Bird & Bird Newsletter Tax

(Unwanted) Spanish stays caused by COVID-19 and their tax repercussions

Among other repercussions from COVID-19 that we have all suffered in one way or another, it is worth discussing some of the fiscal impacts that have arisen unexpectedly in light of these circumstances.

Specifically, we are referring to **"enforced" stays in this country or in an Autonomous Community (AC) other than the territory where the habitual address of an individual is located.**

In situations wherein the persons remain outside their AC of residence for more than 183 days in a calendar year (e.g. from 1 January to 1 July 2020), they could be in compliance with one of the requirements established by personal income tax (IRPF) regulations determining the tax residence of individuals in Spain (in the case of non-residents) or in the Autonomous Community where they may have stayed during COVID-19 (in the case of residents of other ACs).

For these purposes, it is irrelevant whether the stay stems from unwanted confinement outside the normal residence due to the state of emergency, an absence of connections or transport, or any other reason; also irrelevant is whether the stay takes place in a rented or owned flat (second residence), at a hotel, or any other location; the issue is whether the individual physically stayed in the "other territory" in question, without interruption for a period of at least 183 days a year.

It therefore comes as no surprise that this **new place of residence which could stem from a physical stay of more than 183 days/year** may entail important tax repercussions, such as acquiring **tax residence status in a jurisdiction totally unrelated to one's usual residence, with subsequent taxation in Spain on personal income, wealth, inheritance, gifts, and other taxes (in the case of non-residents) or the settlement of the aforementioned taxes in accordance with the regional regulations of the host AC (in the case of Spanish residents from another AC).**

On this issue, the tax authority (*Dirección General de Tributos*, "DGT") in its resolution of recent tax ruling V1983-20, concludes that these physical stays are undisputed and, therefore, regardless of the circumstances or will that prompted them, they would indeed determine tax residence in Spain for the non-resident individuals who filed the tax ruling. The DGT does not address other, more lax interpretive criterion that, as applicable, would allow these unplanned stays to be discarded for the purposes of the aforementioned calculation, as some neighbouring countries have done, following the OECD's recommendations in the document *Analysis of Tax Treaties and the Impact of the COVID-19 Crisis*.

Apart from these administrative criteria, it is worth noting that, in the case of non-residents who enjoy the protection of a Double Taxation Agreement (DTA) signed by Spain, the conclusion on tax residence in Spain for the aforementioned reasons will foreseeably activate the DTA tiebreaker rules. DTAs contain these rules for cases of double "tax residence" claims, to choose the “sole” tax residence in the country where these individuals have a “permanent home at their disposal” or where they maintain personal and economic relations (predictably in this other country, not Spain). This renders the physical stay criterion unapplicable as a point of connection to determine the tax residence foreseen by IRPF regulations and, with it, taxation in this country for the purposes of the latter and other taxes in which the connection point is defined based on the tax residence determined for IRPF purposes.

In addition to these assumptions, it is also worth wondering what treatment should be granted in those cases where **Spanish citizens or others working abroad would have relocated to Spain during the COVID-19 confinement, while continuing to work** (“telework”) for the foreign companies to whom they habitually provide services. Specifically, **it is worth considering whether these individuals (i.e. employees, directors) could give rise to a Permanent Establishment (PE) in Spain,** inasmuch as they acted in the name of these companies and habitually exercised their powers in Spain to finalise contracts on its behalf, thus determining the foreign company’s taxation in Spain.

In instances where teleworkers did not have the authority to represent a foreign entity, it could be concluded that there would be no risk of PE; however, where teleworkers did have this authority, our conclusion would be that PE should not be considered in these cases either, as the powers enabling as much would not be exercised **regularly** because the circumstance of frequency (regularity or continuity) required in DTAs and even in domestic regulation (non-resident income tax) to determine the existence of PE mandates that those powers be effectively exercised continuously over time, not on an ad-hoc basis during an unwanted stay in our country. In other words, there would be no cause or will to exercise these powers in a sustained manner over time, nor would they be exercised beyond the precise time of confinement. Ultimately, it would be a sporadic or occasional exercise of that authority, thereby disregarding the risk of PE from teleworking.

Obviously, if this exercise extends over time (because the teleworker extends his/her stay beyond the “compulsory” period or because he/she decides to work permanently from Spain), the above conclusion may vary.

In an inverse situation, for Spanish companies whose employees relocated to their home countries or elsewhere for the duration of the COVID-19 confinement, the telework performed there could pose a risk of PE for the Spanish company, depending on how the local tax authorities interpret the concept of “regular exercise” of their respective powers in binding commitments.

It is clear that these new circumstances and their unpredictable developments, including viruses, throw us into never-before-seen situations that have to be resolved—even in the tax field—with pragmatism and integrative interpretations in order to adapt them to the rules currently in force, clearly dictated to regulate circumstances far removed from those that concern us today.

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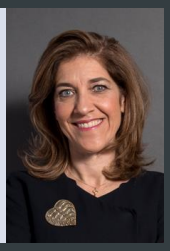

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