

Spain publishes Resolution with additional guidance on foreign look-through entities

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Executive summary

On 13 February 2020, the Spanish Government published a Resolution clarifying the interpretation of the features to be considered for foreign entities to be seen as transparent for Spanish tax purposes.

Detailed discussion

Background

Spain's Nonresident Income Tax (NRIT) Law sets forth look-through tax treatment for entities whose legal nature is identical or analogous to that of look-through entities incorporated under Spanish law. In principle, this regime applies regardless of the tax treatment applicable in the country in which the entity is incorporated or in which the partners or members of the same reside.

However, the Spanish law does not include any further guidance on what those legal features were and, in particular, whether the tax treatment applicable in the country in which the entity is incorporated or in which the partners or members reside is relevant for these purposes. This has led to uncertainty.

The Spanish tax authorities have issued several rulings regarding the look-through characterization of certain foreign entities. In these rulings, the tax treatment of such entities was taken into consideration as one of the factors considered to determine whether they are “identical or analogous” to Spanish look-through entities.

The Spanish Ministry of Finance issued a draft Resolution on 5 November 2019 for public consultation; the Resolution issued in February (See EY Global Tax Alert, [Spain: Draft Resolution provides additional guidance on foreign look-through entities](#), dated 22 November 2019) is the final version which is aligned with the original draft. The Resolution lists the requirements in order for a nonresident entity to qualify as a look-through entity for Spanish tax purposes.

Content of the Resolution

The Resolution lists some of the rulings in which the characterization of foreign entities for Spanish tax purposes has been addressed; these include the rulings on the United Kingdom Limited Partnership (LP) and Limited Liability Partnership (LLP), the German Kommanditgesellschaft (KG) and the Dutch closed Commanditaire Vennootschap (CV). The case of the closed CV is cited by the Resolution as a landmark one, as the ruling confirmed that the tax treatment was relevant for these purposes (and was, in fact, the only difference with an open CV, which would not be regarded as a look-through entity for Spanish tax purposes).

In this Resolution, the General Directorate of Taxes (GDT) considers that the qualification of entities incorporated in foreign countries as look-through entities for Spanish tax purposes must be focused on the defining characteristics of the tax regime for the attribution of income regulated in the Spanish tax legislation.

In this sense, three characteristics are listed that would make non-Spanish tax resident entities to be considered as a look-through entity for Spanish tax purposes:

- ▶ The income obtained by the entity is not taxed at the level of the entity.
- ▶ The income obtained by the entity is attributed to the persons who hold an interest in that entity (the members of the look-through entity), which are subject to tax in accordance with the applicable tax rules regardless of any distribution effectively made by the entity.
- ▶ The income allocated to the members of the look-through entity keeps the same characterization as it received when derived by the look-through entity.

The content of the Resolution is aligned with the criteria set forth by the Organisation for Economic Co-operation and Development (OECD) in its 1999 report entitled “The Application of the OECD Model Tax Convention to Partnerships” and to ensure that no mismatches resulting in lack of taxation or double taxation occurs.

The Resolution has binding effect for the Spanish tax administration as from 13 February 2020 and shall be applicable to all taxable events that become due as from that date.

Impact

The criteria included in this Resolution provide additional certainty on how to approach foreign look-through vehicles for Spanish tax purposes going forward. These criteria, however, should not have a direct impact on reclaims, since they do not have retroactive effect.

Also, the fact that the Spanish approach will be aligned with that of the OECD will help prevent mismatches and ensure a more coordinated treatment at an international level.

Existing structures with foreign look-through entities must be reviewed to determine the impact of this Resolution.

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