

# SPAIN

*Meritxell Yus and Carolina Gómez*<sup>1</sup>

## I OVERVIEW

### i Investment vehicles in real estate

The main Spanish vehicles for investment in real estate properties are:

- a* general real estate companies;
- b* housing rental companies;
- c* real estate collective investment vehicles (RECIVs); and
- d* Spanish real investments trusts (SOCIMIs).

### ii Property taxes

The acquisition of real estate in Spain may be subject to value added tax (VAT) or transfer tax, depending on the transaction's legal and material features and on whether the seller is a VAT payer. When VAT applies, the purchaser must pay stamp duty on the public deed documenting the transfer of the real estate.

The ownership and the disposal of a property in Spain triggers the following taxes, depending on whether the owners are individuals or corporations, and on whether they are Spanish tax residents:

- a* Resident corporations: any income derived from the property (including capital gains arising from its disposal) is subject to corporate income tax.
- b* Resident individuals: any income derived from the property (including presumed income and any capital gains arising from its disposal) triggers personal income tax. The ownership of property in Spain may also be subject to wealth tax.
- c* Non-resident owners: any income derived from property located in Spain (including capital gains arising from its disposal) is subject to non-resident income tax. If the owners are individuals, this ownership could trigger wealth tax.

Additionally, the mere ownership of a property in Spain is subject to real estate tax (RET), a local tax payable annually by individuals and corporations owning real estate in Spain, regardless of whether they are resident in Spain.

The sale of the property is subject to a local tax on the increase in value of urban land, regardless of whether the owners are individuals or corporations and regardless of whether they are resident in Spain.

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<sup>1</sup> Meritxell Yus is a partner and Carolina Gómez is a senior associate at Cuatrecasas.

## II ASSET DEALS VERSUS SHARE DEALS

### i Introduction

Investments in real estate in Spain can be structured as asset deals (buying the real estate directly) or share deals (buying the real estate through the purchase of the corporate vehicle that owns it). Both structures are common and the choice is mainly based on the advantages and disadvantages of each option: the tax impact (considered on a case-by-case basis); the due diligence effort (more significant in the case of share deals); and the risk assumption, whereby the purchaser must assume risks related only to the property (asset deal), or related to both the property and the company (share deal).

### ii Corporate forms and corporate tax framework

#### *Limited companies*

When setting up a business in Spain, foreign investors generally incorporate or acquire a limited company. The two main types of limited companies in Spain are public limited companies (SAs) and private limited companies (SLs). Both have legal personality, separate and distinct from that of their owners, who are not personally liable for the company's debts.

The choice between an SA or an SL is mainly determined by the scale of the business, the legal requirements (only SAs can be listed), the future ability to raise capital, the rules on transferability that partners want to apply and the flexibility offered by SL regulations compared to SA regulations.

Traditionally, small and medium-sized companies have chosen the SL form because its characteristics are more suitable (there are lower capital requirements, statutory restrictions on the transfer of quotas are more stringent than for SAs, and there is more flexibility and greater autonomy in deciding on the company's structure and organisation). In contrast, SAs have traditionally met the needs of larger companies.

#### *Branch or representative office*

As an alternative, foreign companies can establish a branch or open a representative office. A branch is a secondary establishment operating permanently as a representative of its parent company.

Although it has a degree of independence from its parent company and carries out all or part of that company's business activities, it does not have a separate legal personality. Representative offices mostly carry out ancillary, accessory and instrumental activities (including information gathering, market research and local support). Like branches, a representative office does not have a separate legal personality. This means that the parent company of a branch or a representative office will be liable for their obligations and debts.

#### *Other alternatives*

Another investment option is to associate through a joint venture with a business already established and functioning in Spain. Venture partners often create an equity joint venture by incorporating a limited company or acquiring a stake in an existing company. However, Spanish law contemplates other joint venture alternatives:

- a temporary joint ventures, with no separate legal personality besides that of its members, created to carry out specific projects or services, such as an engineering or construction project;

- b* economic interest groups, which are frequently created to provide centralised services for a group of companies, and are aimed at facilitating, improving or increasing the economic activity of their members, who are held jointly and severally liable, albeit subsidiarily to the economic interest grouping; and
- c* joint accounts agreements, under which investors hold an interest in a business they do not manage by making contributions of money or in kind, which are not capital contributions but give investors the right to participate in the positive or negative results of the business.

### ***Corporate tax framework***

Corporate income tax is levied on the worldwide income obtained by companies that are resident in Spain for tax purposes, regardless of the source or origin of that income. It is regulated under Act 27/2014 of 27 November.

#### *Tax base*

The tax base for corporate income tax is calculated on the declared accounting results (profit-and-loss account) and is subject to the adjustments required by Act 27/2014.

In general, accountancy expenses are considered tax deductible if they are duly registered in the company accounts and documented in a corresponding invoice.

Specific tax deduction rules apply to the following accountancy expenses: amortisation and depreciation of assets and rights, bad debts, financial leasing agreements and net financial expenses.

Under Act 27/2014, depreciation is allowed in respect of all tangible fixed assets (except land) and intangible fixed assets, based on their normal useful life. Different depreciation methods are available and depreciation rates are contained in official tables. In general terms, a maximum 2 per cent to 3 per cent rate can be applied to buildings. Depreciation applies from the date the relevant asset is in working condition.

Net financial expenses are tax deductible up to €1 million per year. Net financial expenses exceeding this amount are tax deductible, provided they do not exceed 30 per cent of annual earnings before interest, tax, depreciation and amortisation. A limitation additional to the general one described above applies to interest expenses derived from debt used to purchase shares in cases of tax consolidation groups or post-acquisition mergers under certain circumstances.

Tax deduction of impairment losses of the value of fixed tangible and intangible assets is applied to the tax year in which the asset is transferred to third parties or in the event of the winding up of the company.

Some expenses are considered non-deductible and must be adjusted to the tax base, including:

- a* remuneration on equity (dividends);
- b* corporate income tax;
- c* criminal or administrative fines and sanctions;
- d* gambling losses;
- e* donations, gifts and contributions to internal provisions or funds equivalent to pension schemes;
- f* expenses deriving from unlawful activities;

- g* expenses for operations performed, directly or indirectly, with individuals or entities residing in tax havens, except where the operation is proven;<sup>2</sup>
- h* financial expenses (interest) from debt-financing borrowed from a lender entity or entities that comprise a group of enterprises used to purchase shares in third entities or shares in other entities that belong to the same group of entities;
- i* remuneration exceeding €1 million per year paid to workers because of the extinction of the labour or commercial relationship with the enterprise;
- j* tax on stamp duty acts paid on signing a mortgage loan deed; and
- k* impairment losses in participations in quoted and unquoted entities.

Specific rules apply to the tax treatment of expenses and income from cross-border transactions where hybrid mismatches arise because of a different characterization for tax purposes in the jurisdiction concerned.

*Reduction of the taxable base: capitalisation reserve*

Taxpayers subject to the standard rate are allowed to reduce their taxable base by 10 per cent of the increase in their equity, provided that this increase is maintained over a five-year period, and a separate reserve is recorded in an amount equal to the tax reduction, which must not be released over the five-year period.

As a general rule, the increase in equity must come from the undistributed income of the previous year; therefore, for instance, shareholders' contributions should not be taken into account to determine the increase in equity. The capitalisation reserve is limited to 10 per cent of the positive income for that year. The limit is calculated on the taxpayer's taxable income without taking into account the adjustments for deferred tax assets or the offset of negative taxable bases.

*Offsetting negative tax base*

A negative tax base must be carried forward and offset against positive tax bases calculated in the following tax years without any temporary limitation.

The maximum percentage of income that can be offset by negative tax bases is 70 per cent of the positive tax base of a given year. The limit is calculated based on the taxpayer's taxable income before making adjustments to the capitalisation reserve.

However, companies may use €1 million of negative tax bases annually to offset their positive taxable income without regard to the 70 per cent limitation.

Specific limitations of 50 per cent and 25 per cent of the tax base before adjusting the capitalisation reserve and before offsetting apply when offsetting a negative tax base in the case of taxpayers whose turnover in the previous tax year exceeds €20 million.

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2 Countries and territories that qualify as tax havens are listed on the tax haven blacklist approved by Spanish Royal Decree 1080/1991 but are automatically excluded from the blacklist when they sign a tax treaty with Spain containing an exchange-of-information clause or a tax exchange-of-information agreement. This exclusion is effective from the date the agreement or tax treaty enters into force. The Anti-Tax Evasion Bill which will amend the relevant concept and may facilitate an update of the content of the blacklist is pending to be passed at the time this chapter was drafted.

The following are the general and specific limitations for offsetting.

<b>Maximum offsetting negative tax base calculated as a percentage of tax base prior to capitalisation reserve adjustment and prior to offsetting</b>	
Turnover less than €20 million	70%
Turnover between €20 million and €60 million	50%
Turnover exceeding €60 million	25%

These limitations do not affect the right to offset €1 million of negative tax bases annually.

#### *Tax rates*

The current corporate income tax rate is fixed at 25 per cent. A 15 per cent reduced tax rate is granted to newly created companies for the first tax period they have a positive tax base and for the following period.

#### *Tax credits*

A 95 per cent tax exemption for double taxation is granted for dividends, profit distributions and capital gains deriving from the transfer of shares in other qualifying companies, whether resident or non-resident. For the company to qualify for the tax exemption, the taxpayer must hold a stake of at least 5 per cent in the company that is the subject of the share transfer and the taxpayer must have had an interest in the company for at least one year before the date on which the dividends are payable or before the date of the transfer.

For the tax periods 2021 to 2025, specific transitory provisions grant this tax exemption to dividends, profit distributions and capital gains from shares acquired by the taxpayer before 2021 representing less than a 5 per cent stake, but with an acquisition cost above €20 million.

Special rules apply for this tax exemption when profit distributions or capital gains from the sale of participations derive from entities where income from dividends or capital gains from the sale of participations exceed 70 per cent of their total return.

Dividends from foreign sources and capital gains from transfers in qualifying foreign companies may also apply for this tax exemption, provided that the requirements set out above are met. In addition, the profit distribution or the capital gain deriving from the transfer should correspond to a foreign entity subject to an income tax that is identical or analogous to Spanish corporate income tax and that the tax rate should be at least 10 per cent. (this taxation requirement is deemed to be met if the foreign entity is resident in a country that has concluded a tax treaty with Spain that includes an exchange-of-information clause).

Losses derived from transfers in qualifying companies are non-tax deductible except when the company is liquidated.

A similar tax exemption is provided for foreign income derived from a permanent establishment (PE). Losses derived from foreign PEs are not tax deductible in the tax year in which losses are incurred but are deductible when the PE is liquidated.

Specific tax credits are granted for some corporate investments, such as research and development and technological innovation investments, and investments in film productions, audiovisual series and live performances of scenic arts and music.

Generally, foreign tax credit may be claimed for any foreign tax paid on foreign source income up to the amount of the tax payable in Spain on that income.

*Special corporate income tax regimes*

Corporate income tax regulations include several special tax regimes for some companies or activities, such as companies intended mainly to provide rental housing, Spanish real estate investment trusts (SOCIMI)<sup>3</sup> and foreign-securities holding companies (ETVEs) regimes.<sup>4</sup>

The special corporate income tax regime for companies intended exclusively to provide rental housing provides for an 85 per cent allowance on the tax due (an effective tax rate of 3.75 per cent) on the income (excluding capital gains) arising from the lease of dwellings, provided the following conditions are met:

- a* the taxpayer's main business activity must be the lease of dwellings located in Spanish territory;
- b* the lease must be for permanent dwellings (not short-term or seasonal leases);
- c* at least eight dwellings must be leased or offered for lease at any time of each tax period;
- d* dwellings must be leased or offered for lease for at least three years;
- e* each dwelling must be recorded separately for accounting purposes; and
- f* at least 55 per cent of the income obtained during the tax year must derive from dwellings or at least 55 per cent of the value of the company's assets must be able to produce qualifying income (i.e., income arising from the lease of dwellings).

Only 50 per cent of the dividends corresponding with this under-taxed income and of the capital gains arising from the transfer of such shares (for non-distributed reserves generated with this income) benefit from the 95 per cent corporate income tax exemption for double taxation when derived by qualified Spanish corporate shareholders<sup>5</sup>. For non-resident shareholders of such companies, no special rules apply to the distribution of dividends and capital gains<sup>6</sup>. This special corporate income tax regime for companies has neither regulatory nor listing requirements.

Additionally, the corporate income tax regime provides for special tax deferrals for mergers, spin-offs, contributions of assets, exchanges of securities and the change of address of a European company or a European cooperative company from one EU Member State to another. This special regime is based on the tax deferral of the income obtained by all persons or entities affected in the corporate restructuring. The tax deferral regime will not apply if the transaction concerned is fraudulent or carried out with the intent to evade tax and, in particular, if the transaction concerned is not carried out for valid economic reasons but with the aim of obtaining a tax benefit.

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3 Detailed information on SOCIMI is provided in Section IV.

4 Detailed information on ETVEs is provided in Section V.iii.

5 As the exemption is limited to 95 per cent for tax periods from 2021, the effective exemption is 47.5 per cent.

6 Detailed information on such taxation is provided in Section II.iv, 'Acquisition of shares in a real estate company'.

**iii Direct investment in real estate**

***Pre-existing tax liabilities***

In general terms, the purchaser of Spanish real estate assumes liability for outstanding payments in respect of the following taxes (up to the value of the real estate), regardless of who owned the property at the time the taxes became due for payment:

- a* certain local taxes levied on an annual basis, such as RET within the four-year statute of limitations period; and
- b* certain taxes levied on previous transfers or acquisitions (such as transfer tax, inheritance and gift tax, and non-resident income tax) within the four-year statute of limitations period, provided a tax lien is registered on the real estate in the property registry.<sup>7</sup>

This liability is dependent on the prior declaration of default of the main debtor and of any jointly liable persons. Moreover, the new owner will only be liable in respect of the acquired real estate (up to its value) and not personally in respect of all of his or her assets.

Therefore, when acquiring a property, it is advisable to carry out a due diligence process to detect these potential liabilities.

Additionally, according to the General Tax Act,<sup>8</sup> a purchaser may be considered the successor of a seller if the acquisition of the assets (e.g., a property) allows the purchaser to continue with the seller's business activity. As the successor of the seller's business activity, the purchaser would be jointly and severally liable for any tax liability the seller incurs in connection with the business activity carried out.

This joint and several liability, in the case of the succession of the business activity, can be limited or even eliminated by requesting from the competent tax authorities a detailed certificate of debts, penalties and other tax liabilities deriving from the seller's business activity, in accordance with Section 175.2 of the General Tax Act. The purchaser must request the certificate, with the seller's consent, before completing the transaction.

Once the certificate has been requested, the purchaser's liability would be as follows:

- a* if the tax authorities do not issue the certificate within three months from its request, or if the certificate states that the seller does not have any debts, penalties or other pending tax liabilities, the purchaser would not be jointly and severally liable for any tax liability related to the seller's business; and
- b* if the certificate states that the seller has certain debts, penalties or other pending tax liabilities, the purchaser would be jointly and severally liable only for those stated in the certificate.

***Indirect taxation of the transfer of real estate in Spain***

The acquisition of real estate located in Spain may be subject to VAT or transfer tax, depending on the transaction's legal and material features, and on whether the seller is a VAT payer.

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<sup>7</sup> Although the general statute of limitations for taxes under Spanish law is four years, tax liens are in place for five years from registration. Therefore, the right to levy the tax would expire in four years unless this term was interrupted (in which case, the four-year period would start over). Tax liens expire after five years.

<sup>8</sup> Act 58/2003 of 17 December.

The main difference between these taxes is that, in certain circumstances, VAT is a neutral tax, whereas transfer tax is always a final tax. Depending on the purchaser's business activities, VAT paid on the acquisition of real estate may be recovered by offsetting it against VAT charged on other transactions or by directly claiming a refund from the tax authorities.

### *VAT*

VAT is regulated under Act 37/1992 of 28 December (the VAT Act). If the seller is a VAT taxpayer (company or individual) and the transaction is considered a business activity, the transfer will be subject to VAT (unless it involves an ongoing concern), although an exemption may apply in certain circumstances.

#### *Transfer of land*

The transfer of non-developed land or land not suitable for construction is exempt from VAT.

The transfer of developed land or land in the process of being developed for building purposes is not exempt from VAT (the VAT rate is 21 per cent).

#### *Transfer of buildings*

The first transfer of buildings by the developer is not exempt from VAT.<sup>9</sup> The general VAT rate is 21 per cent. It is 10 per cent for dwellings.<sup>10</sup>

Subsequent transfers are exempt from VAT unless the purchaser intends to demolish or restore the buildings, provided certain requirements are met. If the purchaser intends to demolish the buildings, the transfer may be exempt, depending on the land's urban condition.

Under the VAT Act, works are considered restoration if:

- a* at least 50 per cent of the works are considered structural improvements (specific rules apply); and
- b* the total cost of the works qualifying as restoration exceeds 25 per cent of the acquisition price of the building (if the building was acquired in the previous two years) or, alternatively, 25 per cent of the building's current value at the beginning of the works (excluding the land in both cases).

Regarding the first requirement, the VAT Act specifies that the following will be considered structural improvements:

- a* consolidation works or works that modify the building's structure, facade or roofing;
- b* the following analogous works:
  - structural conditioning work that enhances the building's safety, guaranteeing its stability and mechanical resistance;
  - reinforcement or conditioning work on the foundations, as well as work affecting or involving the treatment of pillars or building frames;
  - the extension of built surface area, above or below ground-floor level;
  - reconstruction work on facades and courtyards; and

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9 If the developer has used or leased the property before the sale, the transfer is VAT-exempt in certain circumstances.

10 Four per cent for special protected housing, and for transfer of dwellings to housing renting companies that apply the especial corporate income tax regime.

- the installation of elevators, including those for use by persons with disabilities that are designed to save architectural barriers; and
- c the following works related to restoration (although the costs of these can only be taken into account if they are lower than the sum of categories a and b above):
  - masonry, plumbing and woodwork;
  - work carried out to improve and adapt enclosures, electrical installations, water, air conditioning and fire extinguisher systems; and
  - energy renovation work, namely work carried out to improve the energy performance of buildings by reducing energy needs, increasing the performance of heating systems and installations, or installing equipment that uses renewable energy sources.

When a VAT exemption applies, the seller can waive the VAT exemption if the purchaser is entitled to deduct (in whole or in part) the VAT invoiced by the seller when transferring the real estate, depending on the purchaser's business.<sup>11</sup>

VAT accrues at the time of transferring the real estate. Any VAT on advance payments will accrue at the time they are made.

As a general rule, the VAT payer is the seller, who issues an invoice plus VAT, and the purchaser must pay the price plus VAT, recovering this by offsetting it against VAT charged in other transactions or by directly claiming a refund from the tax authorities. This mechanism has a financial effect as it may take a few months to recover the VAT.

In certain cases, the VAT reverse charge rule applies. This means that the seller does not have to invoice VAT; the purchaser includes the output VAT in its own VAT form, while deducting the same amount as input VAT, provided no pro rata rule applies. This mechanism means that VAT will not have any financial effect.

For transfers of real estate, the VAT reverse charge rule applies when the VAT exemption is waived; when there is a mortgage on the property at the time of the purchase (even if the seller redeems the mortgage at that time with part of the purchase price according to the Spanish tax authorities' criteria) or when there are urban liens registered and in force in the property registry; or if the seller is in the process of bankruptcy.

Transfers of real estate subject to VAT and documented in a public deed will be levied with stamp duty as set out below.

### *Transfer tax*

The Tax on Transfers and Stamp Duty Act is regulated under the Legislative Royal Decree 1/1993 of 24 September.

When VAT is not applicable (i.e., when the transfer of the real estate is not subject to VAT, or subject but exempt and the VAT exemption is not waived), the purchaser will pay transfer tax on the current value of the real estate.

The transfer tax is also levied on the acquisition of real estate property included in an ongoing concern sold by a VAT taxpayer as those transactions are not subject to VAT.

The general transfer tax rate is between 6 and 11 per cent; different rates and exemptions apply depending on the regions where the property is located and the property's features. There is no stamp duty if the transaction is subject to transfer tax.

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<sup>11</sup> Certain activities such as leasing dwellings are VAT-exempt and do not allow the input VAT to be deducted (the VAT pro rata rule could apply if the company performs VAT non-exempt activities).

### *Stamp duty*

When VAT applies, the purchaser must pay stamp duty on the public deed documenting the transfer of the real estate.

The stamp duty rate is between 0.5 per cent and 3 per cent. Different rates and exemptions apply depending on the region where the property is located and the property's features. The stamp duty rate is often higher for transactions in which the seller has waived a VAT exemption.

### ***Tax on increase in value of urban land***

The seller of urban land (regardless of whether there are buildings on it) will have to pay a municipal tax for the increase of its cadastral value. The amount to pay is determined according to the cadastral value of the land and the number of years the seller has held the property. The applicable tax rate will depend on the municipality where the real estate is located. The Spanish courts have concluded that this tax does not have to be paid if no gain is obtained from the transfer under certain circumstances.

### ***Local taxes levied as a consequence of real estate ownership in Spain***

RET is levied annually on individuals and corporations that own real estate in Spain. The tax due is calculated based on the cadastral value of the real estate and the applicable tax rate, which depends on the municipality where the real estate is located.

Depending on the municipality and the specific circumstances, other local taxes may be payable (e.g., garbage collection tax and garage-entrance tax)

### ***Direct tax on holding real estate and disposal without a PE***

According to the Non-resident Income Act,<sup>12</sup> investment in real estate directly by a non-resident without a PE in Spain will be taxed in general:

- a* at a 19 per cent rate for EU, Norwegian and Icelandic tax residents on their net income – all rental expenditures are tax deductible, including interest; and
- b* at a 24 per cent rate in all other cases (on gross income obtained in Spain).

Where non-resident individuals hold property (excluding unbuilt land) without leasing it, the tax base would be a 'presumed income' calculated annually (regardless of whether the property is used) on either 2 per cent or 1.1 per cent of the cadastral value, depending on whether the cadastral value has been updated.

A special tax of 3 per cent of the real estate cadastral value will have to be paid annually by non-resident entities resident in tax havens with some exceptions.

Non-resident individuals are subject to the Spanish wealth tax on the net value of assets and rights that are located or can be exercised in Spain. This tax has a progressive rate ranging from 0.2 to 3.5 per cent although a tax-free allowance of at least €700,000 for all taxpayers is applicable.

Certain regions have approved particular rules for wealth tax purposes (rates or allowances), which could be more beneficial. Under the Wealth Tax Act,<sup>13</sup> EU tax residents are entitled to apply the wealth tax provisions established in the region where the assets or

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12 Legislative Royal Decree 5/2004 of 5 March.

13 Act 19/1991 of 6 June.

rights concerned are located or exercised, instead of the state legislation, which tends to be more burdensome. The Wealth Tax Act provides that real estate must be valued at the highest of the acquisition price, the cadastral value or any other value confirmed by the tax authorities relating to any other tax.

Capital gains from the transfer of real estate will be subject to the Spanish non-resident income tax at a 19 per cent rate. Certain allowances may be applicable (such as a 50 per cent exemption for capital gains from the transfer of urban properties acquired between 12 May and 31 December 2012, subject to certain requirements).

When a non-resident without a PE in Spain sells a real estate property, the purchaser must withhold 3 per cent of the price to be paid on account of the seller's tax due for the capital gain. If that 3 per cent withholding is not made at the time of transfer, the payment or debt is transferred to the property, and the purchaser therefore becomes liable for this tax (see Section II.iii, 'Pre-existing tax liabilities').

### ***Permanent establishment taxation***

Under the Non-resident Income Act, a non-resident is considered to act through a PE when he or she usually performs all or some of their business from any kind of facility or work place in Spain or acts in Spain through an agent authorised to contract on their behalf, provided that the agent habitually exercises those powers.

If a double tax treaty is applicable, it is necessary to abide by the PE definition in that treaty, which is usually more restrictive than the definition in the Non-resident Income Act.

In the case of real estate letting, the Spanish revenue authority considers that a non-resident acts through a PE in Spain when the letting activity could be considered an economic one under the Personal Income Tax Act,<sup>14</sup> namely when at least one person is employed with a full-time employment contract.

Spanish PEs are subject to Spanish non-resident income tax on their worldwide income, attributable at a general tax rate of 25 per cent. The tax base would be determined according to the Corporate Income Tax Act, with certain particularities (such as rules limiting the deductibility of certain expenses).

## **iv Acquisition of shares in a real estate company**

### ***Pre-existing tax liabilities***

In a share deal, a company retains its pre-existing tax liabilities after its sale; therefore, the purchaser acquires those liabilities. It is advisable to carry out a tax due diligence check to review the vehicle's tax position in respect of the main applicable taxes that are not statute barred, to identify and quantify the relevant tax risks, and to check whether the vehicle has fulfilled its tax obligations during the statute of limitations.

### ***Indirect tax on acquiring shares in a real estate company***

In general, the transfer of shares is not subject to indirect taxation, be it VAT or transfer tax.

However, under Article 314 of the Securities Markets Act (SMA),<sup>15</sup> a transfer of non-quoted shares in the secondary market that leads to the acquisition of or an increase

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14 Act 35/2006 of 28 November.

15 Legislative Royal Decree 4/2015 of 23 October.

in control over certain companies owning real property located in Spain may be subject to transfer tax or VAT where applicable if, by means of the transfer, taxation of the real estate transfer is evaded.

Unless proved otherwise, tax evasion is considered to exist in the following circumstances:

- a* the purchaser obtains control of the share capital of an entity where more than 50 per cent (at market value) of the total amount of the assets on its balance sheet comprises real property located in Spain not linked to a business activity;
- b* the purchaser acquires shares of an entity whose assets include securities that enable the acquirer to exercise control over another entity, more than 50 per cent (at market value) of whose assets comprise real property located in Spain not linked to a business activity; or
- c* the shares transferred were previously subscribed by the transferor in exchange for real estate not linked to a business activity transferred to the entity under incorporation or capital increase of the entity, and the time elapsed between the transfer and the previous acquisition is less than three years.

If taxation takes place within the scope of Article 314 of the SMA, transfer tax or VAT may be levied. The tax base will be the market value of the real property owned by the company whose assets are transferred, or the value of the real property owned by the subsidiaries in which a control position is reached by the purchaser, pro rata to the percentage of ownership.

### ***Direct tax on dividends and capital gains***

#### *Taxation of dividend distributions*

The taxation of dividends paid by a Spanish company to its shareholders is as follows.

#### *Spanish corporate shareholders*

There is a 95 per cent corporate income tax exemption for double taxation if:

- a* the Spanish corporate shareholder holds a participation of at least 5 per cent in the subsidiary company<sup>16</sup>; and
- b* the participation has been held uninterruptedly for at least 12 months at the time the dividends are due.

Corporate income tax is payable, and there is a 19 per cent withholding tax rate if those requirements are not met. Requirement (b) could be met after the dividends are due, in which case, the dividends would be exempt from corporate income tax.

#### *Non-resident shareholders*

If the shareholder is a company resident in another EU or EEA Member State, dividends are exempt from non-resident income tax, provided that:

- a* the shareholder holds at least 5 per cent of the subsidiary company's share capital;
- b* both companies, the shareholder company and the subsidiary company, are subject to, and not exempt from, tax in their state of residence and have one of the legal forms referred to in the appendix to the EU Parent-Subsidiary Directive;

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<sup>16</sup> For the tax periods 2021 to 2025, specific transitory provisions grant this tax exemption to dividends, profit distributions and capital gains arising from shares acquired by the taxpayer before 2021 representing a stake of less than 5 per cent, but with an acquisition cost higher than €20 million.

- c* the distribution of the profits by the subsidiary company does not derive from the liquidation of the company; and
- d* the EU parent company's participation in the subsidiary company has been held for at least one year at the time the dividend is due.

This tax exemption would be subject to the Spanish general anti-avoidance provisions.<sup>17</sup> Otherwise, dividends are subject to withholding tax in Spain at the general 19 per cent tax rate, unless the shareholder is entitled to apply a double tax treaty (in which case the applicable withholding tax would be the lower of the reduced tax rate established in the tax treaty and the ordinary domestic withholding tax rate of 19 per cent).

#### *Taxation of potential divestment*

Any income derived by shareholders as a result of the transfer of shares in a Spanish subsidiary company – or its liquidation – would be taxable in Spain as follows.

##### *Spanish corporate shareholders*

There is a 95 per cent corporate income tax exemption for double taxation if:

- a* the shareholder holds a participation of at least 5 per cent in the project company<sup>18</sup>; and
- b* the shareholding has been held uninterruptedly for at least 12 months at the time the transfer is carried out.

If these requirements are not met, there is no exemption from corporate income tax. The exemption is neither totally nor partially applicable in other specific cases, such as passive or certain holding companies companies.

##### *Non-resident shareholders*

The proceeds from divestment would be subject to non-resident income tax at the 19 per cent tax rate under the Non-resident Income Tax Act, as long as the relevant subsidiary company qualifies as a real estate company, unless the shareholder is entitled to apply a double tax treaty<sup>19</sup> under which Spain is not entitled to tax this capital gain.

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17 Under the anti-abuse provision included by Spain on transposing the EU Parent-Subsidiary Directive into Spanish domestic law, this exemption would not be applicable if a majority of the voting rights in the parent company is held, directly or indirectly, by non-EU entities or individuals under certain circumstances.

18 For the tax periods 2021 to 2025, specific transitory provisions grant this tax exemption to dividends, profit distributions and capital gains arising from shares acquired by the taxpayer before 2021 representing a stake of less than 5 per cent, but with an acquisition cost higher than €20 million.

19 The current wording of the provisions related to capital gains derived from the disposal of a real estate company set out in many tax treaties signed by Spain is expected to be modified by the Organisation for Economic Co-operation and Development Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Sharing by introducing an anti-avoidance provision that establishes a 365-day period preceding the disposal for testing if the company's shares do not derive more than 50 per cent of their value from immovable property to prevent the avoidance of capital gains tax.

### ***Real estate companies held by non-resident individuals: wealth tax***

As a rule, non-resident individuals are subject to wealth tax on direct (not indirect) shareholdings in a Spanish company unless an applicable tax treaty prevents Spain from taxing this event.

Although the Wealth Tax Act provides that only a direct holding in a Spanish company is subject to this tax, the Spanish tax authority has concluded in several tax rulings<sup>20</sup> that the indirect holding by a non-resident individual of company shares is taxable in Spain if the company's main assets comprise real estate located in Spain.

The Wealth Tax Act provides that shares in companies must be valued depending on whether the companies have been audited. If they have been audited, they are valued at book value (i.e., the net equity value) of the most recently approved financial statements. If they have been not audited or the audit was not favourable, shares in companies are valued at the highest of the three following values: nominal value, book value of the most recently approved financial statements or capitalisation at a 20 per cent rate of the profits obtained during the three financial years completed before 31 December of the calendar year in question.

However, the Wealth Tax Act sets out an exemption for shareholders who hold a stake in family-owned companies, subject to certain requirements. Moreover, it provides a general minimum €700,000 exemption for all taxpayers. As mentioned above, certain regions have approved specific rules for wealth tax purposes (e.g., rates and allowances) that could be more beneficial and applicable to EU tax residents.

## **III REGULATED REAL ESTATE INVESTMENT VEHICLES**

### **i Regulatory framework**

In Spain, there are two types of real estate collective investment vehicles (RECIVs): real estate investment funds (REIF), and real estate investment companies (REIC).<sup>21</sup>

RECIVs are regulated under Act 35/2003 of 4 November on Collective Investment Institutions, the regulations of which are contained in Royal Decree 1082/2012 of 13 July.

RECIVs are financial instruments allowing small investors to channel their investments in real estate.

### **ii Overview of the different regulated investment vehicles**

The establishment of RECIVs is subject to the prior authorisation of the Spanish Securities Market Commission (CNMV).

RECIVs must invest in urban real estate for rental purposes and cannot sell their assets until three years have elapsed since their acquisition. A RECIV can also invest up to 15 per cent of their total assets in certain entities (such as SOCIMIS, other RECIVs or real estate limited companies) under certain conditions.

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20 However, in November 2019, the Spanish tax authority issued a tax ruling under the terms of the Spanish Wealth Tax Act (namely that only the direct holding of a Spanish company is taxed in Spain), which implies a change in the authority's criteria. Accordingly, Balears' judgment of 3 December 2020 applies the same criteria.

21 Spanish REITS (SOCIMIS) are discussed in Section IV.

RECIVs can use up to 20 per cent of their total assets to develop new real estate to be used for rental purposes. The minimum holding term of these new properties is seven years after the completion of building works.

No asset (including the rights over it) may represent more than 35 per cent of the total net assets.

RECIVs cannot sell assets to the companies of their own group. Certain limits apply to the acquisition and rental of real estate assets from other companies of the group.

At least 70 per cent (in the case of REIF) or 80 per cent (in the case of REIC) of the annual average of the monthly balance must be invested in urban real estate assets for rental purposes, which may be acquired at different stages of construction.

RECIVs' investments must comply with certain principles of liquidity. The minimum share capital or net assets of RECIVs is €9 million, contributed in cash or in real estate assets. As a rule, RECIVs must have at least 100 shareholders.

### **iii Tax payable on acquisition of real estate assets**

The indirect taxation of the acquisition of real estate assets by a RECIV is not subject to any specific provisions except for the following tax incentives:

- a* a tax exemption may apply for the incorporation of RECIVs, capital increases or non-monetary contributions; and
- b* a tax benefit of 95 per cent may apply to the transfer tax due on the acquisition of urban real estate used for rental housing and for the acquisition of land to develop the real estate to be used for rental purposes, subject in both cases to fulfilling the three-year holding period for these assets.

### **iv Tax regime for the investment vehicle**

To prevent double taxation on income derived from the underlying investments, the Corporate Income Tax Act provides for a special tax system based on applying a reduced 1 per cent rate to RECIVs that fulfil certain requirements. If the real estate assets are transferred before the minimum holding term, they must regularise the corporate income tax paid based on the general applicable rate.

### **v Tax regime for investors**

RECIVs do not usually pay dividends. If distributed, dividends are taxed at the investor level, depending on their circumstances, at their personal income tax rate, without the right to claim for the exemption for double taxation.

Capital gains obtained by corporate income taxpayers or non-residents with a PE will be taxed at the applicable tax rate for corporate income tax or non-resident income tax for the recipient. The 95 per cent exemption for double taxation of capital gains included in the Corporate Income Tax Act cannot be claimed.

Capital gains obtained by personal income taxpayers resident in Spain will be included in the tax base and will be subject to taxation at the applicable rate. Under certain circumstances, the deferral regime is applicable in the case of the reinvestment of participations in REIFs.

Capital gains obtained by non-resident shareholders without a PE in Spain will be taxed at the applicable non-resident income tax rate. Under certain tax treaties, the capital gain will not be taxed in Spain.

## IV REAL ESTATE INVESTMENT TRUSTS AND SIMILAR STRUCTURES

### i Legal framework

SOCIMIs, inspired by REITs, are regulated under Act 11/2009 of 26 October.

### ii Requirements to access the regime

A SOCIMI must be incorporated as a public limited company (SA). Its corporate name must evidence its status as a listed real estate investment company or include the abbreviation SOCIMI, SA.

The SOCIMI's main corporate purpose must be one of the following:

- a* the acquisition and development of urban real estate for rental purposes, including restored buildings under the terms provided in the VAT Act;
- b* the holding of shares in SOCIMIs or other non-resident companies in Spain, when they have the same corporate purpose as the SOCIMI and are subject, by law or under the company's by-laws, to a regime similar to that applicable to SOCIMIs regarding the obligatory distribution of profits;
- c* the holding of registered (and not bearer) shares in other entities, whether resident or non-resident, with a main corporate purpose of acquiring urban real estate for rental purposes and a regime, by law or under the company's by-laws, similar to that established for SOCIMIs regarding the obligatory distribution of profits and investment of income and assets, subject to the requirement that share capital must belong to SOCIMIs or any of the companies mentioned in (b) above, which cannot have any subsidiaries or investee companies; and
- d* the holding of shares or units of RECIVs.

In addition to its main corporate purpose, a SOCIMI can pursue different supplementary business activities. The combined revenues from other supplementary business activities must account for less than 20 per cent of the company's total revenues for each tax period.

A SOCIMI's share capital must be at least €5 million, represented by one class of registered shares. Contributions of real estate assets to the SOCIMI, at incorporation or in a capital increase, must be accompanied by a report from an independent expert appointed by the commercial registry.

SOCIMIs must distribute their annual profit to their shareholders. Profit distribution must be approved within six months following the end of each year, and must include the allocation of:

- a* 100 per cent of profit from dividends or any other profit sharing distributed by the investee companies of the SOCIMI in development of its main corporate purpose;
- b* at least 50 per cent of profits from the transfer of real estate and shares or equity holdings dedicated to the development of the SOCIMI's main corporate purpose, as long as the transfer is made after the minimum holding term has expired;<sup>22</sup> or

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22 The remaining profits must be reinvested in other real estate or equity holdings dedicated to activities comprising the main corporate purpose, within three years following the transfer that generated the capital gain giving rise to the income. If it is not reinvested, it must be distributed in full in the year the term for reinvestment expires. If real estate or shares and equity holdings involved in the reinvestment are transferred before the minimum holding term expires, the income gained from that transfer must be distributed in full in the year the transfer was made.

- c* at least 80 per cent of all other profits obtained, which includes income from revenues obtained on the properties leased by the SOCIMI or from other activities.

The dividend must be paid in the month following the date on which the resolution for distribution is approved.

Act 11/2009 states specific features regarding the content of the SOCIMI's annual accounts.

For the special tax regime to apply, the SOCIMI's shares must be admitted to trading on:

- a* a regulated market in Spain, or in a Member State of the EU or the EEA or in a state that has an effective exchange of information with Spain; or
- b* a multilateral trading facility in Spain, or in a Member State of the EU or the EEA.

SOCIMIs are subject to requirements concerning how they invest their assets and attain revenue from operating their business.

At least 80 per cent of the value of a SOCIMI's assets must be assigned to:

- a* acquire and develop (including restore) urban real estate for rental purposes;
- b* acquire land to develop real estate assets that will be used for rent, as long as the development begins within three years from its acquisition; or
- c* equity holdings in qualifying entities for the development of the SOCIMI's main corporate purpose.

The value of the SOCIMI's assets is determined as the average of the individual balance sheet of the companies, or based on the consolidated quarterly balance sheet for the year if the SOCIMI is the parent company of a group of companies.

If the SOCIMI (or its investee companies) owns real estate abroad, it must have a similar nature to the real estate in Spain to qualify as real estate properties for this purpose. Also, the country where it is located must have an effective exchange of tax information with Spain.

In addition, at least 80 per cent of the revenues for the tax period must be obtained from one or both of the following:

- a* the rental of real estate assets under the SOCIMI's main corporate purpose to non-related persons or entities; and
- b* dividends or profit sharing from equity holdings in entities that can be considered suitable to develop the SOCIMI's main corporate purpose.

To calculate the previous 80 per cent requirement, revenues obtained from the transfer of equity holdings or real estate used to develop the SOCIMI's main corporate purpose will not be considered revenue for the tax period if the three-year minimum holding period has expired.

The 80 per cent must be calculated considering consolidated income if the SOCIMI is the parent company of a corporate group and regardless of the relevant entities' place of domicile and whether they are obliged to draft consolidated annual accounts.

Real estate comprising the SOCIMI's assets must be leased for at least three years. This term includes the time during which the properties have been offered for rental, up to one year. The three-year term is calculated as follows:

- a* if the real estate was part of the SOCIMI's corporate assets before applying the special tax regime, the term is calculated from the starting date of the first tax period that the special tax regime was applied, when the property was already rented or offered for rental from that date; or
- b* if the real estate was developed or acquired later (or not rented when the special tax regime was first applied), from the date it was first rented or offered for rental.

Shares or equity holdings in the share capital of investee companies developing the SOCIMI's main corporate purpose must be held as part of the companies' assets for at least three years from their acquisition or from the starting date of the first tax period in which this special tax regime was applied.

Failure to observe the minimum holding period will not result automatically in loss of the special tax regime. However, the SOCIMI will be taxed on all revenues generated by the assets during the tax periods the special tax regime would have applied, including rental revenues and revenues from transfers, under the general tax regime and at the general tax rate.

### **iii Tax regime**

SOCIMIs that fulfil the corporate requirements can choose to apply a special tax regime, which provides for a neutrality system for SOCIMIs (subject to a zero per cent corporate income tax rate)<sup>23</sup> and for the effective taxation of its shareholders in their respective personal income tax.

The special tax regime can be applied to the SOCIMI and, if specific requirements are fulfilled, to entities in which the SOCIMI holds a stake in the development of its main corporate purpose, namely a stake in resident entities whose main activity is to acquire urban real estate for rental activities that are subject to the same mandatory policy, whether legal or statutory, of profit distribution, and that meet the SOCIMI's investment requirements.

The general meeting of shareholders must approve the decision to apply the special tax regime. That choice must be notified to the Spanish Delegation of the State Agency for Tax Administration (AEAT). The special tax regime will apply for the tax period ending after the notice is given and for following tax periods, and it will cease to apply from the year it is waived or when entitlement to its application is lost.

A SOCIMI can access the special tax regime even if, at the time of that option, some requirements, considered non-essential, are not fulfilled (e.g., those concerning investment of assets, source of revenues, obligation to have shares traded on regulated markets, minimum share capital and corporate name). In any event, those requirements must be fulfilled within two years from the date the application of the special tax regime was approved.

### ***Features relating to corporate income tax***

The corporate income tax rate for SOCIMIs is zero per cent.

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23 One of the measures proposed by the government – although as at the time of writing it is pending parliamentary procedure – is to establish a 15 per cent special corporate income tax rate on profits not distributed by SOCIMIs to their shareholders.

If the zero per cent tax rate applies, the SOCIMI cannot set off negative tax bases or claim tax deductions or subsidies on tax payable.

SOCIMIs are obliged to make withholdings on account of dividends and income distributed to their shareholders, unless the shareholders are entities entitled to apply the SOCIMI regime.

SOCIMIs must regularise income taxed under the special tax regime (regularisation involves taxation under the general regime and at the general corporate income tax rate for that income) in the following circumstances:

- a* the minimum three-year period for holding real estate is not observed, with the result that all the revenues obtained from those properties in all the tax periods the special tax regime was applied must be regularised;
- b* the minimum three-year period for holding shares or equity holdings is not observed, with the result that the portion of revenues generated by the transfer of shares or equity holdings must be regularised; and
- c* the SOCIMI is taxed for corporate income tax under a regime other than the special tax regime for SOCIMIs before the three-year term expires.

### ***Special tax applicable to SOCIMIs***

SOCIMIs may be subject to an additional special corporate tax in Spain. This taxation may arise when the SOCIMI's governing body resolves to distribute profits obtained by shareholders that are not subject to income tax on those profits or are subject to a lower tax rate on those profit distributions.

This additional special corporate tax is part of the corporate income tax payable, and it will be 19 per cent calculated on the gross amount of the dividends or profit sharing distributed to shareholders whose stake in the company's share capital is 5 per cent or more, and whose personal income tax due on those dividends or profit distributions is null or lower than 10 per cent.

In the case of shareholders that are not resident in Spain for tax purposes, the tax rate to which the profits distributed by the SOCIMI are subject will be determined based on the withholding rate at source (if any) applicable to those dividends when they are distributed in Spain. It must also consider the tax rate to which non-resident shareholders are subject in their country of domicile, minus any deductions or exemptions for avoidance of international double taxation that apply as a result of the payment of those profits.

Therefore, if the withholding rate at source is 10 per cent or higher, the minimum taxation requirement will be considered fulfilled and the special tax will not apply, regardless of whether a deduction or exemption for avoidance of international double taxation is subsequently applied to the dividend for the payee's benefit under applicable law.

This special tax will not apply if the shareholder receiving the dividend is an entity qualifying to apply the SOCIMI regime or a non-resident entity, provided that the dividends received are taxed at a rate of at least 10 per cent.

In connection with that additional special corporate tax, a SOCIMI's shareholders are subject to certain reporting obligations. Those with a stake of at least 5 per cent of share capital must substantiate to the SOCIMI that they are subject to income tax at a rate of at least 10 per cent. They must make that disclosure within 10 days from the date the dividend is paid. Otherwise, that income will be considered exempt or taxed at a lower rate, and the SOCIMI will be liable for the additional special corporate tax.

The SOCIMI must ensure shareholders' performance of those reporting obligations so it can foresee any circumstances of application of the additional special corporate tax.

***Opting for the special tax regime: loss of eligibility***

Companies that access the special tax regime for SOCIMIs after being taxed under a different regime will be subject to the following special rules:

- a* Any tax adjustments pending reversal in the tax base at the time of application of the special regime will be included in keeping with the general regime and at the general corporate income tax rate.
- b* Any negative tax bases pending set-off at the time of application of the special regime will be set off against any positive income taxed under the general regime.
- c* Revenues from the transfer of real estate owned before applying the special regime and obtained while the special tax regime applies will be held to have been generated linearly over the term of ownership of the transferred property, unless proof to the contrary is delivered. The portion of revenue attributable to tax periods preceding the application of the special regime will be taxed at the general tax rate and under the tax regime in place before the application of the special tax regime. The same rule applies to revenue from the transfer of equity holdings in other companies dedicated to the main corporate purpose and to all other assets.
- d* Deductions from the amount of tax payable pending application will be deducted from the amount of tax payable under the general regime.

If the company is taxed under the special regime for SOCIMIs and then under a different regime, there is a special rule to determine the revenue from the transfer of real estate owned at the beginning of the tax period in which the company abandons the special regime that was generated in periods in which the tax regime other than the special regime applies. In those cases, that revenue will be considered to have been generated linearly over the term of ownership of the transferred property, unless there is proof to the contrary; therefore, the portion of that revenue attributable to tax periods during which the special regime applied will be taxed in accordance with the conditions for the special regime. That same rule applies to revenue from the transfer of equity holdings in other companies dedicated to the main corporate purpose.

***Tax payable on acquisition of real estate assets***

The indirect taxation of the acquisition of a real estate asset by a SOCIMI is not subject to any special rules, except for the following tax incentives:

- a* a tax exemption may apply to the incorporation of the SOCIMI, and to capital increases or non-monetary contributions to SOCIMIs; and
- b* a tax benefit of 95 per cent may apply to the transfer tax due on the acquisitions of urban real estate used for rental housing and for the acquisitions of land to develop the real estate to be used for rentals, subject in both cases to fulfilling the three-year holding period for those assets.

#### **iv Tax regime for investors**

If the dividend derived from the years the special tax regime is applied, is paid to a taxable person for corporate income tax or to a taxpayer of non-resident income tax with a PE, it will be taxed at the rate applicable for corporate income tax or non-resident income tax with a PE (currently 25 per cent). In both cases, the 95 per cent exemption for double taxation of dividends cannot be claimed.

If the dividend or profit sharing is paid to a personal income tax payer, it will be taxed in the taxable savings base.

If the dividend or profit sharing is paid to a non-resident income tax payer without a PE in Spain, it will be subject to non-resident income tax at the general 19 per cent rate unless a tax treaty is applicable.

The doctrine of the Spanish General Directorate for Taxation is favourable to the dividends or profit distributions benefiting from the tax exemption under the Parent-Subsidiary Directive when the beneficiary is a tax resident in the European Union. However, this favourable administrative approach must be weighed against the judgment of the Court of Justice of the European Union (CJEU) in *Belgium v. Wereldhave Belgium and others*,<sup>24</sup> where the Court stated that the Parent-Subsidiary Directive tax benefits cannot be applied if the EU parent company receiving the dividend is an investment entity subject to a zero tax rate subject to the condition of full profit distribution to its shareholders.

If the revenue obtained from transferring or redeeming the SOCIMI's share capital is paid to corporate income taxpayers or non-residents with a PE, it will be taxed at the applicable tax rate for corporate income tax or non-resident income tax for the recipient (currently 25 per cent). The 95 per cent exemption for double taxation of capital gains provided under Corporate Income Tax Act cannot be claimed.

If the revenue is obtained by personal income taxpayers and represents a capital gain or loss, it will be included in the taxable savings base.

Finally, if the revenue is paid to a non-resident without a PE in Spain holding 5 per cent or more of the SOCIMI, the revenue will be subject to taxation at the standard tax rate (currently 19 per cent) unless a tax treaty is applicable. If it is paid to a non-resident without a PE in Spain holding less than 5 per cent of the SOCIMI, it may be exempt from Spanish non-resident income tax, provided that certain requirements are met (such as a tax treaty with an exchange of information clause).

#### **v Forfeiture of SOCIMI status**

Entitlement to apply the special tax regime will be lost and the general tax regime will apply for tax periods in which any of the following circumstances arise:

- a* delisting from regulated markets or from a multilateral trading facility;
- b* a substantial breach of the reporting obligations to be included in the SOCIMI's annual accounts, unless the breach is remedied in the notes to the annual accounts of the following year;
- c* the failure to pass a resolution for distribution, or partial or total payment of dividends in the terms and by the deadlines established in Act 11/2009, and taxation under the general regime will occur for the tax period corresponding to the year in which the income gave rise to those dividends;

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24 Judgment of 8 March 2017 in Case C-448/15.

- d* the waiver of application of the special tax regime; and
- e* the breach of any other requirement established under Act 11/2009 for the entity to apply the special tax regime, unless the cause of the breach is remedied within the following year, with the exception that the breach of the holding period for assets, whether real estate or equity holdings, will not result in the loss of the special tax regime.

If the company loses entitlement to apply the special tax regime, no matter the cause, it will not be eligible to apply it again until three years have passed from the end of the last tax period during which the special tax regime could be applied.

## V INTERNATIONAL AND CROSS-BORDER TAX ASPECTS

### i Tax treaties

Spain has entered into more than 94 double tax treaties with countries worldwide (particularly relevant is its treaty network with South American countries), many of which are based on the Organisation for Economic Co-operation and Development (OECD) Model Tax Convention on Income and on Capital, and it is continually expanding its treaty network.

As a rule, most of the tax treaties Spain has signed set out a special provision (a real estate clause) under which tax is chargeable in Spain on capital gains arising from the transfer of shares of companies whose main assets comprise, directly or indirectly, real estate located in Spain. It is expected that the renegotiation of tax treaties that do not include this real estate clause, such as that between the Netherlands and Spain, will result in its inclusion.

According to its provisional position, Spain has adopted an ambitious role in the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Sharing (MLI). Spain has chosen to amend most of the tax treaties or covered tax agreements (CTAs) in force, in accordance with the MLI.

Article 9, Paragraph 1 of the MLI includes a special real estate clause under which the source state is entitled to tax this capital gain if, at any time during the 365 days before the transfer, a certain threshold is exceeded. Article 9, Paragraph 1 specifies this threshold as the traditional 50 per cent rate.

In particular, Spain has not reserved the right for the entirety of Article 9, Paragraph 1 not to apply to its CTAs; in other words, Spain has chosen to apply this provision. Furthermore, Spain has chosen to include the provision of Article 9, Paragraph 4.

In any case, Spain has yet to finish internal ratification of the MLI. Once the internal ratification process is complete, Spain will need to deposit its instrument of ratification to bring the MLI into force for its CTAs.

### ii Cross-border considerations

Foreign investment in Spain, including real estate investment and ownership, is not generally restricted<sup>25</sup> (except for sectors affecting public order, public security and public health of another EU Member State or for main strategic sectors, including the financial, energy, technology, media and telecommunications sectors).

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<sup>25</sup> As a temporary measure, from November 2020 to 30 June 2021, investment made by residents of countries that cumulatively meet the following requirements will also be subject to authorisation: (1) those made by residents of EU or EFTA countries other than Spain, or by residents in Spain with a beneficial owner in

However, investors must comply with Spanish anti-money laundering (AML) regulations, which include providing information about the beneficial owner (the real beneficiary of the investment) and the origin of the investor's funds.

Spain has implemented the EU directives on the prevention of the use of the financial system for the purposes of AML and terrorist financing. EU and Spanish AML regulations are in line with the Financial Action Task Force Recommendations.

AML rules apply to several obliged entities, including banks and other financial and credit institutions, real estate agents and brokers, auditors, external accountants and tax advisers, notaries and lawyers. These entities should:

- a implement an internal control system that includes a policy and procedures to identify their clients (know-your-client (KYC) policy); and
- a identify (and avoid) suspicious activities and transactions, and report them to the authorities (namely the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences, or Sepblac).

Obliged entities must also gather and store their clients' information, and keep it available for Sepblac.

A real estate transaction usually involves several obliged entities (e.g., a bank, a real estate agent, a lawyer and a notary), and each entity must apply its KYC and AML risk assessment policy independently. The parties must provide the required information to all involved obliged entities separately, and the transaction schedule must take into account the time, information and documents these entities need to conduct their KYC and AML procedures.

Moreover, some foreign real estate investments must be notified to the Secretary of State for Trade or the Bank of Spain, or both. These reporting obligations are imposed for statistical and tax purposes, and to prevent infringements of the law. Failure to comply with these reporting obligations may result in monetary fines.

### **iii Locally domiciled vehicles investing abroad**

Corporate income tax regulations include a special ETVE regime. This regime is granted to companies meeting specific requirements and includes the following features:

- a the qualifying holding company can claim exemptions to avoid international double taxation of dividends and income from foreign sources resulting from the transfer of equity shares in non-resident companies if the following conditions are met:
  - the holding company holds a stake of at least 5 per cent in the non-resident company;
  - the holding company has held the interest for at least one year before the date on which the dividends are payable or before the date of the transfer; and
  - the profit distribution or the capital gain deriving from the transfer corresponds to a foreign entity subject to an income tax that is identical or analogous to the Spanish corporate income tax, and that tax rate is at least 10 per cent; and
- b dividends and capital gains obtained by foreign shareholders (not resident in tax havens) are not taxable in Spain as they arise from exempt income derived from foreign subsidiaries.

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an EU or EFTA country; (2) investments whereby the investor becomes the holder of a stake equal to or greater than 10 per cent of the capital of a Spanish company or acquires control of the company; (3) those made in companies listed in Spain or unlisted companies, if the value of the investments exceeds €500 million and; (4) those affecting certain strategic sectors.

## VI YEAR IN REVIEW

During the past few years, no significant changes or developments in domestic law or the tax criteria of the Spanish tax authorities have been approved. However, the Budget Bill for 2021, which entered into force on 1 January 2021, contains relevant tax measures such as a 95 per cent limitation of the participation exemption regime for dividends and capital gains, and a personal income tax and wealth tax rate increase.

In addition, in 2021, the government transposed the regulations of the EU Anti-Tax Avoidance Directive (ATAD) on hybrid mismatches.

## VII OUTLOOK

Of note are the judgments of the CJEU of 26 February 2019, commonly referred to as ‘the *Danish cases*’, on the interpretation of the EU Parent-Subsidiary Directive and the EU Interest and Royalties Directive, and their connection with concepts such as beneficial ownership, tax avoidance and tax abuse. These landmark CJEU decisions will have an important effect on the application of the withholding tax exemptions for dividends and interest paid to EU recipients.

The Spanish Central Economic-Administrative Court subsequently applied the jurisprudence from the Danish cases in its decision of 8 October 2019. It is advisable to remain attentive to the approach adopted by the Spanish tax authorities and, particularly, the Spanish courts regarding this issue in the coming months.

Spain has not yet implemented in its domestic tax legislation all the tax measures included in the ATAD. Although Spain has already introduced some ATAD measures, modifications concerning controlled foreign company rules, exit tax and earnings stripping rules are still required.

In 2020, the Spanish government approved the Anti-Tax Evasion Draft Bill, which aims to transpose the ATAD, including measures to fully align the Spanish Act with the ATAD. However, its final content and entry into force will depend on the ongoing parliamentary process. If passed, all these tax measures will affect multinational group structures and cross-border transactions with Spain and have a significant impact on international investors.

## **CUATRECASAS**

Diagonal, 191  
08018 Barcelona  
Spain  
Tel: +34 932 905 577  
Fax: +34 932 905 488  
meritxell.yus@cuatrecasas.com  
carolina.gomezscribano@cuatrecasas.com  
www.cuatrecasas.com

## **MERITXELL YUS**

### *Cuatrecasas*

Meritxell Yus is a specialist in indirect taxation and real estate taxation. She advises multinational groups on VAT applicable to international transactions and on VAT-exempt activities and sectors. She has extensive experience in tax planning for public and private real estate transactions, M&A and real estate group restructuring. An expert in designing real estate investment and divestment structures, she has in-depth knowledge of state, regional and local taxation of these types of transactions.

She is a partner of VAT Forum CV, an international partnership of indirect tax specialists.

She lectures on and coordinates the indirect taxation module in the Master of Laws in taxation at the Universitat Internacional de Catalunya. She also lectures on VAT in the Escuela de Práctica Jurídica of the Universidad Complutense de Madrid and is a member of the Urban Land Institute.

She is recognised by several legal directories, including *Best Lawyers* in the tax category and *International Tax Review* in the women in tax leaders and indirect tax leader categories.

## **CAROLINA GÓMEZ**

### *Cuatrecasas*

Carolina Gómez specialises in advising Spanish family businesses and national and international foreign international groups, particularly on planning real estate acquisitions in Spain, restructuring real estate groups and financing transactions on tax matters. Her practice also includes dealing with Spanish tax audit procedures.

Carolina is a member of the firm's real estate and construction group. She has an exhaustive knowledge of indirect taxation, particularly real estate taxation, including VAT, transfer tax and stamp duty, and international taxation.

She has actively participated in several real estate acquisition and restructuring transactions.

She lectures in the master's programme in legal and tax planning and consultancy at the International University of Catalonia. She also lectures on real estate indirect taxation in Escuela Sert of the Official College of Architects of Catalonia and is a member of the Urban Land Institute.