.2 Do they generally follow the OECD Model Convention or another model?

Spain usually follows the OECD Model standards. However, Spain has also signed tax treaties with different countries following the UN Model (e.g. the United States).

### 1.3 Do treaties have to be incorporated into domestic law before they take effect?

No. Spain does not have any specific domestic law incorporating tax treaties into its domestic legislation. Tax treaties enter into force in Spain once they are published in the Spanish Public Official Gazette. (Although some of them may foresee later entry into force in accordance with their own provisions.)

### 1.4 Do they generally incorporate anti-treaty shopping rules (or "limitation on benefits" articles)?

Spain has included in most of its tax treaties different anti-treaty shopping rules such as "limitation on benefits" clauses (objective clauses) or "principal purpose test" clauses (subjective clauses).

The main purpose is to allow qualified persons to benefit from tax benefits and to avoid the incorporation of companies with no economic substance for the mere purpose of benefiting from the tax treaty provisions.

### 1.5 Are treaties overridden by any rules of domestic law (whether existing when the treaty takes effect or introduced subsequently)?

No. Tax treaties always prevail over domestic law. However, in accordance with the provisions of the tax treaty, Spain and the other contracting state have the right to terminate such treaties.

### 1.6 What is the test in domestic law for determining the residence of a company?

Spanish corporate tax law sets out three different standards for a company to be considered tax-resident in Spain. It must: (i) be incorporated under Spanish law; (ii) have its registered office in Spain; and (iii) have its place of effective management in Spain.

## 2 Transaction Taxes

### 2.1 Are there any documentary taxes in your jurisdiction?

Spain provides for stamp duty on public deeds before a Public Notary. However, stamp duty tax rates depend on the autonomous region where the document is signed (approximately 1% tax rate on average, but which could range from 0.5% to 2.5%).

### 2.2 Do you have Value Added Tax (or a similar tax)? If so, at what rate or rates?

Yes. Value Added Tax is charged at a 21% rate on most goods and services provided in Spain. However, depending on the service or goods being acquired, the applicable tax rate will be 10% (reduced tax rate) or 4% (super-reduced tax rate). As an example, the sale of a new apartment or dwelling will be subject to VAT at 10%, whereas a plot of land or new premises will be subject to VAT at 21%.

### 2.3 Is VAT (or any similar tax) charged on all transactions or are there any relevant exclusions?

As a general rule, VAT is charged on most goods and services provided in Spain. Nevertheless, certain goods or services related to the educational, medical and food sectors enjoy VAT exemptions or tax rate reductions.

The rental of dwellings or apartments is exempt from VAT. Conversely, the rental of premises or offices is subject to VAT.

### 2.4 Is it always fully recoverable by all businesses? If not, what are the relevant restrictions?

No. VAT borne by companies will be fully recoverable if the company only carries out business activities subject to VAT. If the company carries out exempt and non-exempt business activities, such as the rental of dwellings and offices, VAT would be recoverable on a *pro rata* basis.

### 2.5 Does your jurisdiction permit "establishment only" VAT grouping, such as that applied by Sweden in the *Skandia* case?

Yes. The concept of a permanent establishment for VAT purposes differs from that for Corporate Tax purposes.

### 2.6 Are there any other transaction taxes payable by companies?

Yes. Transfer Tax may arise on transactions involving real estate. Rates could range from 6% to 11% (each autonomous region in Spain has the right to decide the applicable tax rate).

Capital tax at 1% on reductions of share capital may arise.

### 2.7 Are there any other indirect taxes of which we should be aware?

If a resident or non-resident entity directly owns a property in Spain and decides to sell such property, Urban Land-Value Increase Tax may apply. This local tax is levied based on the cadastral value of the property and the period of ownership.

## 3 Cross-border Payments

### 3.1 Is any withholding tax imposed on dividends paid by a locally resident company to a non-resident?

Spain would apply the corresponding withholding tax in accordance with the tax treaty signed with the country of residence of the non-resident entity or individual. If Spain has not signed any tax treaty with the country of residence of the non-resident entity, a flat 19% withholding tax rate will apply. EU countries may benefit from tax exemption.

### 3.2 Would there be any withholding tax on royalties paid by a local company to a non-resident?

Spain would apply the corresponding withholding tax in accordance with the tax treaty signed with the country of residence of the non-resident entity or individual. If Spain has not signed any tax treaty with the country of residence of the non-resident entity, a flat 19% withholding tax rate will apply. EU countries may benefit from tax exemption.

### 3.3 Would there be any withholding tax on interest paid by a local company to a non-resident?

Spain would apply the corresponding withholding tax in accordance with the tax treaty signed with the country of residence of the non-resident entity or individual. If Spain has not signed any tax treaty with the country of residence of the non-resident entity, a flat 19% withholding tax rate will apply. EU countries may benefit from tax exemption.

### 3.4 Would relief for interest so paid be restricted by reference to "thin capitalisation" rules?

Thin capitalisation rules no longer apply in Spain. Instead, the amount of net deductible financial expenses is reduced to 30% of operating profit (EBITDA).

If an entity has not been able to deduct all financial expenses in a fiscal year, these net expenses could be offset during the following fiscal years under no time limit.

### 3.5 If so, is there a "safe harbour" by reference to which tax relief is assured?

Spanish companies are entitled to deduct financial expenses up to EUR 1m per fiscal year.

### 3.6 Would any such rules extend to debt advanced by a third party but guaranteed by a parent company?

The same limitations on net financial expenses would apply as those described in questions 3.4 and 3.5.

### 3.7 Are there any other restrictions on tax relief for interest payments by a local company to a non-resident?

Financial expenses deriving from a loan granted by a company which is part of the same group of companies in order to acquire shares or subscribe a capital increase in another company of the same group of companies could be considered non-tax-deductible.

### 3.8 Is there any withholding tax on property rental payments made to non-residents?

Provisions set out in the tax treaty between Spain and the country of residence of the owner of the real estate would apply.

On the negotiation of tax treaties, Spain usually includes shared taxation on income derived, directly or indirectly, from real estate located in Spanish territory.

Consequently, Spain will be entitled to apply 24% (19% in EU jurisdictions) withholding tax on rental income if the lessee is a subject obliged to withholding regulations. For example, non-resident entities leasing properties to individuals not engaged in business activities will not be subject to withholding tax. On the contrary, if the lessee is an entity engaged in business activities, a 24% (19% in EU jurisdictions) withholding tax will apply.

### 3.9 Does your jurisdiction have transfer pricing rules?

Yes. The Spanish transfer pricing rules are based on the OECD transfer pricing guidelines.

The Spanish Corporate Tax Law foresees extensive rules to define the nature of related parties, and it also provides for different methods to assess the market value of transactions between related parties.

In August 2017, the Spanish Tax Authorities approved a new form to report related-party transactions exceeding EUR 250,000, which will have to be submitted between 1 November 2017 and 30 November 2017.

## 4 Tax on Business Operations: General

### 4.1 What is the headline rate of tax on corporate profits?

The general corporate income tax rate is 25% over worldwide profits. However, under several requirements, newly incorporated Spanish companies may apply for a 15% tax rate for the first two fiscal years with a positive tax base.

### 4.2 Is the tax base accounting profit subject to adjustments, or something else?

Spanish companies calculate their tax due from the accounting profit subject to various tax adjustments.

### 4.3 If the tax base is accounting profit subject to adjustments, what are the main adjustments?

The main adjustments on the account profit are as follows: participation exemptions on dividends and capital gains; patent box; amortisation tax rates; non-deductible expenses or provisions, etc.

### 4.4 Are there any tax grouping rules? Do these allow for relief in your jurisdiction for losses of overseas subsidiaries?

Spain has a special regime of tax consolidation for groups of companies. In order to apply for this tax consolidation regime, it is necessary to meet the following requirements: (i) the parent company holds directly or indirectly 75% of the capital of another company or its voting rights (70% if listed); (ii) companies must be subject to, and not exempt from, Corporate Tax; (iii) the parent company must hold its participation or voting rights during the whole fiscal year; and (iv) the parent company must not be controlled by any other qualified parent company.

If any company of the group is not tax-resident in Spain, exempt from Corporate Tax or has been declared bankrupt or included in an insolvency procedure, this company will be excluded from the tax group.

### 4.5 Do tax losses survive a change of ownership?

The Spanish Corporate Income Tax Act sets out that it is not possible to offset tax losses in case of a change of ownership if the following requirements are met: (i) the majority of the share capital or the right to participate in its profits has been acquired by a related party after the generation of such losses; (ii) the related party mentioned in the previous requirement held less than 25% of the share capital of such company; and (iii) the company does not carry out business activities.

### 4.6 Is tax imposed at a different rate upon distributed, as opposed to retained, profits?

Spain provides for the possibility to reduce the effective tax rate by applying the following tax incentives:

(i) Capitalisation reserve: if the equity of the company has increased from one year to the next, Spanish companies will be entitled to apply for a 10% tax allowance of the increase over the taxable base of the company. These companies will have to include an accounting reserve in this regard.

(ii) Anticipation of negative tax bases: Spanish companies are entitled to apply for a 10% tax reduction on the taxable base, limited to EUR 1m, through the anticipation of future tax losses. These companies will have to include an accounting reserve in this regard for the following five years.

The main purpose of both tax incentives is to strengthen and increase the equity of the company.

### 4.7 Are companies subject to any significant taxes not covered elsewhere in this chapter – e.g. tax on the occupation of property?

There are no relevant taxes for companies other than those included elsewhere in this chapter.

## 5 Capital Gains

### 5.1 Is there a special set of rules for taxing capital gains and losses?

As a general rule, Spanish companies will be taxed on capital gains for the difference between the market value of the asset being transferred, and its acquisition cost.

The same applies to capital losses with limitations on the deductibility of tax losses deriving from the transfer of qualified entities (5%).

The applicable tax rate will be 25%.

### 5.2 Is there a participation exemption for capital gains?

With effect from 1 January, Spain foresees a participation exemption regime for dividends and capital gains deriving from resident and non-resident entities.

In order to qualify for the participation exemption regime, the following requirements should be met: (i) the shareholding in the subsidiary must be of at least 5% or, alternatively, it must have a minimum value of at least EUR 20m (participation requirement); and (ii) it has to be held uninterruptedly for at least one year (holding requirement). In this sense, the holding requirement might be met at the company group level.

In addition, if more than 70% of the subsidiary's income consists of dividends or capital gains deriving from other subsidiaries, it would be required that the holding meets the abovementioned participation and holding requirements in the indirectly controlled subsidiary. Nevertheless, the precedent rule would not be applicable if dividends have been included in the tax base of the directly or indirectly owned entity, where the entity is not allowed to apply for an exemption scheme or a double taxation tax credit scheme.

This exemption also applies to foreign-source dividends and capital gains if the abovementioned participation and holding requirements are met and the subsidiary has been subject to (and not exempt from) a tax equivalent to Spanish Corporate Income Tax at a nominal rate of at least 10%.

In this regard, the "equivalent tax" requirement will be met when the subsidiary is resident in a jurisdiction that has concluded a tax treaty with Spain which includes an exchange of information provision. Besides, the indirect shareholding requirement would also apply to foreign-source dividends and capital gains.

Lastly, the exemption does not apply to dividends or capital gains deriving from the transfer of shares in entities with tax residence in a tax haven jurisdiction, in accordance with Spanish legislation.

### 5.3 Is there any special relief for reinvestment?

No. With effect from 1 January 2015, Spain abolished the existing deduction for reinvestment of extraordinary profits.

### 5.4 Does your jurisdiction impose withholding tax on the proceeds of selling a direct or indirect interest in local assets/shares?

Resident taxpayers will have to withhold 3% on the acquisition of real estate located in Spain by non-resident entities.

## 6 Local Branch or Subsidiary?

### 6.1 What taxes (e.g. capital duty) would be imposed upon the formation of a subsidiary?

Spain does not impose any tax on the incorporation of companies; neither is the capital increase in Spanish companies subject to any tax.

### 6.2 Is there a difference between the taxation of a local subsidiary and a local branch of a non-resident company (for example, a branch profits tax)?

No. Both the local subsidiary and the branch of a non-resident entity will be taxed in accordance with the provisions set out in the Spanish Corporate Income Tax Act. However, the Spanish Non-Resident Income Tax Act foresees different limitations such as the deductibility of management fees or non-deductibility of certain payments made from the branch to the parent company.

### 6.3 How would the taxable profits of a local branch be determined in its jurisdiction?

Local branches will be taxed following the general Corporate Income Tax regulations in line with Spanish companies. However, the Spanish Non-Resident Income Tax contains certain specificities: limitation of the deductible expenses with transactions between the local branch and the parent company; or branch profit tax under certain requirements.

### 6.4 Would a branch benefit from double tax relief in its jurisdiction?

Local branches will be entitled to apply for the participation exemption regime in line with Spanish companies, as set out in question 5.2, with certain extra requirements.

Additionally, local branches will be entitled to apply for the deduction to avoid double taxation on income subject to tax in a different jurisdiction. Nevertheless, taxes paid abroad by the local branch will be limited to the taxes that should have in paid in Spain.

### 6.5 Would any withholding tax or other similar tax be imposed as the result of a remittance of profits by the branch?

The Spanish Non-Resident Income Tax Act foresees a branch profit tax consisting of applying a 19% withholding tax on payments made by the branch to the parent company. However, branch profit tax will not apply to payments made by the branch to a parent company which is tax-resident in the EU or in a jurisdiction which has a tax treaty with Spain in place.

## 7 Overseas Profits

### 7.1 Does your jurisdiction tax profits earned in overseas branches?

Profits earned overseas by local branches of Spanish-resident companies are subject to Corporate Income Tax. However, they are entitled to apply for the participation exemption regime as long as the local branch has been subject to similar or identical Corporate Tax. This requirement, among others, will be met if the Corporate Tax paid abroad has a nominal value of at least 10%.

### 7.2 Is tax imposed on the receipt of dividends by a local company from a non-resident company?

If the participation exemption regime applies, dividends received from a qualified non-resident subsidiary will be tax-exempt. If the requirements to apply the participation exemption are not met, dividends will be taxed at a 25% rate.

### 7.3 Does your jurisdiction have "controlled foreign company" rules and, if so, when do these apply?

The main purpose of the Spanish controlled foreign company (CFC) regime is to avoid the effects produced when Spanish tax-resident companies place their capital in low-tax jurisdictions to avoid including passive investment in their taxable base in Spain.

Under this regime, Spanish tax-resident companies will be subject to Corporate Income Tax on income obtained by a non-resident subsidiary if certain requirements are met, such as: (i) holding more than 50% of the capital of a foreign subsidiary or the majority of its voting rights; and (ii) the foreign entity being subject to a Corporate Tax which amounts to less than 75% of the taxes that should be paid in Spain.

The Spanish Corporate Income Tax Act establishes two types of CFC rules:

1) A general CFC regime applies if the non-resident entity does not have at its disposal an adequate structure of material and human resources unless it can justify that its operations are performed using material and human resources existing in a non-resident company of the same corporate group, or that there are valid economic reasons for its incorporation. Under this regulation, all income obtained by the non-resident entity should be included in the Spanish company's tax base. Nevertheless, dividends, stakes in profits, or income arising from the transfer of an interest should not be included when: (i) the participation exceeds 5%; (ii) the minimum ownership period is one year; and (iii) the participation is held for the purpose of directing and managing the subsidiary as long as it has an adequate structure of material and human resources.
2) When the requirements for applying CFC rules are met and the requirements for the application of the general CFC rules set out in the previous paragraph are not met, the following income obtained by a non-resident entity should be included in the Spanish company's tax base: (i) income generated from real estate assets not assigned to a business activity; (ii) income generated from an interest held in the equity of any type of company and from the assignment of own capital to third parties; (iii) capitalisation and insurance operations in which the beneficiary is the company itself; (iv) income

generated from industrial and intellectual property, technical assistance, real estate, image rights, and the leasing or sub-leasing of businesses and mines; (v) income generated from transfers of the aforementioned assets and rights; (vi) income generated from lending, financial and insurance activities and the provision of services if they generate a taxable expense in the Spanish-resident company (the positive income obtained in this case will not be included if over 50% of the gross income obtained by the non-resident company due to these services comes from services provided to non-related companies); and (vii) income generated from derivative financial instruments.

Under this regime, where the positive amount of passive income attributable to the Spanish-resident company is at least 15% of the total net profits or 4% of the total turnover of the CFC, the Spanish company must include in its taxable base that positive amount in proportion to its total interest (directly or through other foreign subsidiaries) in the results or, in the absence of results, the capital, equity or voting rights in the CFC.

Finally, CFC rules are not applicable to EU-resident companies if they are incorporated for economic reasons and carry on a business activity.

## 8 Taxation of Commercial Real Estate

### 8.1 Are non-residents taxed on the disposal of commercial real estate in your jurisdiction?

Non-resident entities or individuals will be subject to Non-Resident Income Tax at a 19% rate if no tax treaty is in place. If Spain has signed a tax treaty with the country of residence of the non-resident making the disposal, provisions set out in the tax treaty will apply.

### 8.2 Does your jurisdiction impose tax on the transfer of an indirect interest in commercial real estate in your jurisdiction?

Yes. The Spanish legislator has included clauses in its internal legislation and in almost all tax treaties to prevent the indirect sale of real estate through the sale of shares.

### 8.3 Does your jurisdiction have a special tax regime for Real Estate Investment Trusts (REITs) or their equivalent?

Spain provides for an equivalent tax regime to REITS, which are known as *Sociedades Cotizadas Anónimas de Inversión en el Mercado Inmobiliario* (SOCIMIs). These companies are listed in a secondary market and subject to 0% Corporate Tax as long as at least 80% of their rental income is distributed to shareholders, among other requirements.

SOCIMIs are subject to strict corporate regulations in terms of investments, assets, income or shareholders.

## 9 Anti-avoidance and Compliance

### 9.1 Does your jurisdiction have a general anti-avoidance or anti-abuse rule?

Yes. Spain has a general anti-abuse rule which enables the Tax Authorities to qualify transactions in order to avoid simulation and tax fraud.

### 9.2 Is there a requirement to make special disclosure of avoidance schemes?

Spanish companies will submit a form to the Spanish Tax Authorities disclosing transactions with related entities exceeding EUR 250,000, or exceeding EUR 100,000 if there has been more than one transaction. Taxpayers will inform the Tax Authorities of these transactions and will keep all necessary documentation in case of an audit.

### 9.3 Does your jurisdiction have rules which target not only taxpayers engaging in tax avoidance but also anyone who promotes, enables or facilitates the tax avoidance?

The Spanish jurisdiction sets out a liability regime which targets entities or individuals who promote or facilitate tax avoidance. According to certain requirements, this would constitute a criminal offence.

### 9.4 Does your jurisdiction encourage "co-operative compliance" and, if so, does this provide procedural benefits only or result in a reduction of tax?

The Spanish tax system foresees a general duty to collaborate with the Tax Authorities. However, taxpayers are entitled to apply for certain reductions on penalties imposed by the Tax Authorities if they accept the tax assessment and they are paid in due time.

## 10 BEPS and Tax Competition

### 10.1 Has your jurisdiction introduced any legislation in response to the OECD's project targeting Base Erosion and Profit Shifting (BEPS)?

With effect from 2015, Spain has passed important legislation in line with the BEPS recommendations: (i) Spanish companies are not entitled to deduct payments made to a related party if that income is tax-exempt in its jurisdiction (i.e. interest payments deductible by the debtor, and tax-exempt by the creditor); (ii) a limitation is placed on deductible financial expenses linked to EBITDA of the company; (iii) related parties must hold 25% of the share capital or voting rights and meet strict documentation obligations (Country-by-Country Reporting); and (iv) CFC rules will not apply if the taxpayers are able to prove that the non-resident entity holds sufficient material and human resources and responds to valid economic reasons.

### 10.2 Does your jurisdiction intend to adopt any legislation to tackle BEPS which goes beyond what is recommended in the OECD's BEPS reports?

Spain follows the OECD recommendations on tackling BEPS in its domestic legislation. The Spanish Tax Authorities are promoting the filing of previous agreements (*acuerdos previos de valoración*) with taxpayers to ensure fair tax treatment in transactions between related parties. These previous agreements with the Tax Authorities provide taxpayers with tax certainty.

### 10.3 Does your jurisdiction support public Country-by-Country Reporting (CBCR)?

Yes. In 2015, Spain published its Country-by-Country Reporting in the Spanish Public Official Gazette.

Multinational companies (those with a turnover exceeding EUR 750m) must file a CBCR form in order to disclose to the Tax Authorities their transactions with related parties, broken down country by country. This form must include gross income, detailed information on related parties, taxes paid abroad, turnover, equity, etc.

### 10.4 Does your jurisdiction maintain any preferential tax regimes such as a patent box?

Yes. Spain maintains a patent box regime which allows Spanish companies, under certain requirements, to apply for a 60% tax allowance and net income deriving from the assignment of an intangible asset.

Spain also offers the possibility of forming an *Entidad de Tenencia de Valores Extranjeros* (ETVE) (Foreign Securities Holding Company) as long as certain requirements are met. Under this regime, ETVE companies are entitled to apply for a full exemption on dividends and capital gains from foreign subsidiaries, and no withholding tax would apply on the distribution of dividends from an ETVE to its shareholders.



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Marc was previously seconded to the Andorran office of Cases & Lacambra, where he gained experience in financial taxation, banking regulation and estate planning.

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Our practice covers all aspects of Spanish tax law, including detailed advice on direct and indirect taxes. We analyse and negotiate tax matters with the Tax Authorities on behalf of clients.

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