2013: The Aftermath

For Private Wealth individuals with Spanish links, 2013 may arguably be best defined as the year after 2012. 2012 saw substantial developments from a domestic and an international point of view, including the Special Voluntary Disclosure facility (in place until 30 November 2012), the introduction of new Anti-Fraud measures and amended Bank of Spain filings, the long anticipated action against Spain at the European Court of Justice for discriminatory Inheritance and Gift Tax laws, the personal tax increases, the material developments on International Tax Treaties and the new EU Regulation 650/2012 on cross-border successions, with substantial civil law implications.

Undoubtedly, one of the main focus areas in 2013 is the reporting requirements for Spanish resident individuals (regardless of citizenship) on activities and investments outside Spain. These comprise the modified rules for filings before the Bank of Spain (Circular 4/2012) and the new Form 720 of Foreign Asset reporting to the Spanish tax administration. The former include compulsory information returns (including Form D6 and Form DD2) for individuals with overseas stocks and/or overseas transactions in excess of € 600,000 annually. Filing deadlines vary depending on the total amount of foreign transactions, but typically entails annual returns. Penalties for late filing or failure to report may reach up to 100% of the unreported transaction, with a minimum of € 30,000.

Form 720, a brand new information return, will generally need to be filed before the Spanish tax administration by all Spanish resident individuals or companies with financial interests in qualifying foreign assets (with certain de minimis exemptions). “Financial interest” is defined very broadly - outright ownership, signatories, representatives, those with powers to dispose, beneficiaries of foundations and/or trusts, usufructuaries, insurance holders etc. Qualifying foreign assets comprise bank accounts, securities, deposits, fund units, shares and stock, life insurance, annuities, private pension payments and foreign real estate.

Form 720 for 2012 must be filed on or before 30 April 2013 and the penalty regime for late filing and particularly failure to report is extremely burdensome, as penalties may reach well above asset values and the full value of the unreported asset may be treated as a capital gain taxable at the marginal income tax rate (currently 52% in general). Most importantly, the law now gives the Spanish tax authorities the possibility to overrule the statute of limitations on unreported assets in the information return in certain situations (which currently generally limits their power to audit to the last four years of tax filings).

Given the likelihood that the Spanish tax authorities will seek to verify the consistency of the 720 returns with past personal tax filings, taxpayers should review their tax situation and past risks, particularly those who opted not to file remedial returns under the 2012 Special Voluntary Disclosure facility or the Ordinary Voluntary Disclosure mechanism. Tax fraud, a criminal offence in Spain, remains applicable to taxpayers who willfully defraud taxes in excess of € 120,000 per tax per annum, a level easily reached for income tax among Private Wealth clients.

Information returns aside, the personal tax landscape in Spain in 2013 remains very similar to 2012. Income tax still distinguishes between investment income/gains, with a marginal rate of 27% for income/gains in excess of € 24,000, and regular income, which is taxed progressively with a marginal rate generally in the region of 52% for income in excess of € 300,000. For 2013 onwards however, capital gains generated in less than one year will be deemed regular income and consequently taxed at the higher rates of tax.

Wealth tax will also continue to apply in 2013. Under the general regime, the marginal rate will remain at 2.5% for individuals with a net asset value in excess of € 10.7 million (with a € 0.7 million de minimis exemption). This is a tax fully transferred to the Spanish regions, which has given rise to a multiplicity of regimes (from regions which have chosen not to levy the tax to those applying higher rates), so situations must be assessed individually. In any event, value reduction strategies and application of Business Property Relief remain valid tax planning tools.

The Inheritance and Gift Tax regime remains mostly unchanged. Under general regulations, the rate of tax will continue to be determined by reference to the kinship with the transferor, the preexistent wealth of the recipient and the value of the assets transferred. Transfers to spouse and descendants with preexistent wealth below € 400,000 with a value in excess of € 800,000 will be subject to a 34% rate of tax. Again, this is a tax fully transferred to the Spanish regions in certain cases, and some have introduced family exemptions and near-exemptions, so situations must be assessed individually. In any event, value minimisation strategies and application of Business Property Relief remain important tax planning techniques.

The beneficial regional regimes for close family transfers may at present not be applied where the transferor and/or transferee are non resident. However, this issue is currently *sub-iudice* under the pending case European Commission vs Kingdom of Spain submitted by the European Commission before the European Court of Justice on 7 March 2012 (C-127/12). Taxpayers potentially affected by the outcome should give specific consideration on how best to preserve their rights to claim excess Inheritance and Gift tax paid if the outcome of the case was contrary to Spain.

Overall, most new tax planning possibilities involve Spanish situs real estate. Real Estate Investment Corporations (SOCIMI) now enjoy a substantially more flexible and competitive regime, with a 0% tax rate, the possibility to act as property developer, manage a single property and be fully leveraged. Requirements include compulsory trading on regulated markets or multilateral trading systems, obligatory distribution of 80% or more of lease earnings, minimum period of property ownership of 3 years and minimum share capital of € 5 million. Also on the Spanish real estate front, the special 3% tax charge on the cadastral value of Spanish properties held through overseas corporations has now been limited to corporations resident in tax havens only.

Other areas Private Wealth individuals should play close attention to in 2013 include the new provisions of the Spanish-German (and shortly the Spanish-UK) Double Tax Treaty, which do away with most of the benefits of corporate wrapper structures for Spanish real estate holdings for 2013 onwards. In addition, substantial changes will materialise during 2013 regarding exchange of information matters, with the oncoming new Spanish-Swiss Double Tax

Treaty, the developments on FATCA agreements (which Spain is a signatory to) and the increasing number of bilateral Treaties on tax and exchange of information procedures (now including Hong-Kong and Singapore).

Finally, Private Wealth individuals should also bear in mind the important effects of the new EU Regulation 650/2012 in matters of cross-border succession. Although this legislation will only come into effect in 2015, given that it will mean a major overhaul of current Spanish civil law rules applicable to cross-border estates, careful will planning to adjust to the new rules well in advance of the deadline will be of key importance.

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