Criminal behaviour?

The international fight against tax avoidance is intensifying; clients are scared of reputational damage and there is a concern that tax advisers could be perceived as facilitating crimes



The global drive to tackle tax avoidance means that domestic tax authorities are feeling increasingly empowered and consequently, tax inspections are on the rise. Clients are terrified that their tax structures could be interpreted as tax avoidance, with the result that their reputations could be completely destroyed. As a result, there is increasing pressure on lawyers to not only provide legal advice but also assess the potential reputational risk associated with certain tax structures. It's a difficult environment for tax lawyers to operate in. As one partner puts it, there is now "an increasing focus on tax advisers as potential criminals".

The economy is improving and, as transactions are increasing, there is a greater demand for tax advice, says Broseta lawyer Luis Alaix. "Tax inspections and related litigation is also a hot topic," he adds. "During the crisis, inspections increased, as the tax authorities needed to complement the revenues they were losing as a consequence of the reduction in taxpayers' income – though the economy is improving, we still see significant tax inspection activity." Meanwhile, with regard to recent trends and developments, Baker McKenzie partner María Antonia Azpeitia says that the Spanish corporate income tax law of 2015 is "not only a challenge for practitioners, but also for the administration, and this means a delay in the processes". One partner says: "Changes in personnel at the Spanish tax inspectorate mean that getting answers from inspectors can be a slow process, because the new members of the inspectorate were not big advocates of the new law."

There is still uncertainty surrounding the Organisation for Economic Co-operation and Development's BEPS (base erosion and profit sharing) initiative, according to Javier González Carcedo, partner at PwC Tax and Legal Services. "Many domestic jurisdictions have implemented BEPS, but there is now uncertainty due to the EU Anti-Tax Avoidance Directive (which must be implemented by member states by 2019); the issue is how the deployment of this directive will be aligned with BEPS," he says.

Potential criminals

The BEPS and European Union fight against tax avoidance is giving more power to tax authorities and reducing the rights of taxpayers, says Ashurst partner Eduardo Gracia. As a result, tax advisers

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Spain: What are the biggest challenges law firms currently face in the area of tax?

"The implementation of BEPs and its application by the tax authorities requires tax advisers to have an in-depth understanding of their clients' business, their industry sector and the particularities of the different jurisdictions in which the client operates. Without this understanding, providing the correct advice is no longer possible in this environment." **Bosco Montejo, counsel, Freshfields Bruckhaus Deringer**

"Having the means to provide the service needed by clients with an increasingly international profile, which in many cases requires a more and more specialised network." **Manuel Díaz Corral, lawyer, Ontier**

"The era of tax creativity and less conservative approaches is basically over, at least as far as the bigger players are concerned. International groups are changing their corporate structures to materially increase their tax payments in the countries in which they operate. They are doing this because of the painful tax assessments different tax administrations are delivering and also for reputational reasons." **Javier Fernández Cuenca, partner, Lener**

"One of the biggest challenges for law firms in the area of tax is how to provide tax certainty in an uncertain world. In this regard, clients demand that professionals are informed, have an international and global view of any transaction and its consequences in any jurisdiction, and, most difficult of all, anticipate the consequences of any tax reform." **Enrique Ortega, partner, Gómez-Acebo & Pombo**

"The level of uncertainty and risk which is, frankly speaking, not acceptable for both taxpayers and tax lawyers. It seems as if tax law is not treated as law." **Javier Prieto, partner, Araoz & Rueda**

"Recruiting talented young lawyers. After the economic crisis, it was relatively easy finding lawyers, now the best professionals are asking for better conditions and career opportunities." **Jordi Capelteras, partner, Jausas**

and tax lawyers are now being scrutinised by the tax authorities, he adds. "There is an increasing risk associated with giving tax advice," he explains. "There is now a focus on tax advisers as potential criminals – advisers have to be more conservative now, whereas in the past, they would be more creative." In the view of Allen & Overy partner Adolfo Zunzunegui, the main role of tax lawyers has "moved from tax planning to tax compliance and tax risk management advice".

However, though lawyers' work may now involve less tax planning, there is "still room" for this type of work, says Javier Garcia-Pita, partner at Linklaters. "The tax authorities like to collect revenues and the tax rules are open to interpretation," he says. Garcia-Pita adds that tax inspections in Spain are creating a less attractive environment for investment: "It's becoming more difficult to attract investment and there needs to be more focus on attracting investors."

Rafael Fuster, partner at Uría Menéndez, says that there is now pressure on tax lawyers to be "broader in their approach" when advising. He adds: "Tax is now critical, rather than just technical, it can impact on reputation and on management liability – tax lawyers have evolved in that they are now largely risk assessors rather than creative planners." One partner says that the business community now sees tax planning as a "terrible thing, so there is a problem with the public image [of tax planning]".

Clients are now more concerned about how the public will perceive their tax arrangements, according to Clifford Chance counsel Roberto Grau. "Lawyers are pushed by clients to assess the reputational risk," he adds.

Burden of proof

Economic analyses used to be distinct from legal analyses, but now, given the changes in accounting rules as well as initiatives such as BEPS, tax lawyers have to incorporate economic analysis into their legal analysis. "The economic nature of a transaction forms an integral part of its legal (and tax) nature," says Fuster. "Tax rules and authorities are increasingly looking at the economic effects of things, not only the legal effect." Ramón Palacín, partner and head of international tax at EY Abogados, says that the "relevance of factual evidence" is increasingly important in tax matters. "Tax Administrations are scrutinising the tax schemes of companies with an increased emphasis on the burden of proof, which has been shifted from the tax authorities to the tax payer," he adds.

Brian Leonard, partner at Deloitte Legal, says there is a difference between a US multinational's conception of tax and that of a European multinational. He adds: "A US taxpayer is able to claim economic substance in foreign tax savings – the mismatch in understanding of acceptable and unacceptable tax planning is up to the policymakers to resolve." The US has recently overhauled its tax code – with a reduction in corporate income tax from 35 per cent to 21 per cent

> "There is an increasing risk associated with giving tax advice."
> Eduardo Gracia Ashurst



Portugal: What are the biggest challenges law firms currently face in the area of tax?

"Clients demand a one-stop-shop, including tax advisory, reporting and full tax compliance services. This is a big challenge for Portuguese law firms not used to a multidisciplinary approach." **Nuno de Oliveira Garcia, partner, Andersen Tax & Legal**

"The emergence of the exchange of information era makes taxpayers and their tax structures much more exposed. The use of offshore shelf companies for simple tax planning is long gone and tax advice requires more expertise on the side of law firms." **José Calejo Guerra, partner, JCG Advogados**

"Being prepared to meet the demand generated by the increase of foreign investment as well as being prepared for the increase of tax inspections and consequent tax litigation." **João Marques Pinto, counsel, PBBR**

Portugal: What are the biggest opportunities for law firms in the area of tax?

"Contentious work remains an opportunity due to the appetite of tax authorities to collect taxes beyond what is admissible. Compliance and risk assessment globally (private equity risk assessment, transfer pricing, reporting obligations) are also a big opportunity for law firms, together with due diligence and corporate-related work." **António Moura Portugal, partner, DLA Piper ABBC**

"Common reporting standards and automatic exchange of information. The implementation of these mechanisms in 2018 will increase reporting obligations, audits and cross-references, for which financial institutions, tax administrations, taxpayers and tax lawyers must be prepared." **Catarina Belim, founder, Belim Legal Services**

"The tax benefits for foreign investors such as Golden Visa Regime and the Non-Habitual Residents Tax Regime." **Raquel Galinha Roque, founding partner, Cruz, Roque, Semião e Associados**

– and this will have a significant impact on tax on a global scale, Leonard says. "The US tax reform will change all the rules, even BEPS." Palacín says there is a feeling among some clients in the US that BEPS has been "implemented by the EU against US multinationals".

Leonard adds that there is the possibility of the EU introducing rules for regulating tax professionals. "There is clearly political capital in safe regulation by accounting/auditing institutions and bar associations," he says. Azpeitia argues that "one should not lose sight of the fact that tax professionals are very often lawyers, and therefore, they are protected by all the privileges of such status". However, she adds that it raises the issue of whether tax professionals who are not lawyers "would be equally protected". While it is becoming an increasingly risky environment for tax lawyers, one partner argues that tax lawyers' credibility will be their biggest asset. "If lawyers are taking more risk, they'll be better paid," he says.

There has been speculation in the past that some law firms may scrap their tax practices due to the heightened risk of providing such advice, but Gracia believes this to be unlikely. "The tax aspects of transactions are key," he says. "Not having tax lawyers could increase the risk for law firms." Another partner remarks that "transactional firms must make tax a core practice and provide tax advice that adds value to the client and the firm".

Defending tax payers in cases is a growing area of work for law firms, according to Gracia, who adds that rulings by the European Court of Justice – based on the EU human rights charter – have established the principle that taxpayers can defend themselves in cases against tax authorities where rights have been granted by EU law. Pérez-Llorca partner José Suárez says that defending "clients' rights and, in general terms, clients' positions vis-à-vis the tax authorities will be more difficult in the next few years due to the higher standard of tax transparency and administrative collaboration". Zunzunegui says clients have generally tended to avoid litigation, but adds that they "need to be prepared" to litigate against tax authorities.

Not black and white

Generally law firms are doing more contentious tax work, and specifically more litigation, one partner says. "Our litigation practice expanded through the crisis," he adds. "Also private clients are generating new tax matters – generally, Spain is getting more investment and this is providing more work." However, other partners argue that litigation is not always the "best instrument for solving issues – the courts look at it in black and white, but you have to anticipate a lot of opinions". The partner adds that law firms are also experiencing an "increase in demand from boards of directors who are looking to protect themselves [from possible tax-related issues]."

It's vital that law firms are more selective in terms of which clients they provide with tax advice, argues one partner. "A client could impact on a law firm's reputation, so firms have to conduct more thorough due diligence on potential clients," he says. "We are saying no to a lot of new mandates and we need to do more thorough research

Spain: What have been the major developments and trends in tax in the last year?

"There have been significant court cases such as the judgment of the Spanish Constitutional Court that ruled that the application of tax on the increase in value of urban land could be in conflict with the Spanish Constitution in certain cases." **Marta Esteban, of counsel, Herbert Smith Freehills**

"I feel we are definitely facing the end of aggressive tax planning schemes, and both domestic and multinational companies are now adapting their business model to the new international tax environment. In some way, the BEPS initiative has caused a change in mentality, and now companies see there may be a high reputational risk if their tax policies are not aligned with the new international trends." **Juan Alberto Urrengoechea, partner, Roca Junyent**

"The implementation of the SII (immediate information sharing) system for VAT purposes and the more aggressive attitude of the Spanish tax authorities, who are under pressure to collect money for the public purse." **Antonio Cuellar, partner, Eversheds Sutherland Nicea**

"The approval of the MLI (Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting)." **Alberto Ruano, partner, King & Wood Mallesons**

"Changes regarding how to manage and store invoices, new regional taxes including tourism taxes and the sugar tax in Catalonia." **Gonzalo González, partner, Marimón Abogados**

"Transfer pricing remains one of the main lines in tax services and we foresee that it will be one of the most important service lines in 2018, not only with regard to documentation compliance, but also with regard to value chain planning." **Carlos López, partner, BDO Abogados**

"The implementation by the Spanish tax authority of the SII (Immediate Information System) has caused increased demand for tax advice. Also, an increase in litigation involving the administration due to a greater focus on inspections." **Jordi Rovira, partner, AGM Abogados**

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with existing clients – this makes the value of the independence of lawyers even higher." Another partner at a global firm says: "The single most important thing is our brand, we must do the utmost to protect that brand, we cannot damage it."

Some tax partners report increases in fees, though they acknowledge that this could be largely due to general economic growth in Spain. They also say there is a growing trend for clients to have a number of different tax advisers, whereas in the past, they were more inclined to rely on one firm.

There is a big opportunity for tax lawyers to become "trusted advisers" who are at the core of their client's decision-making, says one partner. However, he adds that being held "personally liable" for tax advice is a major risk faced by lawyers. Similarly, tax lawyers argue that they have an opportunity to make their practice area a "core department" at their firms. However, one partner adds that there is a great deal of uncertainty surrounding tax regimes and this is one of the big risks tax lawyers face. "A major risk is the speed of change in tax policy and legislation," says a partner at a major global firm.

Helping multinationals to navigate BEPS is a huge opportunity for lawyers, says one partner. However, he adds: "To do this, firms need a global reach and an understanding of business as well as digitalisation and data analytics; this is an opportunity and a challenge." Another opportunity for tax lawyers is presented by the current trend for companies to review their financial structures on a "country by country basis", a lawyer at one of the law firms connected to the 'Big Four' auditors says.

Tax lawyers are playing an increasingly crucial role in M&A deals, and the number of such deals in Spain is increasing, say law firm partners. Suárez says: "Lawyers are required to future-proof clients' tax structures – if clients implement good corporate governance, they will be able to see what their potential liabilities are." Another partner at a leading Spanish firm remarks: "Tax lawyers are needed now more than ever so there are big opportunities ahead – however, there is the risk of causing potential harm to your client or your own firm."

Spain: What are the biggest opportunities for law firms in the area of tax?

"We help clients with their new investments and protect them in the face of aggressive tax inspections. In relation to new investments, the economic recovery has made Spain attractive for international investors again, and it has also meant Spanish multinationals have revisited their internationalisation plans. Both in-bound and out-bound flows of investment require careful tax planning to avoid double taxation." **Antonio Barba, partner, Cuatrecasas**

"The reactivation of the real estate market after the recession will present opportunities. Also, the digital economy, as well as the development of technological and digital businesses." **Pablo Romá, partner, Ecija**

"Assisting multinational companies reviewing their business models, supply chain structures and financing schemes in order to fit in with the new international tax framework." **Miguel Lorán, partner, Osborne Clarke**

"Providing companies with comprehensive advice, analysing issues such as the value chain, transfer pricing, tax efficiency from the point of view of indirect taxation or financing, and international advice that assesses the risks and opportunities in all jurisdictions." **Itziar Galindo, partner, KPMG Abogados**

"Businesses and investors need to ensure their investment structures and operations conform to new national and international regulations, as well as to the new transparency requirements that tax authorities are demanding." **Antonio López Poza, tax department director, Lupicinio International Law Firm**

"Reorganising and transferring family assets, though this is in the context of uncertainty regarding future changes to tax regulations." **Alejandro Capdevila, partner, RCD – Rousaud Costas Duran**

"Despite the political situation in Cataluña, clients are more active in Spain and they require tax advice. Many international companies are establishing headquarters in Spain and this is a big opportunity." **Enrique Viola, partner, Pinto Ruiz & Del Valle**

"Tax litigation is because of the aggressive approach of the tax office. Also M&A and real estate activity is generating high demand for tax advice." **Luis Rodríguez-Ramos, partner, Ramón y Cajal Abogados**

"In the financial sector, the impact of regulatory reforms, as well as Brexit and fintech are seen as good opportunities for tax teams." **Juan Sosa, partner, Simmons & Simmons**

"We expect an increasing amount of tax lease transactions in the Spanish shipping finance market as new arranging banks are stepping back into the market. Also, we expect to see research & development financing transactions that make use of tax incentives in the Corporate Tax Act." **Luis Soto, partner, Watson Farley & Williams**

Portugal: Fat tax

Portuguese tax policy has played a major role in the country's efforts to alleviate the effects of the austerity imposed by the European Union, the International Monetary Fund and the European Central Bank, says António Lobo Xavier, partner at MLGTS. He adds: "There is a tax break trend in personal income tax, including special regimes for attracting high-net-worth individuals."

Meanwhile, Lobo Xavier says the country's tax authorities have become more vigilant with regard to tackling tax avoidance which has led to a significant increase of litigation.



"Tax is now critical, rather than just technical, it can impact on reputation and on management liability."
Rafael Fuster
Uría Menéndez

Other major tax-related developments in Portugal include the introduction of a new property tax called AIMI (Adicional Imposto Municipal Sobre Imóveis), a 'fat tax' on sugary drinks, as well as new tax breaks for investment in start-up companies, says Tiago Marreiros Moreira, partner at Vieira de Almeida. He adds that significant trends include the provision of tax structuring advice on major real estate transactions, as well as advice on restructuring of renewable energy groups.

The "above-EU average" performance of the Portuguese economy in 2017, as well as a politically stable environment, means lawyers should expect an increase in M&A, real estate and tourism-related tax work, says PLMJ partner Nuno da Cunha Barnabé. He adds: "Furthermore, private client work should remain stable due to the country's international reputation and the competitiveness of the Portuguese non-habitual tax scheme. Meanwhile, complex tax litigation work should increase as the tax inspection authorities are moving to a risk-based approach for major taxpayers."

Marta Pontes, partner at Uría Menéndez-Proença de Carvalho, highlights the important tax measures contained in the country's 2018 state budget. It includes a reduction in personal income tax, an increased surcharge for corporate entities with a taxable income higher than €35M (from 7 per cent to 9 per cent), and a change in how Portuguese sourced-income is defined in order to include capital gains related to certain classes of property located in Portugal that are achieved by non-resident individuals and entities. Meanwhile, there is now no need to apply for real estate transfer tax, stamp tax and registration fees exemptions in relation to corporate restructuring transactions as they are now automatically applied (with certain exceptions). Pontes adds: "The Portuguese tax authorities remain very aggressive and have higher tax collection targets and therefore tax litigation and arbitration should definitely be an important area of opportunity."

The coming year will provide lawyers with significant tax-related opportunities in the real estate sector, particularly in connection with tourism, as well as the office and residential markets, says Cuatrecasas partner Diogo Ortigão Ramos. He adds that there will also be high demand for advice relating to "private equity transactions, refinancing operations and the sale of assets to meet more demanding financial regulatory requirements". In addition, Portuguese family offices and the restructuring of Portuguese companies will also generate tax work for lawyers, says Ortigão Ramos.

Getting tense

Against this background, there is a growing tension between the European Union/internationally-driven tax legislation that focuses on combatting tax evasion and achieving a "fair tax framework and the fact that changes to domestic tax laws around the world are increasingly prone to erratic and politically-biased views prevailing over technically solid approaches to the underlying issues and challenges", says Linklaters partner Rui Camacho Palma. "EU Directives are seeping into

Portugal: What have been the major developments and trends in tax in the last year?

"The implementation of BEPS and the continuous effort to increase tax transparency. Meanwhile, Portugal's increasing popularity has meant great demand for advice on the non-habitual tax resident regime. In addition, there is more work related to the sale and purchase of real estate, short-term leases and all sorts of tourism-related investments. Fintech-related issues are also materialising, including the taxation of gains derived from Bitcoin." **Pinelas Pinto, partner, Miranda & Associados**

"The major change was the creation of a supplementary real estate tax (the AIMI), in addition to the existing real estate tax (IMI), that replaced the previous annual stamp duty of 1 per cent applied to certain properties with a tax value of more than €1 million." **Diogo Bernardo Monteiro, partner, FCB Sociedade de Advogados**

"Portugal has begun to win the confidence of international and national investors – in the last year tourism has grown exponentially, and Lisbon is being promoted as one of the top European capitals. Developers are building projects designed purely for investment purposes, with tourist apartments and hotel apartments becoming common, all with guaranteed returns, and often designed for short-term rental, and this is generating tax-related work." **Elsa Rodrigues, partner, Espanha e Associados**

"Portugal's reputation as an excellent tourism destination, as well as the development of special tax regimes for non-residents, has had a positive impact on the economy as a whole and on the tax revenue of the Portuguese State." **Sónia Martins Arêde, senior associate, PRA-Raposo, Sá Miranda & Associados**

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national legislation and disrupting existing structures and creating challenges regarding compatibility with international tax law and constitutional law principles, all against the backdrop of increasing pressure for tax collection by the tax authorities," he adds.



"Complex tax litigation work should increase as the tax inspection authorities are moving to a risk-based approach."
Nuno da Cunha Barnabé
PLMJ

One of the most significant challenges facing tax lawyers is the digitalisation of the economy, says Caiado Guerreiro partner Tiago Caiado Guerreiro. He adds that this results in a need to "speed up answers and have a more pragmatic international overview for our clients". Meanwhile, CCA Ontier managing associate Frederico Velasco Amaral says the need of multinational corporations to ensure compliance represents a significant opportunity for law firms, as does increased regulation and the impact of technology on the tax compliance, which, he says, will change the way tax authorities work.

Tax lawyers face more pressure than lawyers in some other practice areas to keep up-to-date with new regulations, according to AAA Advogados senior associate Joana Tavares de Oliveira. She adds: "The challenges posed by the need to balance the diverse ideological backgrounds of the coalition parties in the Portuguese parliament and the ambitious collection targets that the deficit reduction objectives entail have resulted in tax legislation of questionable quality." Tavares de Oliveira says that the collection targets set for the tax authorities justify the "increasingly 'pro-treasury / anti-taxpayers' position that has been adopted". She continues: "Managing the relationship with the tax authorities in a fast-paced regulatory context while keeping clients permanently updated is one of the main challenges that tax practices face."

Tax lawyers need in-depth understanding of clients' business to give good advice



Javier González Carcedo

It is no longer possible for lawyers to give effective tax advice without having a thorough understanding of their clients' business, says Javier González Carcedo, partner at PwC Tax and Legal Services.

"The whole underlying principle in international taxations has clearly moved to the substance issue," he says. "Therefore, we need to go into the business and understand it because the advice we provide needs to be related to the business, so we have to get involved with it."

González Carcedo says the service provided by lawyers must now factor in the economics of the client's business rather than concentrating solely on the law. "We need to move from the law to the business because the fundamental judgement is linked to the facts and circumstances of the business," he explains. González Carcedo says that clients need their tax advisers to assess the value of the operations they are developing in different jurisdictions. "Lawyers cannot make a good judgement on that [the value] just from the law, it will not explain that, you need to get into the relative relevance of different businesses around the globe," he adds. Consequently, legal advisers must be able to conduct an "economic analysis" of their client's business. "It requires an understanding of the economics of the business and you cannot give tax advice any more without a good comprehension of that," remarks González Carcedo.

Meanwhile, González Carcedo says the Organisation for Economic Co-operation and Development (OECD)'s base erosion and profit sharing (BEPS) initiative resulted in changes in tax regulations in many jurisdictions and this has created "a lot of uncertainty" for clients. "There is no clarity any more about what is the real state of the situation in each jurisdiction," he adds.