

Spanish Government proposes to exclude EU ETFs from *traspasos* (deferral) regime

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Executive summary

On 23 October 2018, the Spanish Ministry of Taxation released a draft Bill proposing measures to prevent and fight tax evasion, including implementation of European Union (EU) Council Directives 2016/1164, dated 12 July and 2017/1852, dated 10 October.

This draft Bill includes, among other measures, the proposal to prevent Spanish tax resident individuals from benefiting from the Spanish deferral regime (the so-called *traspasos* regime) on gains/losses triggered upon the transfer to or from EU exchange traded funds (ETFs), as summarized below.

Stakeholders can provide comments during the public consultation phase that closes 15 November 2018; after that deadline the Ministry of Taxation will publish the final Bill proposal to be submitted to the Spanish Parliament for approval.

Detailed discussion

Background

The Spanish Personal Income Tax (PIT) Law¹ provides for the so-called *traspasos* regime. Under this regime, capital gains (and losses) obtained by individuals subject to Spanish PIT and arising from the transfer or redemption of shares/

units in qualifying collective investment vehicles (CIVs) can be deferred if the amount obtained upon such transfer or redemption is effectively reinvested in the acquisition or subscription of different shares or units of qualifying Spanish CIVs or European Undertakings for Collective Investment in Transferable Securities (UCITS) CIVs.

In particular, under such tax regime the Spanish individual investor is entitled to defer for an unlimited period, the taxation on income or losses obtained under a qualifying transfer or redemption of shares/units in CIVs until a subsequent transfer or redemption that is not protected by a tax roll-over/deferral regime takes place.

As a consequence, the newly acquired or subscribed shares/units inherit the tax value and acquisition date as the shares or units transferred or redeemed by the PIT taxpayer.

The Spanish PIT Law currently in force expressly sets forth that this special regime does not apply if the transfer or reimbursement consists of shares and participations deriving from Spanish ETFs (irrespective of the Spanish ETF being an origin fund, destination fund or both).

In turn, the Spanish PIT Regulations provide for an exemption from the obligation to withhold on the redemption/transfer of the shares or units of the Spanish ETF.²

In the past, the Spanish tax authorities have interpreted that:

- ▶ An EU ETF is not a qualifying fund *if listed on the Spanish stock exchange*;³ and
- ▶ Conversely, an EU ETF is a qualifying fund for the purposes of the *traspasos* regime *if the listing of the qualifying EU ETF takes place on an EU stock market other than the Spanish*

stock exchange. Nevertheless, such ETF is not covered by the exemption from the obligation to withhold as this is only applicable to Spanish ETFs. Hence, the distributor must report the transaction for withholding tax purposes.⁴

Therefore, currently, as per the Spanish tax authorities' view, the criterion to determine whether an EU ETF is a qualifying fund for the purposes of the "*traspasos* regime" is its listing in the Spanish stock exchange.

Proposed amendments

It could have been expected that the Spanish Government would broaden the scope of funds that qualify the *traspasos* regime to also include Spanish ETFs. However, the proposed change is to disallow the *traspasos* regime for the investment (or divestment) in both Spanish and EU ETFs.

Additionally, it is proposed that the exemption from Spanish WHT also be extended, so it applies to both Spanish and EU ETFs, unless it is established that the EU ETF is incorporated in a tax haven and the transaction does not take place in a market located in a tax haven.

Impact

The Government proposes to introduce this modification effective 1 January 2020.

The draft Bill includes a grandfathering provision to protect the *traspasos* regime regarding investments in EU ETFs -that are not listed in Spain- made before 1 January 2020, if the proceeds derived from the transfer or redemption is not reinvested in the acquisition of shares in EU ETFs.

Endnotes

1. Law 35/2006, on the Spanish Personal Income Tax, dated 28 November 2006 (the Spanish PIT Law).
2. Article 75.3.i) of the Royal Decree 439/2007, of 30 March, which approves the Personal Income Tax Regulations and modifies the Pension Plans and Funds Regulations, approved by Royal Decree 304/2004, of 20 February 2007.
3. Binding ruling V0713-06 of 12 April 2006.
4. Binding ruling V4596-16 of 27 October 2016.

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EYG no. 011545-18Gbl

1508-1600216 NY

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