

# Key features of the Tax Fraud (Prevention and Combating) Bill

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*Analysis of the most important facets of the recently adopted bill that addresses various measures to fight tax fraud, as well as other tax-related issues of interest.*

On 13 October 2020 the Cabinet approved the “Tax Fraud (Prevention and Combating) Bill, transposing 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”.

We highlight below some of the most relevant aspects of the bill’s text.

Firstly, reference should be made to the amendments which, in line with Council Directive (EU) 2016/1164 – the Anti-Tax Avoidance Directive or ATAD - the bill incorporates in relation to both the international tax transparency rules and the so-called exit tax.

As regards the exit tax and cases where the change of residence has been to another Member State of the European Union, the deferral provided for in Spanish law for the payment of exit tax is amended to bring it into line with the provisions of the Anti-Tax Avoidance Directive, which does not provide for such a deferral, but rather for the possibility of paying it in instalments over five years. In addition, aside from the referred provision concerning the payment by instalments

being amended, in the legislation on non-resident income tax, which currently governs the transfer of assets abroad from a permanent establishment situated in Spain, a new case of exit tax is introduced consisting in the transfer, not of an isolated item, but of “the business activity” carried out by the permanent establishment.

In relation to controlled foreign companies regime, several changes are introduced. Thus, the imputation of income under such body of rules will not only affect income earned by entities in which the taxpayer has an interest, but also income earned by their permanent establishments abroad. Furthermore, income not previously covered, such as that derived from capital (finance) leases or from insurance, banking and other financial activities, will also be subject to such imputation. In addition, in line with the approach already taken by Spain in some respects, it has now been decided to maintain higher standards of protection than those laid down in the Directive in respect of certain aspects of tax transparency, e.g. the inclusion of certain types of income not expressly mentioned in the Directive as susceptible of imputation.

Furthermore, in the context of the fight against tax havens, in addition to incorporating the international designation of *non-cooperative jurisdictions*, the bill extends this concept, taking into account criteria of tax equity and transparency, on the basis of a number of criteria specified in the bill which will in turn serve to update the list of countries and territories which are considered as such, as well as that of harmful tax regimes. In those cases where Spain has signed a convention to avoid double taxation, the tax rules relating to non-cooperative jurisdictions will also apply to the extent that they do not conflict with the provisions of the convention. The list of non-cooperative jurisdictions will be approved by order of the Minister of Finance (until now it was approved regulation).

In addition, the *cash payment* scheme - for which a transitory arrangement is provided - is amended, including changes in its sanctioning procedure. It is worth noting that the general limit for cash payments established by Act 7/2012 has been reduced from 2,500 to 1,000 euros, except for payments made by natural persons not acting as employers or self-employed professionals, for which the previous limit continues to apply. However, in respect of natural persons whose tax domicile is outside Spain, the limit for cash payments decreases to 10,000 euros.

The provisions contained in the Bill - which will undoubtedly be the subject of controversy - under which the tax base for property taxes (transfer tax, inheritance and gift tax, wealth tax) is to be determined by the *reference value of the Cadastre*, a figure considered objective and calculated in accordance with rules that seek to extract the most probable value of the property on the market. To this end, the regulation of the aforementioned reference value is adapted to provide it - the Bill points out - with greater rigour, precision and legal certainty in its determination. Furthermore, the Explanatory Notes to the Bill make it clear that the new system is intended to ensure that the tax

base of the transfer or acquisition of real estate is an objective value - the reference value - that is not subject to value verification.

In the area of *personal income tax*, the following changes are noteworthy:

- The acquirers of property through *agreements of succession or pacta successoria*, in which the transfer occurs before the death of the assignor, will be subrogated to the value and date of acquisition of the said property in the instituting party of the agreement or contract - which, among other issues, will negatively affect the transfers of family businesses that have been carried out in this way in the 'Autonomous Communities' (devolved regions) whose civil law regulates this type of agreement. On the other hand, with respect to such agreements or *pacta*, Art. 30 of the Inheritance and Gift Tax Act (LISD), which regulates the accumulation of gifts, is also amended to include the cases of agreements of succession or *pacta successoria* that produce acquisitions during the life of the assignor, thus resolving an issue that has generated a great deal of controversy.
- The treatment of investments in Exchange-Traded Funds is standardised, regardless of the market, domestic or foreign, on which they are listed. In this sense, ETFs marketed in Spain and listed on foreign stock exchanges are excluded from the deferral scheme on account of reinvestment in shares or units in collective investment schemes, an exclusion which currently only applies to Spanish or foreign institutions listed on the Spanish stock exchange. In both cases, they will be exempt from withholding tax.
- In relation to *life insurance policies* in which the policyholder assumes the risk of the investment, Art. 14(2)(h) of Act 35/2006 is amended, since the requirements under the version thereof still in force in order for the special rule of temporary imputation in this type of insurance to not apply, refer to insurance legislation that has already been amended. Instead, the requirements set out in Article 89 of Royal Decree 1060/2015, of 20 November, on the organisation, supervision and solvency of insurers and reinsurers will be applicable.
- In relation to *cryptocurrencies*, those who provide services on behalf of third parties to safeguard private cryptographic keys that enable the holding and use of such currencies, including providers of exchange services for such currencies if they also provide the holding service, will be required to provide information on the balances held by holders of virtual currencies and on the transactions carried out with them (acquisition, transfer, exchange, collection and payment), the latter obligation being extended to those who make initial offers of new virtual currencies. Furthermore, virtual currencies will be included in the declaration of property and property rights abroad (form 720).

Likewise, also in the area of insurance, the Wealth Tax Act 19/1991 of 6 June is amended, changing the valuation rule of Art. 17 of the statute so that *life insurance savings plans* are effectively taxed by said tax, even though the policyholder does not have the right to redeem the same. In this way,

although as a general rule, life insurance will be calculated by the redemption value at the moment of the accrual of the tax, when the policyholder does not have the right to exercise the total redemption right on that day, the insurance will be calculated by the value of the mathematical provision on the mentioned date in the tax base of the policyholder. Well, these will be the rules that apply also in the cases in which *temporary or life annuities* are received from a life insurance policy, being calculated by the value thus calculated in the tax base of the recipient.

In the field of *transfer tax* and in order to solve the interpretative problems arising from the taxation of purchases of gold and jewellery by traders in this sector from private individuals, the Bill clarifies that the case of non-taxation provided for in Art. 7(5) of the Recast Version of the Transfer Act (TRLITPAJD) requires that the transferor be an employer or self-employed professional carrying out his business activity, without the status of the acquirer being relevant for these purposes.

The following aspects of the planned amendments to the *value added tax* should be noted:

- Art. 87(3) of the Value Added Tax Act is amended to update the case of vicarious liability for the payment of the tax currently defined for *customs* agents, which will now apply to natural or legal persons acting for and on behalf of the importer. Furthermore, in order to delimit the scope of the joint and several or vicarious liability derived from customs payments, the expression “customs area” in Art. 87(4) of the aforementioned statute is replaced; it is thus clarified that this liability extends to the procedures for declaration and verification of data on customs declarations. These amendments are also incorporated into the Canary Islands’ general tax.
- In relation to *groups of undertakings*, it is specified that the parent undertaking will be the defaulter in respect of the obligations derived from the payment of tax arrears, of the request for offsetting or the return resulting from the aggregated declaration-assessment for the group of undertakings.

In the field of *excise duties on manufacture*, the amendments are basically aimed at clarifying that the obtaining of authorisation for owners of tax warehouses to operate as such requires that effective storage operations of products subject to excise duties on manufacture be carried out in those establishments and at defining new cases of infringement.

With respect to *business activity tax*, among other aspects, the regulatory references for consideration as a group of companies are updated and it is clarified that the rule for calculating net turnover must be applied independently of the obligation for accounting consolidation.

With regard to the planned amendments to the General Tax Act, the following aspects should be highlighted:

- An express prohibition is introduced on the establishment of any extraordinary tax regularisation mechanism involving a reduction in the amount of the tax due.

- It is expressly acknowledged that, where applicable, interest on arrears in the event of improper return is compatible with late payment surcharges.
- The surcharges for late payment in Art. 27(2) of the Taxation Act are modified - independently of the transitory arrangement established in this respect - essentially by establishing a system of increasing surcharges of 1% for each full month of delay without interest for late payment until the twelve-month period of delay has elapsed. From the day after the twelve months have elapsed, in addition to a 15% surcharge, interest on arrears will start to accrue. This same provision establishes an exception to the imposition of surcharges when the taxpayer regularises, by presenting a declaration or self-assessment for other periods in respect of the same tax, facts or circumstances identical to those regularised by the Tax Authority and when certain circumstances occur.
- Arts. 31 and 32 of the Taxation Act are amended, expressly acknowledging that no interest on arrears will accrue on the refunds derived from the rules and regulations of each tax and on undue payments during certain periods - delays not attributable to the tax authority and periods of extension of the time limit in the inspection procedure -.
- The prohibition of dual-use *software* is established through the obligation that the computer or electronic systems that support the accounting or business management processes comply with certain requirements that ensure the integrity, conservation, accessibility, legibility, traceability and inalterability of the records.
- The system of representation of non-residents is adapted to EU law, so that the representative of the non-resident need not necessarily be domiciled in Spanish territory.
- The possibility of granting interim relief during the conduct of suspension procedures with guarantees other than those required to obtain automatic suspension or with total or partial waiver of them is incorporated.
- The amount to be exceeded will be reduced to 600,000 euros and will include those jointly and severally liable.
- The reasons for the termination of the management procedure initiated by declaration in respect of those taxes that are assessed for imports of goods are modified. Thus, the declaration of expiry will not be applicable in these procedures which, on the other hand, may be terminated when it is subsequently decided on the same subject of the procedure to initiate a limited verification or inspection procedure.
- The mandatory nature of the report of disagreement in the processing of the notices of disagreement is eliminated, being required only when necessary to complete the information contained in the notices.

- It is provided that repeated applications for deferment, payment by instalments, offsetting, suspension or payment in kind shall not prevent the start of the enforcement period when previous applications have been refused and the appropriate payment has not been made. It is also clarified that the opening of insolvency proceedings does not affect the voluntary period.
- In relation to the procedure for claiming liability, the voluntary period for the original payment of the debt shall be understood as the voluntary period for the initial payment, regardless of any actions that the principal debtor may have taken or the vicissitudes that the tax due may undergo.
- With regard to the reduction of penalties - for which a transitory arrangement is provided - the reduction of penalties arising from notices with agreement is raised from 50% to 65%, and that provided for cases of early payment from 25% to 40%.
- In respect of the failure to file, or the incomplete, inaccurate or falsified filing of, the information returns required under the customs rules and regulations, the amount of the minimum penalties provided for in respect of those infringements is increased to 600 euros where the abovementioned infringements occur in connection with the entry summary declaration governed by the Union Customs Code.
- The maximum period for initiating penalty proceedings initiated on the basis of assessments or decisions made in certain tax application procedures is set at six months. We should recall that this period was three months.
- It is expressly stated, with regard to customs declarations, that interest on arrears is not compatible with the requirement for surcharges for late declarations.
- The period of time during which documentary evidence, statements required from persons holding or controlling financial accounts and other information used in the fulfilment of reporting and due diligence obligations are retained by financial institutions is changed. This period should in no case be less than five years from the end of the period during which the financial institution is required to disclose the information.

Finally, measures are also taken to combat fraud in *gambling activities* by amending Act 13/2011 of 27 May.

This Bill, together with the recent approval of the Google and Tobin taxes, can be framed in one of the areas in which, according to the Recovery, Transformation and Resilience Plan presented by the Government, part of the 140 billion euros of the European recovery fund to which our country is entitled will have to be invested. In this regard, it must be borne in mind that one of the policies

around which this plan is structured is the “modernisation of the tax system for sustainable and inclusive growth”, an objective that includes the fight against tax fraud to strengthen the collection capacity of the tax system and adapt it to the reality of the 21st century. However, the truth is that, in view of the numerous amendments to tax legislation included in the text of the Bill, the objective of this piece of legislation goes beyond the framework of the fight against fraud, as it achieves other tax policy objectives.