

The subject to be addressed in this report has generated much literature in Spain and abroad. The application of new rules concerning the principles of source and residence are a topic for discussion not only when changes in tax policy occur, or significant new legislation is introduced, but also where the practical application of treaty rules is concerned. As the general reporter specifically requests, we will describe the tax regime which applies in Spain, principally from the perspective of the way in which tax jurisdiction principles are established and applied.¹

1. Policy

Taking into account both Spanish national law and current treaty policy, we can state that Spanish tax policy is to obtain the same balance of source and residence taxation as provided by the OECD model convention (MC). First, there is the residence criterion. The definition of a resident is given by domestic law: individuals are deemed to be resident in Spain for tax purposes if they habitually reside in Spain for more than 183 days in a calendar year, and/or their main centre of professional or business activities or economic interest is located in Spain. In addition, a company is resident in Spain either if it is incorporated under Spanish law or its registered office or effective headquarters is on Spanish territory. In both cases, tax on worldwide income is levied in Spain and subject to domestic tax legislation. However, domestic tax rules do envisage measures to avoid double taxation of residents. Secondly, the source criterion is used for taxing non-residents. Particular tax rules apply depending on the income categories. In order to specify the tax treatment, the first step is to determine whether or not

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¹ No references to regional legislation have been included as this would exceed the allowance given in the general guidelines. However, the special tax treatments of the Basque Country and Navarre should at least be mentioned and some interesting specific characteristics of the regime in the Canary Islands (ZEC tax regime).

there is an applicable tax treaty. Under Spanish tax treaty rules, taxing powers correspond either exclusively to the state of residence (for example, private pensions or capital gains on shares), not exclusively (dividends, interest or royalties) or in a few cases exclusively to the source country (public pensions, immovable property). In the absence of a tax treaty, domestic law applies when income is deemed to be obtained in Spain.² Moreover, it is also important to distinguish when a permanent establishment (PE) exists because the tax treatment is different in every case.

In general terms, there has been no significant change in the balance of source and residence taxation in Spanish tax policy. However, global trade “disintermediation” due to electronic commerce and international taxation have had an effect on the tax sovereignty of the state, particularly on the tax system model and taxation principles. These factors have influenced tax policy changes in Spain which have followed OECD and EU trends and rules. In this context, exchange of information represents one of the means of guaranteeing the effectiveness of taxation in the state of residence³ and tax cooperation between the tax institutions of EU Member States has intensified in recent years. Other changes have been introduced, in response to European Community law. For example, as a result of the recent implementation of Directive 2003/49/EC (Interest–Royalties), from January 2005, withholding tax on this income will be reduced to 10 per cent.⁴ The implementation of Directive 90/435/EEC (Parent–Subsidiary) introduced into Spanish law a new exemption rule for the profits distributed by subsidiaries resident in Spanish territory to their parent companies resident in other Member States of the EU.⁵ According to this rule, an entity which holds a direct interest of at least 25 per cent in the capital of another company is considered a parent company. The other company is considered a subsidiary company. The above-mentioned interest must have been held uninterruptedly during the year prior to the date on which the profit to be distributed becomes receivable or, if this is not the case, the tax liability paid in is refunded when the term has been completed.⁶ The Ministry of Economy and Finance may declare, provided there is reciprocity, that the exemption is applicable if the rate is at least 10 per cent of the capital of the subsidiary resident in Spain, provided that the remaining conditions established

² See art. 13 of the Act on Non-Resident Income Tax (currently regulated in Royal Legislative Decree 5/2004).

³ See J.M. Calderón Carrero, “El intercambio de información entre Administraciones tributarias en un contexto de globalización económica y la competencia fiscal perniciosa”, *Las medidas anti-abuso en la normativa interna española y en los convenios para evitar la doble imposición internacional y su compatibilidad con el Derecho Comunitario*, p. 270.

⁴ See art. 25(1)(i) Non-Resident Income Tax Act.

⁵ See art. 14(1)(h) and 14.2 Act on Non-Resident Income Tax. In this case, dividends are exempt from tax subject to additional EC directive requirements. The first domestic law (Act no. 28/1991) implementing this directive exempted not only profits distributed by foreign companies to the Spanish parent, but also profits distributed by Spanish companies to EU parents. Since 1 January 1995, the parent resident in Spain has been allowed to apply the same system to avoid double taxation independently of whether the residence of the subsidiary is in the EU area (Act no. 42/1994).

⁶ The *Denkavit* case (17 October 1996, C-283/1994, C-291/1994 and C-292/1994) limited Member States’ ability to make the concession of the exemption subject to certain conditions. As a consequence, Spanish law was adapted to comply.

are met. These requirements are the following: both companies must be subject to and not exempt from one of the taxes which tax the profits of legal entities in the Member States of the EU mentioned in article 2(c) of Council Directive 90/235/EEC; the profit distribution may not be the consequence of the liquidation of a subsidiary; and, finally, both companies must take one of the forms provided in the appendix to Council Directive 90/235/EEC.

Moreover, as a result of the decisions of the European Court of Justice about the non-discrimination principle and the freedoms guaranteed by the EC Treaty, Spanish law is tending to approximate resident and non-resident tax treatment, but only for some categories of income.⁷ Some authors have qualified the mixed effect of *Gerriste-Barbier-Bosal* as an “uncontrolled blowing-up of the mechanisms on international taxation”.⁸ Other issues have received more attention, for instance e-commerce tax problems, globalization or “legal” tax competition. However, not only hard law but also EU soft law has caused changes in direct and indirect taxation in Spain.

Furthermore, according to Spanish law, those individuals who move their residence to a tax haven will continue to be considered as Spanish residents during the five following tax periods.⁹ On the other hand, domestic law allows non-Spanish residents who are EU residents to opt to be taxed as residents (providing some requirements are fulfilled).¹⁰ Moreover, those individuals who become Spanish residents because of their employment can opt to be taxed as non-residents.¹¹

During the last 15 years, there have been some proposals involving a change to the source criteria.¹² Most of them were boosted by the reforms of the general tax laws. However, the Lagares Commission reports (1998, 2002) proposed continuing with this “traditional system”.¹³ As Soler Roch has stated in the Spanish tax literature, “a process of crisis or revision of the configuration of the criteria for states’ powers of taxation has begun and these processes exceed the supranational processes of integration and the current situation”.¹⁴ The discussion was

⁷ For example, as a result of the *Ladkhorst-Hohorst GMBH* case (12 December 2002). From January 2004, thin capitalization rules are not applied when the associated non-resident company is resident in the EU.

⁸ B. García Carretero, C. García-Herrera Blanco and P.M. Herrera Molina, *Comentarios de Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas, año 2003, 2004*, p. 27.

⁹ See art. 9(3) Act on Personal Income Tax (currently regulated in Royal Legislative Decree 3/2004).

¹⁰ See art. 46 Act on Non-Resident Income Tax.

¹¹ Since 1 January 2004. See art. 9(5) Act on Personal Income Tax.

¹² In the EU area, the Ruding criteria (1992) defend the source principle to avoid distortions. See the arguments in B. Terra and P.J. Wattel, *European Tax Law*, 2nd edn., Kluwer, Deventer, 1992.

¹³ This refers to the residence and source principles which are always established in domestic law. See *Informe de la Comisión para el estudio de propuesta de medidas para la reforma del impuesto sobre la renta de las personas físicas* (1998), pp. 57 and 99, and *Informe para la reforma del impuesto sobre la renta de las personas físicas* (2002), pp. 150–151.

¹⁴ Cf. M.T. Soler Roch, pp. 77–78, considering L. Hinnekens, H.D. Rosenbloom, K. Vogel and A. Radler. See also Jefferson Vanderwolk, *Direct Taxation in the Internet Age: A Fundamentalist Approach*, Bulletin of IFA, April 2000, p. 173, Conclusions of the IFA Congress 1984, and R. Falcón y Tella, *Correlatoria del tema “La imposición a las rentas de las empresas en los procesos de integración”*, *XVIII Jornada Latinoamericana de Derecho Tributario*, Montevideo, Uruguay, 1996. It has also been said that “semi-personalization” of the PE for sourced income exceeds

more intense about specific items of income, such as royalties or pensions. In fact, until 2003, Spanish law did not define royalties (*cánones y regalías*) as a homogeneous category.

2. Spain's taxation as a country of residence

The general rule in accordance with Spanish domestic law is to levy tax on the worldwide income of residents. However, the latest changes seem to neutralize this worldwide taxation principle by introducing different classes of exemptions, for instance, income from employment earned abroad or income from non-residential holdings (entities holding foreign securities (ETV)). In addition, the concept of "resident in Spain" has been subject to several reforms affecting individuals. National laws aim at avoiding fictitious changes of residence ("economic interest" criteria and legal presumptions). On the other hand, in order to attract new business to Spain, a new rule was introduced in 2004.¹⁵ Pursuant to this new rule, the payer who becomes a Spanish resident may choose to be taxed as a personal income taxpayer or as a non-resident from the tax period in which the change of residence takes place and in the 5 following tax periods. The following requirements must be fulfilled: the individual has not been a Spanish resident in the last 10 tax periods, the change of residence must be caused by an employment contract, the employment must be carried out effectively in Spain for a Spanish company or the PE in Spain of a non-resident entity and, finally, salaries must not be exempt from Spanish income tax on non-residents (there are similar rules in the Netherlands and the UK).

Under Spanish national law, the following categories of income are taxable when earned in another country by a resident of Spain:

- (a) Business profits (excluding services) attributable to a PE: however, from the tax year beginning 25 June 2000, no tax is payable by companies under the following circumstances: 85 per cent of the income of the PE comes from business activity (and must not be imputable under the "international tax transparency regime"); the PE is not located in a tax haven jurisdiction, and it must be taxed abroad in similar terms as under Spanish law.¹⁶ For individuals there is no exemption, but from January 2003, domestic law establishes a specific double taxation deduction different from that of companies.¹⁷
- (b) Business profits (excluding services) not attributable to a PE: corporation tax rules are applied to determine income and expenses both for individuals and companies so that there is no difference in the tax regime for calculating the tax base. However, article 23 of the Corporation Tax Act allows

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logical models of source jurisdiction and promotes examples of double or triple taxation difficult to resolve, even where treaties exist; cf. Baena, *op. cit.*, p. 156.

¹⁵ Art. 9(5) Personal Income Tax Act.

¹⁶ See art. 22 Corporation Tax Act (currently regulated in Royal Legislative Decree 4/2004) and its requirements and limits.

¹⁷ See art. 8(3) Act on Personal Income Tax.

companies to deduct from the tax base a maximum of 30,050,605.22 euro for investments setting up companies abroad.

- (c) Dividends from a foreign subsidiary: there are specific rules for companies to exempt dividends or reduce economic double taxation effects providing certain requirements are met.¹⁸
- (d) Dividends from a portfolio investment abroad: dividends are not taxable if there is an ETV.¹⁹ The special ETV tax treatment established from 25 June 2000 aims to neutralize the negative effects of international economic double taxation on Spanish companies operating outside Spain. The exemption is guaranteed for dividends and capital gains arising, depending on the level of holding (5 per cent) and the business activity of the non-resident company in which the stake is held.
- (e) For income from independent services rendered by professionals and consultants general rules are applied.
- (f) Income from independent services by artistes and athletes: as a general rule, Spanish law does not tax financial assistance to top athletes up to a maximum of 30,050.62 euro per annum.²⁰
- (g) For income from other types of independent services general rules are applied.
- (h) Employment income: since January 1999, there has been an exemption rule for a maximum of 21,035.42 euro (60,101.21 euro from 2001) which requires effective taxation in the other country.²¹
- (i) Income from shipping and air transport: as a general rule there is special treatment for shipping entities depending on the tonnage level.²²
- (j) For rental payments for immovable property general rules are applied.
- (k) For rental payments for equipment general rules are applied.
- (l) Interest: as a result of the *Ladkhorst-Hohorst GMBH* European Court case (12 December 2003, C-324/00), since January 2004, thin capitalization rules have not been applied when the associated non-resident company is resident in the EU. As stated in article 20 of the Spanish Corporation Tax Act:

“where the direct or indirect net remunerated indebtedness of an entity, other than a financial institution, to one or more related persons or entities not resident in Spain exceeds the result of applying a coefficient of 3 to capital for tax purposes, the interest accrued on the excess shall be treated as a dividend ... The provisions of this Subarticle shall not apply to transactions performed with or by persons or entities resident in countries or territories classed by regulations as tax havens ...”

- (m) Royalties:²³ from a tax point of view, they are treated for individuals either as a gross return on movable property, gross business earnings or gross

¹⁸ See arts. 21 and 32 Corporation Tax Act.

¹⁹ See arts. 116–119 Corporation Tax Act and its requirements.

²⁰ Specific requirements are regulated on specific tax rules. See Royal Legislative Decree 1467/1997, Personal Income Tax Act and development rules.

²¹ See art. 7(p) Personal Income Tax Act and its requirements and limits.

²² See art. 124 Corporation Tax Act.

²³ See Carmona Fernández, *op. cit.*, pp. 49–67.

earned income depending on the specific case. However, neither income obtained from the transfer of technology nor royalties are easily defined in the domestic regulations. Moreover, there are different criteria in the courts and the OECD.²⁴

- (n) For capital gains on shares general rules are applied. Capital gains obtained for individuals in more than one year are taxable at a fixed rate (15 per cent). For companies, an exemption rule (article 21 Corporation Tax Act) is applied as well as in the taxation regime for foreign dividends.
- (o) For other capital gains (e.g. from the sale of immovable property, intangible assets) general rules are applied.
- (p) General rules are applied for pensions.
- (q) Other important categories of income: international fiscal transparency (IFT) treatment is applied to passive income that does not arise from the pursuit of business activities, such as the positive income from the ownership of rural or urban real estate property or associated property rights, holdings in the equity of any kind of entity, or credit, financial, insurance and service provision activities.²⁵

To relieve double taxation when a Spanish resident obtains income generated in another country, Spanish tax law provides a tax credit system so that when the tax base of a resident taxpayer includes income and/or gains obtained and taxed abroad, the lower of the following two amounts shall be deducted from gross tax payable: (i) the amount actually paid abroad by reason of a tax identical or analogous in nature to Spanish corporation tax; (ii) the gross tax which would have been payable in Spain on the income and/or gains had such income and/or gains been obtained in Spain. On the other hand, Spanish legislation also focuses on the elimination of economic double taxation by including methods of exemption or imputation, depending on the type of income.

As Sanz Gadea observes, domestic law contains a more generous double taxation deduction system than several treaties. It is beneficial for the Spanish economy for Spanish companies to relocate abroad and the exemption method, which determines neutrality for capital imports, encourages companies to invest outside Spain.²⁶ In particular, the different methods are as follows:

- (a) Business profits (excluding services) attributable to a PE: until 25 June 2000, a tax credit was applied to the gross tax payable (method of imputation) both by individuals and companies, but in some cases it coincided with the exemption method as the tax credit applicable matched the gross tax payable resulting from the income included in the tax base. Since 25 June 2000, certain exemptions have been introduced in order to encourage the internationalization of businesses (Act no. 6/2000). For example, certain income and/or gains obtained abroad through a PE were exempt. As stated earlier, there is no exemption for individuals, but since January 2003, domestic law has established a specific double taxation deduction regime different from that of companies.²⁷

²⁴ *Ibid.*, p. 23.

²⁵ See art. 92 Personal Income Tax Act.

²⁶ Cf. E. Sanz Gadea, "El nuevo impuesto sobre sociedades, incidencia general", *Estudios sobre el Impuesto de Sociedades*, Comares, 1998, p. 26.

²⁷ See art. 82(3) Personal Income Tax Act.

- (b) Business profits (excluding services) not attributable to a PE: for individuals, domestic law establishes a tax credit as the lower of two amounts: the tax paid abroad by reason of a tax identical or analogous in nature to Spanish personal income tax or the result of applying the effective average tax rate to the part of the net tax base taxed abroad.²⁸ For companies, domestic law establishes a tax credit when the tax base of a resident taxpayer includes income and/or gains obtained and taxed abroad as the lower of the following two amounts to be deducted from gross tax payable: (i) the amount actually paid abroad by reason of a tax identical or analogous in nature to Spanish corporate income tax (no tax credit should be taken for taxes not paid by virtue of an exemption, tax reduction or any other tax relief; should a tax treaty be applicable, the tax credit may not exceed the amount of tax payable); (ii) the gross tax which would have been payable in Spain on the income and/or gains had such income and/or gains been obtained in Spain. Pursuant to the Spanish rule, where the taxpayer has obtained several items of income and/or gains abroad during the same tax period, the tax credit shall be taken by grouping together items of income and/or gains from the same country except for income and/or gains from PEs which must be computed separately by each of them. Moreover, any tax credits not taken due to insufficiency of gross tax payable may be taken in the tax periods ending in the 10 immediately succeeding years.²⁹ The EU convention signed on 23 July 1990 establishes the elimination of double taxation in the case of related companies.
- (c) Dividends from a foreign subsidiary: according to the Corporation Tax Act, when the tax base of resident taxpayers includes dividends or shares in income paid by an entity not resident in Spain, the amount of tax actually paid by it relating to such dividends on the income out of which the dividends are paid shall be deducted, provided that the amount is included in the tax base of the taxpayer. To receive this tax credit, the direct or indirect holding in the capital of the non-resident entity must be at least 5 per cent and must have been owned uninterruptedly during the one-year period prior to the date on which the distributed income became claimable or, failing that, must be maintained for such time as is required to complete the one-year period.³⁰ Moreover, the double tax treaties signed by Spain also included a method for avoiding economic double taxation (for example, when there is a subsidiary company).³¹ In these cases the most beneficial rule is deemed to be applied.
- (d) Dividends from a portfolio investment abroad: pursuant to Spanish law there is a voluntary regime. The entity resident in Spain may choose between: (i) including the foreign income and applying the tax credits established by

²⁸ See art. 82 Personal Income Tax Act.

²⁹ See art. 31 Corporation Tax Act. The Spanish rule aims to be compatible with treaties and other EC law.

³⁰ Since 1998 this deduction has been applicable even though the holding does not continue throughout the preceding year up to the day when dividends are payable, if continuity during one year is proved afterwards (as a result of the *Denkavit* case). See art. 32 Corporation Tax Act.

³¹ See arts. 23, 24 different double taxation treaties signed by Spain.

- Spanish corporate law (if applicable) or (ii) not including this foreign income in accordance with the exemption regime.
- (e) For income from independent services rendered by professionals and consultants general rules are applied.
 - (f) For income from independent services by artistes and athletes general rules are applied.
 - (g) For income from other types of independent services general rules are applied.
 - (h) For employment income general rules are applied.
 - (i) For income from shipping and air transport general rules are applied.
 - (j) For rental payments for immovable property general rules are applied.
 - (k) For rental payments for equipment general rules are applied.
 - (l) Interest: as an effect of EC Directive 2004/48, from January 2005 withholding taxes paid in Austria, Belgium and Luxembourg are deductible from individual income tax on the same terms as withholding taxes implemented in Spain.³²
 - (m) For royalties general rules are applied.
 - (n) Capital gains on shares: as with dividends, the method of avoiding double taxation has been, from 25 July 2000, an exemption in the tax base instead of the method of imputation which consists of a tax credit against the gross tax payable.
 - (o) For other capital gains (i.e. from the sale of immovable property, intangible assets) general rules are applied.
 - (p) For pensions general rules are applied.
 - (q) For other categories of income general rules are applied.

Spanish rules for determining the source of income obtained in another country are in general terms the same as the rules for determining whether Spain may tax income of a non-resident arising in Spain, as Spanish law follows OECD guidelines.

As stated previously, in Spanish law, in principle, the foreign income of a domestic PE is taxable. However, we must consider the exemptions in Spanish law as described above (see item (a)).

Spanish legislation envisages particular controls for the taxation of groups of companies³³ and for income obtained abroad.³⁴ From 1 January 1995, the international tax transparency regime has applied both to companies and individuals. This regime tries to discourage investment by Spanish residents in tax havens or countries with low tax rates, with the intention of not including them in their Spanish taxable base. This tax regime is based on three aspects: the holding in the non-resident entity, its level of taxation and the type of income obtained. This regime is compatible with the OECD principles and the double tax

³² See new para. 11 art. 101 Personal Income Tax Act.

³³ The corporate group has the option of applying the consolidation regime established in the Spanish Corporation Tax Act. Pursuant to this regime, the group is one taxpayer which is taxed upon the income obtained by all of the companies which make up the group. From 2001, the participation percentage amounts to 90 per 100.

³⁴ Among other things, the ETVES regime as already explained.

treaties.³⁵ Therefore, it can also be applied in those countries that have signed a tax treaty with Spain.

The Personal Income Tax Act establishes, among other things, an exemption for some of the income obtained abroad by Spanish residents. Therefore, the income earned from work actually performed abroad and taxed by an identical or analogous tax to the Spanish personal income tax is exempt. However, it has a quantitative limit and other requirements must be met. Moreover, this exemption is incompatible with the regime for excesses excluded from taxation when obtained abroad. The taxpayer may choose to apply the excess regime or the exemption.³⁶ The exemption was included from 1 January 1999, on condition that the income has been taxed in the foreign country. From 1 January 2004, should non-residents working for the companies organizing the America's Cup 2007 event become resident in Spain because of their time spent on Spanish territory they will be able to apply a 65 per cent reduction on the income obtained from their services provided that they are connected with the event.

The Spanish Corporation Tax Act does not have a special regime for primarily foreign owned resident companies. The report on reforming Spain's Corporation Tax Act proposed new regulations for international aspects, such as introducing rules to boost external investment or restrictions on tax havens, which have proved successful when implemented in other countries.³⁷ As a result, these measures have now been included in the Corporation Tax Act.

The requirements for applying the most beneficial treatment have already been described in the preceding paragraphs. This advantageous treatment cannot be applied if the income arises in a tax haven, and all of the measures include anti-abuse clauses to avoid capital movements solely for the purpose of achieving a more beneficial tax treatment (e.g. international tax transparency regime, thin capitalization or methods of exemption established in article 21 of the Corporation Tax Act).³⁸

3. Spanish taxation as a country of source

Since 1998 (Act no. 41/1998), non-residents have been subject to a specific tax (the non-residence income tax), which was introduced specifically in order to promote a unitary legal treatment for non-residents (individuals and companies). Territoriality and payment were the traditional criteria used to assess whether income was obtained in Spain. Since 2003 the payment criterion has only been applicable to specific and legally expressed income.

Table I shows how income earned by a non-resident is treated in Spain.³⁹

³⁵ See art. 92 Personal Income Tax Act; art. 107 Corporation Tax Act; and DGT Resolution, 10 November 1995.

³⁶ See art. 7(p) Personal Income Tax Act, and art. 5 of the Royal Decree.

³⁷ See Sanz Gadea, *op. cit.*, p. 25.

³⁸ See Martín Jiménez, *op. cit.*, pp. 109 and 154.

³⁹ There are exemptions and cases of non-subject earnings.

Table 1. Spain's domestic law treatment of income earned by a non-resident

Type of income	A. Does Spain tax this income when earned by a non-resident?	B. Is the non-resident taxed on a net or gross basis (i.e. can he deduct relevant expenses)?	C. At what rate is the non-resident taxed? ^a
Business profits (excluding services) attributable to a local PE	Yes	Net basis ^b	35% ^c
Business profits (excluding services) not attributable to a local PE	Yes	Gross basis ^d	25%
Dividends paid to a foreign parent	Yes ^e	Gross basis	15%
Dividends paid to a foreign portfolio shareholder	Yes	Gross basis	15%
Independent services rendered by professionals and consultants	Yes ^f	Gross basis	25%
Independent services by artistes and athletes	Yes ^g	Gross basis	25%
Other types of independent services ^h	Yes	Gross basis	25%
Employment income	Yes	Gross basis	25% ⁱ
Shipping and air transport income	Yes ^j	Gross basis	4%
Rental payments for immovable property	Yes ^k	Gross basis ^l	25%
Interest	Yes ^m	Gross basis	15%
Rental payments for equipment (not a financial lease)	Yes	Gross basis	25%
Royalties	Yes ⁿ	Gross basis ^o	25% ^p
Capital gains on shares	Yes ^q	- ^r	35% - 15% ^s
Other capital gains	Yes	-	35 - 15%

Table 1. (cont.)			
Type of income	A. Does Spain tax that income when earned by a non-resident?	B. Is the non-resident taxed on a net or gross basis (i.e. can he deduct relevant expenses)?	C. At what rate is the non-resident taxed? ^a
Pensions	Yes ^l	Gross basis	8% - 30% - 40% ^u
Other important categories of income ^v	Yes	Gross basis	25%

^a See art. 25 Non-Resident Income Tax Act.

^b In contrast to income obtained without a PE, it is possible to compensate revenues with a different sign.

^c If the PE carries out activities of investment in and exploitation of hydrocarbons the tax rate is 40 per cent. In addition, there is a supplementary tax of 15 per cent applicable to the income of non-residents without a PE. This supplementary taxation is not applied to PEs belonging to entities resident in another EU state or to those PEs resident in a state which has signed a tax treaty with Spain that does not expressly state otherwise (e.g. Indonesia or the United States).

^d The tax base is calculated by the difference between the gross income and the personnel costs, materials and supplies.

^e The profits distributed by subsidiaries resident in Spain to their parent companies resident in the other Member State are exempt if certain requirements are fulfilled.

^f Taxpayers resident in other Member States of the EU, except taxpayers resident in countries or territories legally classified as tax havens, may choose to be taxed as personal income taxpayers, provided they demonstrate that they have their habitual address or residence in a Member State of the EU and have obtained at least 75 per cent of their total income for the year as earned income and/or business earnings in Spain, provided that this income has effectively been taxed as income tax on non-residents during the period.

^g In accordance with administrative criteria, when a state does not consider interposed companies and treats income as if it was earned directly by individuals, it is possible to levy taxes on these incomes, even though it is not considered as an artistic income (DGT Resolution, 26 February 1997). Income earned by musical groups from an artiste's performance in Spain would be taxed in Spain (DGT Resolution, 25 April 1994).

^h General management expenses include amounts paid to the parent company by associated Spanish companies in relation to these services, if there is documentary support and if they correspond to the effective use of these services. From 1996, income is taxed at the general rate.

ⁱ 25 per cent is the general tax rate. Earned income of individuals who are not resident in Spanish territory and provide their services in diplomatic missions and consular offices of Spain abroad shall, provided they are not personal income taxpayers, be taxed at 8 per cent when no specific rules derived from international treaties, to which Spain is a party, are applicable. Earned income received by individuals who are not resident in Spanish territory under a fixed-term contract for foreign seasonal workers, pursuant to the provisions of labour legislation, is taxed at a rate of 2 per cent.

^j When shipping transport companies are non-resident and their ships arrive in Spanish territory. This tax is not applicable if companies are resident in a Spanish tax treaty country, or if the situation arises in countries with a special exemption treaty referring to these companies (South Africa and Venezuela) or, finally, when exemption is reciprocally accepted. Certain ministerial orders applying the reciprocity condition declare an exemption for shipping and aviation transport companies in some countries (Argentina, Belgium, Canada, etc.). With effect from 16 September 2003, Spain signed a treaty with New Zealand on 6 May 2002 providing an exemption for aviation companies which would be established in a future administrative rule. Spanish law does not tax income obtained in Spanish territory from the rental, assignment or

Table 1. (cont.)

transfer of containers or naked hull ships or aircraft used in international air or sea transport (art. 14(1)(g)).

Two particular cases should be highlighted: special levy on real estate owned by non-resident entities and obligations to make withholdings and payments on account if non-residents without a PE transfer immovable property. The tax regime for immovable property differs according to whether or not the property is rented.

In the case of immovable property which is not rented, there is a particular income attribution regime. Under this regime entities which pay non-resident income tax will apply the specific guidelines included in the tax rules of the Personal Income Tax Act (except time-sharing rights to use property).

Interest and other returns obtained by the assignment of own capital to third parties, together with capital gains derived from movable property and obtained without an intermediary PE by residents of another Member State of the EU, are not taxable in Spain except in two cases: (i) when the assets of the entity mainly consist, directly or indirectly, of real property located in Spain, (ii) when, at some time in the 12 months preceding the transfer, the taxpayer has held, directly or indirectly, at least 25 per cent of the capital or equity of the entity. Returns derived from a public debt, obtained without an intermediary PE in Spain, are also not taxable.

As a general rule, royalties (*cánones* and *regalias*) are taxable when obtained without a PE in Spain. The definition of domestic law was inspired by art. 12 of the OECD MC. The definition of *cánones* is as it appears in art. 2(b) of the above-mentioned directive. From 1 January 2003, the Non-Resident Income Tax Act offers a wide-ranging and precise definition of this item of income.

It is only possible to make deductions for the provision of technical assistance services where these are of an economic nature. Where there are cross-operations between residents and non-residents, the tax base for royalties would be the net amount of both payments (Supreme Court's criteria).

From 1 January 2005 there will be a single maximum tax rate of 10 per cent for royalties paid between companies and/or PEs located in the EU (see art. 25(1)(i) Non-Residents Income Tax Act).

Income for individuals and non-resident companies issued in Spain is not taxed, independently of the residence of the intermediary financial institution.

Tax bases would be determined by applying personal income domestic tax rules for each transaction, generally, by the difference between the transfer and acquisition values. In the case of non-resident entities, when the capital gain arises from an acquisition free of charge, the amount thereof shall be the normal market value of the item acquired.

A 15 per cent tax rate is applicable from 1 January 2003 for income earned in collective investment institutions/transactions.

From 1 January 2001, as guaranteed by Royal Legislative Decree 728/1993, old age pensions awarded in favour of Spanish emigrants are not taxable.

From 2003, pensions and similar benefits received by individuals who are not resident in Spanish territory, irrespective of the person who generated the right to such amounts, have been taxed in accordance with a marginal scale.

From 1 January 2003, an income attribution regime was introduced in the Non-Residents Income Tax Act. It is applicable to income generated both on Spanish territory and abroad (attribution to the partners, heirs, co-owners or participants, respectively) and may be amended as a result of double taxation treaties, for example, as a direct consequence of their fiscal subjectivity or where specific requirements are met (e.g. USA treaty). This regime and the regime applicable to foreign entities with an economic presence in Spain or their members are similar to the tax regime for PEs.

Spain has developed a general legislative approach for determining the geographical source of income. Since 1 January 2003, the scope of application for the non-residents tax focuses on the following: the situation of the property, the

place of exercise of the right, the residence of the payer, the place of issue⁴⁰ or the place of use.⁴¹

Remuneration paid to non-resident persons or entities by PEs located abroad and charged thereto is not considered to be obtained on Spanish territory, when the pertinent services are directly related to the activity of the PE abroad. On the other hand, some of the income obtained by the ETVE is not considered to be obtained in Spain, such as the benefit obtained when it is distributed, or the capital gains derived from the transfer of the securities when obtained by non-resident partners (unless they are located in a tax haven).

Spanish law establishes specific rules for determining whether each of the following types of income is taxed in Spain when earned by a non-resident:⁴²

- (a) business profits (excluding services) attributable to a PE:⁴³ non-resident tax law specifies income categories: earnings from business activities carried on by a PE, returns derived from assets applied thereto, and capital gains or losses derived from the assets applied to the PE. Since 2003, securities are only considered assets applied to a PE when it is registered in the Mercantile Register and certain requirements are met. So any income different from that mentioned above is not applied to the PE;
- (b) business profits (excluding services) not attributable to a PE: the Act refers specifically to earnings from business activities performed on Spanish territory,⁴⁴ provision of services used on Spanish territory,⁴⁵ and those which derive from the personal performance of artistes and athletes in Spain;
- (c) dividends⁴⁶ from a subsidiary;
- (d) dividends from a portfolio investment, if they are paid by individuals, companies or by PE residents in Spain, or the return on movable property used in Spanish territory;

⁴⁰ Dividends and capital gains are taxable when they derive from securities issued by persons or entities resident in Spanish territory.

⁴¹ In accordance with this criterion, income from business activities or operations performed (professionals, studies, projects, technical assistance or management support) without an intermediary PE located in Spanish territory, artistic performances or earned income of individuals located in Spain, will be considered to have been obtained in Spanish territory.

⁴² See art. 13 Non-Resident Income Tax Act.

⁴³ For tax periods beginning after 1 January 1999, taxation of PEs located in Spain (which has not changed with the Non-Resident Income Tax Act) have joint income company taxation rules. PEs are taxed on the total income attributable to the PE, irrespective of where it was obtained (art. 14(1) Act on Non-Resident Income Tax). Several European Court decisions invite the interpretation that PEs that have EU residence have the right to be taxed as resident companies (for instance decisions of 21 September 1999, 14 December 2000).

⁴⁴ It does not affect profits derived from the installation or assembly of machinery or imported equipment, when the relevant operation is carried out by the supplier itself and the value of the service does not exceed 20 per cent of the purchase price of the imported materials.

⁴⁵ They are considered to be used on Spanish territory when they are used for economic activities or operations carried out on Spanish territory or when goods situated on Spanish territory are referred to. From 2003, the scope of tax liability based on "Spanish use" lost its absoluteness: if the service received is only partially used for economic activities carried out on Spanish soil, the liability will be limited to income derived from the part of the service used for these activities and extends no further than this.

⁴⁶ From 2004, if dividends and other returns are derived from companies or collective investment funds (venture capital funds) or from the transfer or return of loaned shares, payments will not be considered to be obtained in Spanish territory.

- (e) income from independent services rendered by professionals and consultants (see item (b));
- (f) income from independent services by artistes and athletes (see item (b));
- (g) income from other types of independent services (see item (b));
- (h) employment income: remuneration is considered to be obtained in Spain when it derives directly or indirectly from a personal activity performed in Spain;⁴⁷
- (i) income from shipping and air transport;
- (j) rental payments for immovable property, when it derives from real estate property located in Spanish territory or rights relating thereto;
- (k) rental payments for equipment: the income earned from international purchases and sales, including commission for intermediation therein, together with ancillary and related expenses shall not be considered to be obtained in Spain;
- (l) interest (see paragraph (f) 2) article 13 of the Act on Non-Resident Income Tax);
- (m) royalties (see paragraph (f) 3) article 13 of the Act on Non-Resident Income Tax);
- (n) capital gains on shares if issued by individuals or companies resident in Spain;
- (o) other capital gains (i.e. from the sale of immovable property, intangibles) when they derive from other movable property, other than securities, located in Spanish territory or from rights that must be complied with or exercised in the territory. From 2003, the capital gains which derive from property or rights located in Spain and added to the taxpayer's estate without previous transmission are considered to be obtained in Spain. If the income derives from urban property located on Spanish territory or a right relating thereto it is also considered as obtained in Spain;⁴⁸
- (p) pensions and other similar benefits which are derived from employment performed on Spanish territory or a PE located therein;
- (q) other important categories of income.

The situations where Spanish national law allows for income earned by a non-resident to be taxed on a net basis are exceptional. The payments made by a PE to its head office or any of the PEs thereof for royalties, interest or commission paid in exchange for technical assistance or for the use or assignment of other items or rights are not deductible.⁴⁹ If the owner of the urban property is an entity subject

⁴⁷ From 2003, when it constitutes public remuneration or remuneration paid by entities resident in Spanish territory or PEs located therein as a result of a job performed on board a ship or aeroplane making international trips (the liability results from the right to be paid from Spain), income is not considered to be obtained in Spanish territory if the work is performed entirely abroad and this income is subject to a personal tax abroad.

⁴⁸ In particular, capital gains are included which are derived from rights or interest in an entity, resident or otherwise, whose assets consist mainly, directly or indirectly, of real property located on Spanish territory and capital gains derived from the transfer of rights or interest in an entity, resident or otherwise, which attribute the right to enjoy real property located on Spanish territory to their holder.

⁴⁹ In general, the tax base corresponding to earnings and/or returns that payers of non-resident income tax in Spain obtain without an intermediary PE shall comprise the gross amount thereof.

to special taxation the tax payable can be reduced when calculating the taxable base. The general rule for income obtained without a PE is that the expenses are not deductible. However, where a business activity is carried out, some expenses are allowed on an exceptional basis. So, in the case of the provision of services, technical assistance, installation or assembly works derived from engineering contracts and, in general, business activities or operations carried on in Spain without a PE, the tax base is equal to the difference between the gross income and the costs of personnel, materials included in the work and supplies, in accordance with conditions established.⁵⁰

Spanish law establishes the opportunity for the PE to deduct a reasonable part of the management and general administration expenses which its head office has incurred. These expenses are allowed only if certain requirements are satisfied: they are reflected in the PE's accounting statements, they are consistent, demonstrated by a report filed with the return, with the amounts criteria and distribution of such expenses and rationality and continuity of the allocation criteria adopted.⁵¹ In contrast, payments made to the head office or any other PE thereof for royalties, interest or commission paid in exchange for technical assistance or for the use or assignment of other items or rights are not considered deductible. In addition, the equity costs of the head office derived, directly or indirectly, from the PE located in Spain are not deductible. Notwithstanding the above, interest paid by PEs of foreign banks to their head offices or to other PEs in order to carry on their activity is deductible.

As has been explained, the treatment for the different types of income is different depending on whether or not the individual or the company is resident in Spain. According to the rulings of the European Court of Justice, the non-deductibility of expenses and the non-application of some exemptions if applied only to non-residents may be contrary to the principles of EU law.⁵² This has already been raised, for example, in relation to the regime in the Basque country, which did not allow its special tax regime to be applied for the benefit of non-residents. Other tax credits/deductions established in the Spanish Corporation Tax Act for Spanish companies are also not applicable to non-resident companies (export companies).

The circumstances and cases in which expenses are deductible when obtained by non-residents have already been explained in the preceding sections.

cont.

determined in accordance with the rules of the Personal Income Tax Act and the percentage multipliers and reductions established in the Act are not applicable. Exceptionally, interest paid by PEs of a foreign bank to the parent or other PEs is deductible.

⁵⁰ It is necessary to provide evidence or a guarantee that the requirement to withhold taxes on earnings has been complied with.

⁵¹ Exceptionally, interest paid by PEs of a foreign bank to the parent or other PEs is deductible.

⁵² See M. Villar Ezcurra, P.M. Herrera Molina and J. Santa-Bárbara Rupérez, "No discriminación fiscal y derecho de establecimiento. Comentario a la sentencia Royal Bank del TJCE". *Impuestos*, no. 21/1999, p. 98; M. Villar Ezcurra, "La fiscalidad de los no residentes y el principio de igualdad de tratamiento al hilo de la sentencia del TJCE de 14 de febrero de 1995". *Comunidad Europea*, no. 4/1995, p. 43 and bibliography of the annex.

4. Coordination of residence and source taxation

The current tax treaty policy of Spain for different categories of income is as shown in Table 2.

Over the last 15 years, a number of changes have been introduced to Spanish tax treaty policy concerning some of the categories of income described in Table 2. With regard to interest, the amendment of the Austria tax treaty (1995) eliminates paragraph 11 in which it was established that the interest derived from the state's public debt could only be taxed in this state. As a result, this power of taxation is now shared. There has also been much discussion about whether the thin capitalization rule can be applied in the case of a non-resident protected by a double taxation treaty. According to the OECD Committee, if the rule respects articles 9, 10 and 11 of the model treaty, it cannot be contrary to article 24 of the model treaty. The Spanish authority allows its application if it is based on the valuation of a related operation according to the "arm's length" principle and the tax treaty applicable (Resolution of the DGT of 17 October 1994). On the other hand, some Spanish authors consider it contrary to most of the double taxation treaties signed by Spain, basically because the Spanish rule is based on a fixed rate. Besides, since 2002, the thin capitalization rule has been amended.

In some cases, tax treaties include clauses for avoiding double taxation by including a tax credit for economic double taxation or by including the taxes not actually paid because of the exemptions applied in the source state (tax-sparing regime). All these rules differ depending on the specific tax treaty. Some of them allow tax sparing for dividends, interest and royalties (Canada, Denmark, Japan, Finland, Norway and Sweden), in other cases only for interest (Belgium, Germany, Luxembourg and Switzerland). In the case of the Netherlands tax sparing is only recognized for royalties, and in the case of France and the UK unique provisions apply.

Otherwise, only a few of the treaties entered into by Spain contain a tax-sparing clause. As some authors have said, its character of a developing country in the OECD context, at least at the time when treaty negotiations started, and its importance for foreign investment, led the treaty negotiators to consider the Spanish request for a tax-sparing regime⁵³ to be an important concession. The official Spanish position on the tax-sparing clause in the negotiation of double taxation treaties was, when it was dealing with highly industrialized countries, not to apply reciprocity to the income earned in the other country, in spite of claiming it itself. Later on, when Spain began negotiations with less developed countries, the clause began to appear with a reciprocal character in several treaties.⁵⁴ Exceptional cases are the treaties with Morocco and the Philippines, in which Spain guarantees the tax-sparing system even if the other country does not respond reciprocally.

⁵³ Felix De Luis, *op. cit.*, p. 301. For more information on tax sparing see TEAC Resolution 23 March 1998.

⁵⁴ See González Poveda, p. 39. On the Finland, Brazil and Tunisia tax treaties, the rule would be applied to income arising from both countries. In Brazil there is a special rule: for the deduction of interest and royalties they would always be considered paid on a 20 per cent and 25 per cent share (matching credit).

Table 2. Spanish tax treaty policy with regard to income

Type of income	A. Follows the OECD model convention	B. Tries to obtain more residence taxation rights than are provided in OECD model	C. Tries to obtain more source taxation rights than are provided in OECD model
Business profits (excluding services) attributable to a local PE	Yes ^d		
Business profits (excluding services) not attributable to a local PE	Yes ^b		
Dividends paid to a foreign parent	Yes ^c		
Dividends paid to a foreign portfolio shareholder	Yes		
Independent services rendered by professionals and consultants	Yes ^d		
Independent services by artistes and athletes	Yes ^c		
Other types of independent services	Yes		
Employment income	Yes ⁱ		
Shipping and air transport income	Yes		
Rental payments for immovable property	Yes ^g		
Interest	Yes ^h		
Rental payments for equipment (not a financial lease)	Yes		
Royalties			Yes ⁱ
Capital gains on shares	Yes ⁱ		
Other capital gains	Yes		

Table 2. (cont.)

Type of income	A. Follows the OECD model convention	B. Tries to obtain more residence taxation rights than are provided in OECD model	C. Tries to obtain more source taxation rights than are provided in OECD model
Pensions	Yes ^b		
Other important categories of income	Yes ^c		

^a However, some particularities should be noted. Benefits would be taxed independently of parent company profits as if the PE were an independent and separate company, in spite of the same activities being carried out in similar conditions.

^b The treaties which Spain has entered into establish (art. 7 OECD model) the resident taxation principle, except where the activity is carried out by a PE in the other country. Spain's treaties (except with the Soviet Union and Bulgaria) include an art. 9, concerning the taxation of associated companies in similar terms as domestic tax law. The OECD model refers to the possibility of profit correction and it should be remarked that the EU Treaty (signed on 23 July 1990) aims to eliminate double taxation with the correction of benefits between associated companies.

^c Double taxation treaties which Spain has entered into basically follow the OECD model (art. 10) and establish the rule of sharing taxation. Profits distributed by subsidiaries resident in Spanish territory to their parent companies resident in other Member States of the EU are exempt in legal terms.

^d A general criterion is that taxation should occur exclusively in the state of residence, as occurs with business profits. Double taxation treaties with Canada, Norway and Sweden provide, as an exception, the possibility of taxing this income in the country where professional performance occurs, even though no fixed base exists. The treaty with Mexico allows taxation in the country where services are performed if a person is present in that territory for more than 183 days in a continuous period of 12 months in the calendar year. The treaty with Argentina allows taxation in the country where services are performed, even though no fixed base exists, independently of the length of the service, at a rate of 10 per cent of the gross amount received. The treaty with the Philippines allows taxation in the country where the services are performed if there is a presence in the territory for 120 days or more during a calendar year.

^e Double taxation treaties basically follow the OECD model (art. 17) which proposes criteria for sharing taxation.

^f Following the OECD model, treaties subscribed to by Spain distinguish several situations depending on the beneficiary. As regards art. 15 of the MC, earned income, salaries and other similar returns accruing to a resident in one of the contracting parties, for employment done in the other country, is only taxed in the resident country. However, in some circumstances, it would be taxed in the state of employment. In the case of public workers, MC (art. 19) establishes the exclusive principle of taxation in the source country, but in the case of the Netherlands treaty, the rule is that taxation will be shared. Other treaties envisage an exception whereby this income may only be taxed by the country of employment, when the beneficiary is a national of this country or when he has not become a resident only for the reason of performance of services (for instance those with Argentina, Australia, Belgium and Brazil).

^g Some not very significant deviations from the OECD model exist. Real property assets are defined in art. 334 of the Spanish Civil Code. The model (art. 6) contemplated the possibility of allowing shared taxation powers and in this case, the first right to tax returns on real property corresponds to the country where these are located. Except for the Austria tax treaty, which assigns the right of taxation exclusively to the country where the assets were located, the other treaties allow shared powers of taxation.

^h The majority of the tax treaties entered into by Spain adopt the "shared taxation" principle. By way of an exception, the treaties with Czechoslovakia, Hungary, Ireland, Poland and

Table 2. (cont.)

USSR confer the right to tax exclusively on the country where the beneficiary of the interest is resident.

The OECD model follows the criterion of exclusive taxation by the state of residence of the beneficiary. However, Spain's treaties do not follow this criterion and establish shared rights of taxation (except in the case of Hungary and Bulgaria and some others with regard to authors' rights) and consequently in the source country this income is taxed at the maximum rate fixed in each treaty.

All Spain's treaties follow the guidelines of art. 12 of the MC.

Spain's treaty policy follows the OECD MC (art. 18). Private pensions are taxed only in the state where the beneficiary resides and public pensions only in the state paying the pension. Some treaties also provide an exemption according to the nationality of the beneficiary (for instance, Argentina, Australia and Bolivia). Social security pensions are specifically regulated in some treaties according to the shared taxation principle (USA, Luxembourg and Sweden).

Income which is not specifically mentioned in treaties follows the general rule of the OECD model (art. 21) and the power of taxation corresponds exclusively to the country of residence of the beneficiary. Only the tax treaties with Argentina, Brazil, Canada, China, Philippines, India, Thailand and Mexico do not follow the general rule, allowing a non-exclusive right of taxation. This criterion is expressly fixed for income attributable to a local PE or fixed base in the tax treaties with Argentina, Australia, Belgium, Bolivia, Korea, Czech Republic, Chile, Cuba, Denmark, Slovenia, Greece, Iceland, Israel, Lithuania, Norway, Poland, Portugal, the UK, Romania, Russia, Sweden, Thailand, Tunisia and Turkey.

Generally, when a Spanish tax treaty refers to the credit system for avoiding double taxation, a "limited system" is chosen as in domestic law. In several cases, treaties include special clauses to prevent economic double taxation or establishing tax-sparing provisions. The decisions of Spanish courts have allowed a more generous rule for relieving double taxation than is included in domestic law and have accepted the application of a treaty that declares exempt some categories of income in one country (in spite of the silence of the domestic law).⁵⁵

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⁵⁵ For instance, the exemption for students and individuals on job experience placements as in art. 22 of the Spain-USA treaty. It is interesting that the TEAC Resolution of 20 October 1992 which establishes that treaty exemptions are totally applicable since they are in accordance with legal taxation principles. The efficacy of taxation exemptions inserted in treaties is also acknowledged in the Resolutions of 7 February 1996 and 12 December 1995 and in the Supreme Court case of 19 May 1983.

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Résumé

On peut affirmer que dans la configuration du régime fiscal applicable aux impôts sur le revenu, le législateur espagnol combine les principes de la résidence et de la source suivant le modèle de convention de l'OCDE. Ainsi, les résidents sont taxés sur le total de leur revenu, tandis que les non-résidents le sont pour celui qui est généré sur le territoire espagnol, hormis qu'un établissement permanent intervient. Dans ce cas là, l'établissement permanent est taxé pour la totalité des revenus qui lui soient "imputables".

Dans les plus de 45 conventions de double imposition (CDI) signés par l'Espagne, les règles qui fixent le droit d'imposition de chaque pays, varient selon la catégorie de revenu et sont d'application préférentielle par rapport à la législation domestique.

Comme pays de la résidence, l'Espagne taxe ses résidents sur le revenu mondial. Cependant, les plus récentes réformes fiscales neutralisent ce principe général, puisque des nouveaux cas d'exemption sont prévus pour certains revenus procédant de l'étranger. Tel est le cas des redevances procédentes de l'emploi, les attribuables aux établissements permanents ou celles qui procèdent de *holdings* non résidents, du moment que les conditions légales sont jointes. La méthode pour éviter la double imposition établie par le législateur espagnol, est, généralement, un système de crédit à l'impôt (imputation ordinaire), selon lequel le bénéficiaire peut déduire le paiement à l'étranger ou le montant dû à l'Espagne si celui est

inférieur au débit étranger. Cependant, depuis les dernières années, les deux méthodes (imputation et exemption) coexistent, entre autres cas, pour les revenus procédant de l'étranger par l'intermédiaire d'un établissement permanent.

Comme pays de la source, l'Espagne taxe les revenus des non résidents localisés sur le territoire espagnol. Traditionnellement, territorialité et paiement ont été les critères suivis par la législation interne pour localiser les revenus des non résidents, mais depuis l'année 2003, le critère du paiement devient seulement applicable pour certains revenus légalement identifiés. L'existence et l'application d'une CDI et l'obtention de revenu pour un établissement permanent ou non, détermine le régime fiscal applicable. La règle générale, en absence de CDI et d'établissement permanent, est une taxe d'un 25 pour cent sur le gros de l'assiette imposable.

Dans certains cas, les CDI signés par l'Espagne incluent des clauses particulières en matière de double imposition, généralement parce que la déduction pour double imposition économique est établie et en moindres occasions, parce que des clauses *tax sparing* sont prévues, bien qu'avec une projection très différente.

Même si la jurisprudence de la Cour de Justice de la Communauté Européenne a eu, comme effet, l'approximation légal des régimes fiscaux entre résidents et non-résidents pour certaines catégories de revenus ("personnalisation"), le procès de révision de la configuration actuelle des critères de subjection au pouvoir fiscal national, excède du cadre de l'intégration de l'Espagne à l'Union Européenne et résulte aussi du traitement semi-personnalisé des établissements permanents.

Zusammenfassung

In der Konfiguration des geltenden Einkommensteuerrechts hat der spanische Gesetzgeber die Grundsätze der Ansässigkeits- und der Quellenbesteuerung nach dem Musterabkommen der OECD kombiniert. Ansässige unterliegen der Steuer mit ihrem gesamten Welteinkommen, während Nichtansässige nur mit dem auf spanischem Staatsgebiet erzielten Einkommen steuerpflichtig sind, es sei denn, es handelt sich um eine "Betriebsstätte" (*permanent establishment*). In diesem Fall ist das gesamte Einkommen, das ihr "zugerechnet" wird, zu versteuern.

In den mehr als 45 Doppelbesteuerungsabkommen (DBA), die Spanien ratifiziert hat, ist das Recht der Besteuerung der beiden Unterzeichnerländer sehr unterschiedlich geregelt, je nach Einkommenskategorie und festgelegter Berechnungsmethode im Vergleich zu inländischem Recht.

Als Ansässigkeitsstaat besteuert Spanien seine Ansässigen mit ihrem Welteinkommen. Die jüngsten Steuerreformen haben dieses allgemeine Prinzip jedoch gelockert, denn für bestimmte Einkommen aus dem Ausland wurden Ausnahmen eingeführt. Das gilt für Löhne und Gehälter, für Gewinne aus Betriebsstätten (ständigen Niederlassungen) oder nichtansässigen Holdings, sofern die gesetzlichen Bedingungen erfüllt werden. Zur Vermeidung der Doppelbesteuerung hat der spanische Gesetzgeber ein System der Steueranrechnung eingeführt (normale Besteuerung). Danach kann der Steuerpflichtige die im Ausland entrichtete Steuer oder den in Spanien fälligen Betrag, wenn dieser geringer ist als seine Steuerschuld im Ausland, absetzen. In den letzten Jahren bestehen jedoch beide Verfahren (Anrechnung und Befreiung) nebeneinander, unter anderem für Einkünfte aus dem Ausland, die über eine Betriebsstätte erzielt werden.

Als Quellenstaat besteuert Spanien die Einkünfte von Nichtansässigen, die auf spanischem Hoheitsgebiet erzielt werden. Territorialität und Zahlungsort waren für die nationale Gesetzgebung immer die wichtigsten Kriterien für die Bestimmung des Herkunftsorts der Einkommen von Nichtansässigen, doch seit 2003 gilt das Kriterium des Zahlungsorts nur noch für bestimmte, im Gesetz genau definierte Einkünfte. Das Bestehen und die Anwendung eines DBAs und die Ergebnisse einer ständigen oder nicht ständigen Niederlassung

bestimmen das anwendbare Steuerverfahren. In der Regel wird eine Steuer von 25 Prozent auf die Bruttobemessungsgrundlage erhoben, wenn kein DBA mit diesem Land geschlossen wurde oder dort eine ständige Niederlassung besteht.

In einigen Fällen umfassen Spaniens DBA besondere Bestimmungen in Bezug auf die Anrechnung der doppelten Steuerlast, weil *tax sparing*-Klauseln eingeführt wurden, die sich allerdings sehr unterschiedlich auswirken.

Auch wenn die Rechtsprechung des Europäischen Gerichtshofs zu einer gesetzlichen Annäherung der Steuerverfahren für Ansässige und Nichtansässige in einigen Einkommenskategorien ("Personalisierung") geführt hat, geht der Reformprozess im Hinblick auf die gegenwärtigen Kriterien der nationalen Besteuerung über den Rahmen der Integration Spaniens in die Europäische Union hinaus und bewirkt eine "Halb-Personalisierung" der steuerlichen Behandlung von ständigen Niederlassungen (Betriebsstätten).

Resumen

Cabe afirmar que en la configuración del régimen tributario aplicable a los impuestos sobre la renta, el legislador español combina los principios de residencia y fuente en línea con el modelo de convenio OCDE. Así, los residentes tributan por su renta mundial y los no residentes por cada renta obtenida en territorio español, salvo que medie un establecimiento permanente, en cuyo caso éste tributa por la totalidad de las rentas que le sean "imputables".

En los más de 45 convenios de doble imposición (CDI) suscritos por España, las reglas que fijan el derecho a gravar de cada Estado dependen de la categoría de renta de que se trate, siendo los CDI de preferente aplicación a la legislación interna.

Como país de residencia, España somete a tributación a los residentes por su renta mundial. No obstante, las últimas reformas legales neutralizan este principio general, al haberse introducido supuestos de exención para determinadas rentas generadas en el extranjero, como ocurre con las rentas de trabajo, las imputables a un establecimiento permanente o las procedentes de *holdings* no residentes, siempre que se den las condiciones fijadas legalmente. El método para corregir la doble imposición establecido por el legislador español, es, por regla general, un sistema de crédito de impuesto (imputación ordinaria), en virtud del cual se permite al perceptor, deducir lo pagado en el extranjero o lo que hubiera debido pagar en España si la cuantía resultara menor a la satisfecha en el extranjero. No obstante, en los últimos años, coexisten los métodos de imputación y exención, entre otros casos, para las rentas de fuente extranjera obtenidas por medio de establecimiento permanente.

Como país de la fuente, España grava la renta de los no residentes generada en territorio español. Tradicionalmente, los criterios utilizados por la legislación interna para localizar las rentas de los no residentes han sido los de territorialidad y pago, pero desde el año 2003 el criterio de pago resulta sólo aplicable a determinados ingresos legalmente identificados. La existencia y preferente aplicación de un CDI y la obtención de renta a través de establecimiento permanente o no, determina el régimen fiscal aplicable. Por regla general, en ausencia de CDI y de establecimiento permanente, el gravamen es del 25 por ciento sobre el importe bruto percibido.

En algunos casos, los CDI suscritos por España incorporan cláusulas específicas en materia de doble imposición, normalmente, porque se prevé la deducción de la doble imposición económica y en menos ocasiones, debido al establecimiento de cláusulas *tax sparing*, con muy distinto alcance.

Pese a que la jurisprudencia del Tribunal de Justicia de las Comunidades Europeas ha tenido como efecto la aproximación legal del régimen fiscal de residentes y no residentes para determinadas categorías de renta ("personalización"), el proceso de revisión de la configuración actual de los criterios de sujeción al poder tributario estatal excede del marco de la integración de España en la Unión Europea y resulta también del tratamiento semipersonalizado de los establecimientos permanentes.