

Spain releases draft Bill implementing ATAD 2 for public consultation

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Executive summary

On 30 November 2020, the Spanish Ministry of Finance released a draft Bill to implement the European Union (EU) Anti-Tax Avoidance Directive (Council Directive 2017/952 of 29 May 2017, "EU ATAD 2") into the Spanish Corporate Income Tax (CIT) and Nonresident Income Tax (NRIT) provisions. This draft Bill is now subject to public consultation until 23 December 2020.

Detailed discussion

The EU ATAD 2 requires EU Member States to include a number of anti-hybrid provisions in line with the OECD¹ BEPS² Action 2 in their domestic legislation.

The draft rules published by the Spanish Ministry of Finance are generally in line with the EU ATAD 2 provisions and do not significantly deviate from the wording of the Directive.

In particular, the Spanish CIT and NRIT Laws are amended to include provisions under which expenses incurred by Spanish tax resident companies and permanent establishments located in Spain which: (i) fall under the scope of the hybrid mismatches identified in the Directive; and (ii) result in a deduction/non-inclusion or a double deduction situation, would not be deductible for Spanish tax purposes.

In particular, non-inclusion is deemed to exist when the income is not subject to tax within a reasonable period of time (defined as the fiscal year beginning in a 12-month period before the expense has been accrued), or is exempt, or benefits from a foreign tax credit, or is subject to low taxation. In line with the anti-hybrid provisions already included in the Spanish domestic rules (as requested by ATAD 1, Council Directive 2016/1164 of 12 July 2016), the threshold for low taxation is set at 10%.

Under the draft Bill, the Spanish rules implementing ATAD 2 will be applicable to tax years beginning on, or after, 1 January 2020 and which have not concluded before the Law is passed and enters into force. Considering that the draft is subject to public consultation until 23 December 2020, it is unlikely the Law will enter into force before year end.

Impact

The draft Bill is now subject to public consultation until 23 December 2020. Consequently, the final wording may undergo changes as a result of this process, although it is expected to continue to be in line with the Directive.

Multinational groups should review their current structures and transactions to determine whether they could fall under these rules, as currently set forth in the draft, and closely monitor the following steps in the approval procedure where the final text will be determined, to determine the future impact of these rules.

Endnotes

1. Organisation for Economic Co-operation and Development.
2. Base Erosion and Profit Shifting.

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