Tax Annual Report 2013: From 'havens' to 'infernos'

TUESDAY, 26 FEBRUARY 2013 10:11



Continuous reforms, increasingly aggressive tax authorities, and a Government that keeps changing the rules of the game mean that 2013 looks set to be another year of tax controversy and challenges for clients and law firms alike.

As if Spain and Portugal didn't have enough on their plates with the crisis, they must now contend with a wave of new tax reforms. Companies already choked by a lack of liquidity and financing are now feeling the vice-like grip of tax increases on their balance sheets. There has been a decrease in the amount of taxes collected by the Iberian Governments, due to the decline in economic activity and consumption over the past few 'crisis' years. And, with a dire need of cash for the State, they are both going into 'tax overdrive'.

The resulting tax reforms, some expected others unexpected (almost overnight), has proved a big challenge for clients and law firms alike. The feeling among lawyers is that their respective Governments have been changing the rules while they are still playing the game.

But in amongst all this tax doom and gloom, the good news is that with all the reforms and ensuing issues, 2012 was a busy year for tax departments, and this looks set to continue.

Como si España y Portugal no tuvieran suficiente con la crisis económica, la gota que colma el vaso tiene nombre de reforma fiscal. El reto al que se enfrentan las compañías con sus problemas de liquidez, refinanciamiento, etc. viene ahora exacerbado por las modificaciones fiscales que tienen un efecto directo en sus balances. El frenazo en la actividad económica y el consumo ha repercutido en los Gobiernos, que con su necesidad de contar con mayores ingresos han optado por presionar a las empresas incrementando los impuestos.

Spanish austerity

> "The new REITs regime is the good news for this year, and there are potential opportunities there for law firms and clients alike going forward."
> Eduardo Gracia, Madrid Managing Partner and Head of Tax, Ashurst



With a high fiscal deficit to reduce, and a bailout to repay, the Government's austerity measures have caused a dramatic increase in the tax burden on Spanish individuals and companies.

2012 saw a record amount of new tax measures introduced, and while 2013 should be less of a rollercoaster ride, say lawyers, they feel that it will still be a year filled with tax controversy.

A painful increase in VAT rates from eight percent to ten percent (reduced rate) and 18 percent to 21 percent (normal rate) in less than three years and a hike in Personal Income Tax have sent citizens to the streets in protest. Personal Income Tax, generally at a maximum of 43 percent, is now 56 percent in Catalonia and 52 percent in Madrid. "The Government should concentrate on having more tax payers," says Silvia Paternain Global Head of Tax at Freshfields, "rather than trying to squeeze more out of the ones it already has". They have even added a new tax of 20 percent on lottery winnings, something that has never been done before.

"An effective tax policy has been sacrificed for tax collection," says Victor Hernán, Tax Partner at CMS Albiñana & Suárez de Lezo. Some of the measures are clearly intended to increase tax collection, including, among others, restrictions for the application of free depreciation, a rise in the rates for Corporate Income Tax payments-on-account, and an increase in withholding tax rates, explains Luis Rodríguez-Ramos, Tax Partner at Ramón y Cajal Abogados, as well as limits for the depreciation of the goodwill and new taxes applicable to the production of electricity.

The high fiscal deficit has also had a significant impact on tax because of recent anti-deferral measures, such as the limits on deductibility of some financial expenses, explains Sonia Velasco, Tax Partner at Cuatrecasas, Gonçalves Pereira in Spain, and other temporary measures (for 2012 and 2013), such as the limits on using tax losses and introducing high prepayment obligations for corporations that meet specific size criteria.

Not all the measures are collecting ones, however. There is one important regulation that provides for the updating of the value of tangible assets and real estate included in company balance sheets. This measure allows for the correction of the monetary depreciation of the assets and to put them at current values (the maximum being the market one), says Carlos López, Tax Partner at BDO Abogados y Asesores Tributarios. Nevertheless, this costs companies five percent of the net increase of assets´

LATEST | POLLS | JOB OF THE MONTH

Capital markets confidence returning
Portugal's lawyers in radical shake up
Iberia's telecoms giants hit with anti-competitive fines
Mozambique's magnetism

DIGITAL EDITION LOG IN

Username
Password
Remember Me
LOGIN
Forgot your password?
Forgot your username?
Create an account

MONTHLY E-ALERTS

E-alert February 2013
E-alert January 2013
E-alert December 2012
E-alert November 2012
E-alert October 2012

Sign up here

EVENTS & TRAINING



PODCAST

The lawyer of the 21st century Summit 2011



VIDEOS

40 under Forty Awards 2011

SUBSCRIBE



2011 forty 40 under IBERIAN LAWYER

pbbr.a SOCIEDADE DE ADVOGADOS, RL

AVM ADVOGADOS

Azevedo Neves, Benjamim Mendes, Carvalho & Associados Sociedade de Advogados RL

ABREU INTERNATIONAL LEGAL SOLUTIONS

Web2PDF converted by Web2PDFConvert.com

value.
Also, in 2012, the Government announced new measures aiming at helping entrepreneurs and start-up companies, some of which are expected to be approved this year. This draft law contains administrative clauses that provide for measures to defer taxes during the first years of business until the company is consolidated.

REITs

One of the most significant developments, however, has been the new tax treatment of the Spanish real estate investment trust (REITs) – the so-called SOCIMIs. "The new REITs regime is the good news for this year," says Eduardo Gracia, Managing Partner and Head of Tax at Ashurst in Spain, "and there are potential opportunities there for law firms and clients alike going forward."
The applicable Corporate Income Tax rate is now zero percent for real estate lease and sale income (subject to certain conditions) while the dividends distributed by the SOCIMI are taxable at the level of the shareholders. "The former approach, applicable until the end of 2012, was that the SOCIMI would pay 19 percent Corporate Income Tax and its shareholders (except Spanish corporate shareholders) would basically be tax exempt," says Javier Fernández Cuenca, Tax Partner at Pérez-Llorca. This approach proved unsuccessful as, since their creation back in 2009, there is not a single one in place. The Government expects that eliminating the tax and transferring the tax burden to its shareholders will ease future creation of SOCIMIs.
The REITs regime is new, however, and therefore still untested, notes Jordi Domínguez, Head of Tax at Latham & Watkins in Spain. "Once clients start applying it, we will then be able to see from the tax authorities' approach whether the new tax framework accomplishes its purpose."



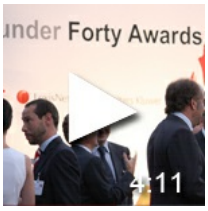
> "To comply with the deficit requirements set forth by the Troika, the 2013 Portuguese State Budget has been described as containing a 'brutal' increase in taxes."
> Rogério M. Fernandes Ferreira,
> Founding Partner,
> Rogério Fernandes Ferreira & Associados

The challenges ahead

What worries lawyers most, however, is what lies ahead. The Spanish Government promises that its intention is to make the country attractive to both domestic and foreign investment, and is promising that the current tax increases are only temporary as its real intentions are to lower taxes once the crisis is over. However, the Government's statements do not instil confidence in the businesses, says Ramón Parcerisa, Head of Tax at Pintó Ruiz & Del Valle because it has repeatedly breached its promises.
Following a European trend, says Borja Escrivá de Romaní, M&Aand Tax Partner at Deloitte Abogados, temporary tax measures intended to reduce State fiscal deficits might become permanent in the near future. And while the reforms are still ongoing, their clients still have the same needs.
But in amongst all this, 2012 was a good year for Spanish external tax departments. Much work stemmed from the tax amnesty enacted by the Government, which ended in November 2012, and the increase in tax inspections to both companies and high-net-worth individuals and ensuing litigation. And this is set to continue into 2013.
And although the tax amnesty has already finished, there are some new 2013 reporting provisions for individuals or companies owning assets outside Spain. While it is true that it is a mere compliance work, says Juan Alberto Urrengoechea, Tax Partner at Roca Junyent, it has a high level of complexity and banks and clients will likely require their services. "In fact, we have already detected such a necessity."
The big challenge for lawyers will be how to help their clients navigate such an unstable legal environment. "We are unable, as advisers, to give them any safety or security as to their tax obligations in the long-term," says Hernán at CMS Albiñana. And what any client wants at the moment is stability, especially when it comes to their long-term tax obligations and investments.

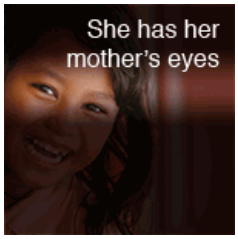
Portuguese bailout

The situation is no better in Portugal. To comply with the deficit requirements set forth by the Troika, says Rogério M. Fernandes Ferreira, Founding Partner of tax boutique Rogério Fernandes Ferreira & Associados, the 2013 Portuguese State Budget has been described as containing a "brutal" increase in taxes.
A big part of Portugal's budgetary adjustment under the bailout has depended on there being an increase in revenue, and this in turn has led to a massive rise in the tax burden to try to fulfil this.
The Government failed to contain public expenses in 2012 and improperly evaluated VAT revenue, which instead of a two-digit growth was negative, and then, for 2013, chose a tremendous tax increase ('enormous', was the word used by the Ministry), says João Espanha, a Founding Partner of Espanha & Associados, which relies mostly on the increase of Personal Income Tax. Tax on savings income and on capital gains was also increased, not to mention all sorts of special indirect taxes and an increase on immovable property tax due to the evaluation of real estate imposed by the Troika.
"Our creditors suggested that reductions of public expenditure should come essentially from cutting public expenses and only marginally by increasing taxes," says Tiago Caiado Guerreiro, Head of Tax at Caiado Guerreiro. Unfortunately the Government chose the opposite approach, and put enormous increases, most notable on Personal Income Tax and Corporate Income Tax.
The most significant change in relation to Personal Income Tax is that lower earners will now be caught in a higher tax bracket. In addition, individual taxpayers will be subject to an Extraordinary Surtax of 3.5 percent, says Tiago Marreiros Moreira, Tax Partner at Vieira de Almeida & Associados, and those falling in the higher brackets will also be subject to a Solidarity Surcharge of up to five percent. "The impact on middle class net income is expected to reduce domestic consumption levels, with an



TransLegal
search...
5,000 legal terms
5,000+ legal documents
8,000 audio and video recordings
10,000+ exercises and quizzes
www.translegal.com

ROCA JUNYENT
PLMJ
SOCIEDADE DE ADVOGADOS, RL
GÓMEZ-ACEBO & POMBO
FCB&A
SOCIEDADE DE ADVOGADOS



BDO Abogados
BDO

Web2PDF
converted by Web2PDFConvert.com

impact on day-by-day business and, in particular, small and medium enterprises."
At the same time, adds Caiado Guerreiro, the Government intends to lower corporate income tax to 10 percent. Currently at 31.5 percent – one of the least competitive in the EU – a comprehensive Corporate Income Tax reform has been announced, to be approved in 2013.
This will, among others, simplify the ancillary obligations for companies and taxpayers and review the international aspects of the system in order to encourage and capture foreign investment. Significant changes will be introduced to the Portuguese participation exemption regime, double taxation treaties and even transfer pricing rules, explains Samuel Almeida, Tax Partner at Miranda Correia Amendoeira & Associados. According to the Ministry of Finance, the main drivers of the reform will be publically announced in October 2013.
In effect, the Government is intending to make Portugal internationally visible, in a positive way, says Elsa Rodrigues, Head of Tax at Espanha & Associados, by establishing the lowest corporate income tax rate within the EU.
In order to do this, the Government has formed a special commission to prepare a wide revision of the Corporate Income Tax, says Tiago Soares Cardoso, Tax Partner at Sérvulo & Associados, and one of the measures in discussion is the creation of a reduced tax rate for major investments.
But the only way to conduct such a reform successfully without the loss of income, however, is to enlarge the number of corporate taxpayers in Portugal, says Miguel Teixeira De Abreu, Co-Head of Tax at Abreu Advogados. "That can be done either by fostering growth and foreign investment or by offering foreign investors a special regime for income flowing through Portugal, but not directed at it. For that, it must look at the Dutch, Swiss or Luxembourg regimes for guidance."
The proposal for a new code will be presented later this year to be implemented in 2014.
The Government has also been authorised to create a new VAT regime applicable to small businesses with a turnover of up to €500,000. According to the new regime, VAT will only be due by companies upon receipt of the amounts invoiced, explains Filipe Romão, Tax Partner at Uría Menéndez - Proença de Carvalho, and VAT will only be deductible by the acquirer when the respective invoices are paid.
Also, following the approval of the so-called 'Tobin Tax' in other EU States, the Government has also been authorised to submit a proposal for a new financial transactions tax involving securities, which may vary between 0.1 percent and 0.3 percent per transaction. And Real Estate Transfer Tax (IMT) will be extinguished as of 2016.
All of these changes reflect Portugal's need to maximise tax revenue for 2013 and take a stricter approach to the under-reporting of taxable income, explains Henrique Nogueira Nunes, Head of Tax at Albuquerque & Associados. "But the actual levels of taxation are unbearable in the long run and the internal confidence indicators in the economy register minimum levels."
Unfortunately, say lawyers, the predictions for a better 2013 in relation to tax are not looking good.

Incentivising Spain



> "We need a tax law and system that incentivises Spanish companies to invest in Spain, and not just abroad."
> Silvia Paternain, Global Head of Tax, Freshfields

Spain and Portugal are both in bitter need of investment, both foreign and domestic. While last year's fear that Spain would exit the Euro has diminished, lawyers believe it is still a factor that is putting off investors as it could mean around a 40 percent devaluation on their investment.
However, a key turn off is the lack of a stabilised tax environment in both countries, as investors have no certainty when it comes to pricing assets and cannot realistically invest without knowing their return. While the barriers to investment are slowly being curtailed, say lawyers, a lot could be done from the tax side to help that process.
While Spain has had many tax incentives over the years, for one reason or another the majority have been abolished – the Beckham Law for example. The abolishment or partial elimination of such tax incentives is mainly due to budgetary reasons, says Urrengoechea at Roca Junyent – the need for collecting more money through taxes.
This feeling is echoed across the profession as lawyers believe that any new tax measures will not be aimed at enhancing investment, rather collection. The income of the tax authorities is reducing each year with the crisis, and that's even taking into consideration all the new tax measures introduced, says Pablo Serrano de Haro, Head of Tax at Clifford Chance in Spain. "We somehow need to help them in making a regulation that will make Spanish economy attractive for international investors."
Spain does however continue to have a very favourable holding regime, says Velasco at Cuatrecasas, Gonçalves Pereira, which in recent years has resulted in multinational groups opening new headquarters in Spain, enabling them to expand their presence in Europe, Latin America and North Africa. Executives moving to Spain also enjoy a tax rate of 24.75 percent on their income obtained in the country, and no taxation on any income considered to have been be earned abroad.
And Spain's new REITs regime, as well as trying to reactivate the real estate market, also simplifies the requirements needed to do business. "It is an example of where the tax authorities have listened to the market, understood what it needs and responded, and it will be very positive," adds Serrano de Haro at Clifford Chance. "Some international investors have already decided to invest in Spain instead of other countries due to our REIT regime."
Ultimately, however, the lack of a stable and effective legal framework is what is truly putting investors off, including local ones. "We need a tax law and system that incentivises Spanish companies to invest in Spain," says Paternain at Freshfields, and not just abroad.

Portugal's pull
Despite its austerity measures, Portugal continues to have a number of tax incentives aimed at

Web2PDF
converted by Web2PDFConvert.com

attracting foreign investment. The Government is currently negotiating a tax incentive scheme with the EU Commission that is designed to encourage and promote investment, both foreign and domestic. Details are still unknown, but the general idea is a substantial reduction of Corporate Income Tax rates applicable to resident companies either producing or exporting tradable goods, or developing areas considered of high-added value.

Under the 2013 Budget, the Government was authorised to amend the Investment Support Tax Legal Framework in order to, among other things, create a tax incentive to the reinvestment of profits and capital increases the proceeds of which are invested in eligible assets, says André Dias, Tax Partner at Macedo Vitorino & Associados, consisting of a tax relief up to 10 percent of the investment.

Much has been debated about tax incentives, including the negotiation with the European Commission for a special 10 percent Corporate Income Tax rate applicable to certain new investments, says Diogo Bernardo Monteiro, Tax Partner at F Castelo Branco & Associados. "However, this possible tax incentive has been postponed indefinitely, until the outcome of the works of the commission responsible for reviewing Corporate Income Tax is known."

Portuguese legislation also sets out contract-based tax benefits (lower taxes or exemptions) for productive-investment and globalisation-oriented investment projects (the latter, for Portuguese companies), subject to certain conditions. And there are tax benefits applicable to companies investing in research and development, says Romão at Uría Menéndez - Proença de Carvalho, as well as an investment tax regime applicable to investing companies acting in certain sectors, such as agriculture, forestry, agribusiness, energy and tourism, mining and processing.

There is also a Tax Relief Regime on Contractual Investments (BFCIP), available for investment projects by foreign or domestic companies up to December 31st, 2020 with a minimum value of €5m. The project must be deemed relevant to the development of the national economy and reduction in regional inequalities, says João Magalhães Ramalho, Head of Tax at PLMJ, leading to the creation of jobs and helping boost technological innovation and national scientific research.

And the Special 2009 Tax Regime to Support Investments (RFAI2009) has been extended and now applies to relevant investments made up until December 31st, 2013 on fixed tangible and intangible assets.

But while there are incentives out there, the feeling among lawyers is that they are very bureaucratic and complex to apply, and the continuous changes to tax codes are incompatible with the safety and stability that investors need.



> "Voices from almost all different economic and political sectors are rising to demand new tax measures, which may also contribute to economic growth."
> Gonçalo Bastos Lopes, Tax Partner, Cuatrecasas, Gonçalves Pereira

Difficulties ahead

Businesses and tax advisers now face a big challenge, says Stella Raventós-Calvo, Tax Partner at Ecija, which is simply knowing how to comply with the continuous changes.

Fragmentation is a big issue, and there is no uniformity in Spain or across Europe. "We need fiscal unity and a common approach," says Fuster at Uría Menéndez. "This is key to enhance the efficiency of the tax system as a whole."

If there was more dialogue between the Spanish tax authorities, law firms and corporates, for example, then it could be a win-win situation. The authorities would collect more taxes and corporates could benefit from more legal certainty, says Javier Vinuesa Magnet, Tax Partner at Gómez-Acebo & Pombo in Spain, and although there is a new trend towards a higher interaction, there is still a lot of work to do.

However, the Spanish authorities have little tools to fight the deficit other than to raise taxes. So while they don't expect many changes, says José Ignacio Jiménez Blanco, Partner in charge of tax structured finance deals at KPMG Abogados, if the public deficit doesn't improve then it is likely that the Government will make further reforms. In addition, says Fernández Cuenca at Pérez-Llorca, it is likely that companies will have a hard time financing the anticipated new tax rates.

In Portugal, the tax increases are seen as having contributed in a substantial way to the current recession, says José Pedroso de Melo, Head of the Tax at CCAAdvogados, as well as to the tax revenue shortfall from the beginning of 2012 onwards.

And despite the severe measures enacted, the recent budget starts showing that the huge increase of taxes is not giving rise to the expected increase of revenue, raising serious concerns as to the effectiveness of the tax policy followed so far. Voices from almost all different economic and political sectors are rising to demand new tax measures, says Gonçalo Bastos Lopes, Tax Partner at Cuatrecasas, Gonçalves Pereira in Lisbon, which may also contribute to economic growth.

The general feeling in Portugal, however, is that taxation levels in 2013 have been taken to the limit of social and economical tolerance, adds Tiago Mascarenhas, Tax Associate at Carlos Aguiar, Ferreira De Lima & Associados. "Portugal may now be referred to as a 'tax inferno' as opposed to a 'tax haven'. "

Ultimately, we have to learn to live in a more unstable framework, says Ángel Calleja Crespo, M&A and Tax Partner at Garrigues in Spain, and somehow try to understand and anticipate what the legislators intend through their reforms and adapt to the changes in the market. And the advantage throughout all the reforms is that clients increasingly need their tax lawyers, adds Javier García-Pita, Tax Partner at Linklaters.

2013, therefore maybe well be 'taxing', but at least it shows signs of being a busy year for tax departments.

Client challenges

Web2PDF
converted by Web2PDFConvert.com

Things, however, aren't getting any easier for businesses. Currently, they are trying to cope with a significant increase in taxes, says Alberto Ruano, Tax Partner at SJ Berwin in Spain, amid a declining economy and a drastic reduction of their profits. Continuous and seemingly endless changes in tax regulations don't help, and the biggest challenge for clients is dealing with the new size of their tax bill, as they struggle with liquidity.

We also live in a whole new world where the complexity and pace of transactions have changed dramatically over the past few years. And the challenge lawyers face, says Federico Linares, Managing Partner and Head of Tax at Ernst & Young, is helping clients to do cross-border business in the most tax-efficient way possible.

This includes how to develop an appropriate and well-planned internationalisation strategy, "One of the most controversial issues this year will be the location of corporate profits," says Carlos Diéguez, Head of Tax at Broseta Abogados, "both from the perspective of the residence of the company obtaining those benefits, and from the transfer procedures used in financial transactions between companies in the same corporate group, but located in different countries."

The first challenge is not to lose sight of the tax function as a key driver to obtain efficiencies in times of base-broadening measures, says Fernando Castro Silva, Head of Tax at Garrigues in Lisbon. The second is to navigate the increasing complexity of the tax system and still implement tax-efficient business decisions, and the third to efficiently manage tax controversies and relationships with the authorities.

Businesses, therefore, are also facing the challenge of a significant increase in tax litigation, says Marreiros Moreira at Vieira de Almeida. Both in Portugal and Spain, this stems from the Government's collection drive, meaning that clients are experiencing a more aggressive attitude from the tax authorities, and the friction between the authorities and multinationals has brought an increase in litigation – a trend that lawyers expect to continue.

"The long term consequences of recent reforms are not positive," says Gracia at Ashurst. "And we are not seeing any legislation that is offering the tax authorities and the taxpayers the opportunity to negotiate with each other and come to a compromise and so avoiding long-lasting tax litigation."

Lawyers are also seeing relevant initiatives in the EU and OECD against what is considered illegitimate international tax planning. Structures that mean significant tax shifting are in the eye of the storm, says Javier Prieto Ruiz, Tax Partner at Araoz & Rueda, regardless of the fact that they were completely legal. The recent Starbucks case in the UK is an example, and multinationals will have to deal with this issue in the year ahead. The trend now with tax is not about whether it is 'legal', says Paternain at Freshfields, but whether it is moral or ethical.

Spanish companies are already feeling targeted by the press for not seemingly standing up to their tax responsibilities. But it is a myth that big Spanish corporates don't pay income tax, says Linares at Ernst & Young. "They do – just not in Spain."

The rules of the international tax planning game have therefore changed, and lawyers as advisers have a different profile. "Our roles have moved more towards pre-litigation than pure tax planning," says Rafael Fuster, Head of Tax at Uría Menéndez, "which is a problem but also an opportunity, and as professionals we just have to adapt to a different scenario."

The authorities

In Spain, there is a pressure on the tax system to generate new revenue, which is extremely difficult because market activity is low, says Jiménez Blanco at KPMG. "And authorities are taking an extreme position in many cases to make money but sometimes without enough support of the law."

The tax authorities are incentivised to charge, irrespective of the outcome of an eventual litigation against their assessment, as they get credit for it. And as transactions become increasingly complex, the likelihood of having different views about a specific issue is high and, in this context, tax authorities tend to act not as a judge but as a party, by applying restrictive interpretations, says García-Pita, at Linklaters in Spain. "This often leads to a lack of alignment between the tax legislator (eg, trying to incentivise certain activity) and tax authorities applying the laws."

The tax inspection division in Portugal has been strengthened with more than 1,000 new tax inspectors to maximise the collection drive, and as a result, say lawyers, they have had a marked increase in demand for assistance with tax audits and tax litigation.

Portuguese tax authorities have never been as aggressive as they are now, says Sofia de Sousa Caetano, Senior Associate at Cardigos, with intensive tax audits and massive assessments within all areas of direct and indirect taxation. "On the other hand, due to the implementation of tax adjustments, tax enforcement and revenue collection have become, in some cases, a results-oriented 'milestone' for the authorities."

And the increase of tax inspections and collection efforts is expected to continue, says Bastos Lopes at Cuatrecasas, Gonçalves Pereira, which is good news as long as while they are combating illegitimate non-payment of taxes, tax authorities duly observe the legitimate rights of taxpayers. However, one of the biggest challenges continues to be a tax administration that is often insensitive to the needs of tax payers in receiving prompt and clear answers to their questions on tax compliance, says Manuel Anselmo Torres, a Partner at Galhardo Vilão, Torres.

Web2PDF
converted by Web2PDFConvert.com