Global Tax Alert

Spain adopts new Law for the Prevention and Actions combating Tax Fraud

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On 10 July 2021 the Law for the Prevention and Actions Against Tax Fraud (*Ley de Medidas de Prevención y Lucha contra el Fraude Fiscal*) was published in the Spanish Official Gazette. This law includes several tax measures which directly affect multinational groups of companies.

In first instance and with the aim to adapt the Spanish legislation to the European Union (EU) Anti-Tax Avoidance Directive (ATAD) the Law amends the exit tax and Controlled Foreign Corporations (CFC) rules.

In respect to the Spanish exit tax rules, previously it was possible to defer the exit taxation, without any time limit, until the assets were transferred, provided that the migration took place to another EU Member State. However, the new rules introduce the obligation to integrate the difference between the market value and tax value of assets and liabilities in the taxable base, with a maximum five year deferral in equal annual installments being subject to certain conditions. The law lists the cases where the deferral would be terminated prior to the end of the five year period.

As to the CFC rules, some of the main amendments are as follows:

1. The scope of CFC rules is expanded to apply to foreign permanent establishments, without the possibility to apply for the exemption foreseen in article 22 Corporate Income Tax Law.

2. The law eliminates the safe-harbor rule applicable to holding companies, whereby companies holding more than 5% participation in foreign subsidiaries, during more than one year, were not subject to CFC rules if they had human and material means to manage the participation and did not qualify as companies “merely holding assets”. Therefore, foreign holding companies obtaining dividends and capital gains arising from the transfer of shares may - under the new regulation - fall within the scope of the CFC rules if all the other relevant requirements are met. This amendment should be analyzed together with the amended Spanish participation exemption regime which limits to 95% the amount of the exempt income, resulting in a positive effective tax higher than 0% (to be compared with the effective tax rate of the foreign holding subsidiary).
3. The law also includes new sources of CFC income, such as sales and services conducted with a related party, in case e the foreign entity adds little or no economic value, as well as insurance or leasing financial activities with a related party if they constitute a deductible expense.
4. Moreover, the scope of the safe-harbor clause for EU tax resident subsidiaries is extended to entities tax resident in the European Economic Area. In addition the new rules eliminate the requirement of a valid economic reason (“business reasons for its incorporation and operative”) and now it only requires the taxpayer to prove that economic activities have been carried out. This new wording could derive in a relevant safe harbor rule for foreign holding subsidiaries resident in those jurisdictions, taking into consideration the amendment mention in 2 above.

Secondly, the concept of tax havens is replaced by “non-cooperative jurisdictions” The characterization as non-cooperative jurisdiction is compatible with the existence of a double tax treaty between Spain and that jurisdiction to the extent that the relevant taxation is not contrary to the said double tax treaty.

The list of non-cooperative jurisdictions shall be updated to include or exclude jurisdictions, either according to the criteria of the respective EU or OECD working groups, or according to the following three criteria:

- The tax transparency of the jurisdiction assessed based on the following criteria: the existence of regulations on mutual assistance in the exchange of tax information; effective compliance with the exchange of information; the result of the peer reviews of the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes; and effective exchange of information regarding the beneficial owner as per the definitions of the Spanish law on the prevention of money laundering and financing of terrorism.
- If such countries facilitate the conclusion or existence of offshore instruments or entities aimed at allocating profits that do not reflect a real economic activity in such countries.
- Low or no taxation in such jurisdictions.

Multinational groups with presence in Spain are advised to revisit their holding structures to assess any potential implications of the new Spanish regulations to their businesses.

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