CLIFFORD

CHANCE

Client briefing | December 2016

Urgent tax measures

On 2 December, Spain's Council of Ministers approved Royal Decree-Law 3/2016 (RDL 3/2016) which adopts urgent tax measures.

The main measures, in addition to other relevant sector-specific changes, affect **Corporation Tax** in relation to: (i) restrictions on offsetting negative tax bases, (ii) tax losses deriving from the transfer of the stake in companies, (iii) impairments of the stake held in companies, and (iv) limits on applying deductions to avoid international double taxation.

In addition, various other measures have been approved which affect other taxes and investment vehicles (**Real Estate Tax, Tax on the Increase in Value of Urban Land, Wealth Tax, SOCIMIs**), with a view to increasing tax revenue.

1. Changes to Corporation Tax

The changes to the Corporation Tax Act (*Ley del Impuesto sobre Sociedades*, LIS) are designed, as the Preamble to RDL 3/2016 states, to increase revenue from this tax. With some measures having a temporary impact and others a definitive effect, the idea is to achieve this increase by eliminating or reducing tax deductible items ("broadening the tax base"), so that the actual rates are closer to the nominal ones.

The most noteworthy measures affecting the tax periods as of 1 January 2016 are the following:

1.1. Limitation of set-offs of negative tax bases

RDL 3/2016 maintains the current limit of 60% of the positive tax base for offsetting negative tax bases. However, it does establish a difference only for large enterprises.

Thus, in the case of taxpayers whose turnover is at least 20 million euros for the 12 months prior to the start date of the corresponding tax period, the limits established in the previous regulations will apply, namely:

- **50%** when the net turnover is at **least 20 million euros but less than 60 million euros**.
- **25%** when said turnover figure is **at least 60 million euros**.

Entry into force

- In general terms, the new measures entered into force on 3 December (date of publication in the BOE).
- This means that they will have to be taken into account with regard to closing for Corporation Tax in 2016, as well as for the next instalment payment (April).
- Meanwhile, the non-deductibility of losses derived from the sale of shares in SOCIMIs will only be applicable in the financial years commencing as of 1 January 2017.

As for those taxpayers who do not reach the above turnover figure of 20 million euros, the limit for offsetting negative tax bases remains unchanged for 2016 at 60%, and for 2017 at 70%.

1.2. Non-deductibility of capital losses obtained in the transfer of holdings in resident and non-resident entities

Article 21 LIS regulates the exemption applicable to capital gains obtained from the transfer of certain holdings in resident and non-resident entities provided certain requirements are met in terms of participation (and taxation relative to the stake held in companies in the event it is foreign).

Nothing was said in the event the income obtained was negative (with the exception of certain operations carried out within a group) meaning that said negative income was considered tax deductible.

The modification introduced by RDL 3/2016 means that **capital losses** obtained as a result of a transfer of holdings in entities that met the requirements for application in said Article 21 **is not included in the tax base of the seller**, making it more closely resemble the regime applied in Spain's neighbouring jurisdictions in the European Union.

Moreover, the modification establishes that the holding or acquisition value requirement (5% or 20 million euros, respectively) will be understood as met, provided that said threshold was reached at some point in the year prior to the transfer. The objective here is to avoid transfers carried out in two or more stages during that time.

The new rule also establishes the non-deductibility of capital losses obtained from the transfer of holdings in non-resident entities when said entity does not meet the taxation requirement stipulated in Article 21 LIS. That is, in the case of non-resident companies that are not subject to a foreign tax that is identical or comparable to Spanish Corporation Tax at a nominal rate of at least 10%, or that are resident in a country that has not signed a double taxation treaty with Spain that is applicable to it and contains an information exchange clause, any capital loss obtained as a result of the transfer of holdings in said entities will not be included in the tax base of the transferor entity, regardless of the participation threshold held by the latter.

The above will not apply in the financial year in which the company is wound up, unless said winding up is derived from a corporate restructuring operation involving the succession of the legal personality in favour of another entity.

1.3. Reversal of losses due to impairment of assets representing the stake in a company's capital or equity

As we know, for tax periods beginning as of 1 January 2013, the tax deductibility of losses due to the impairment of assets representing stakes in other companies had been eliminated. However, a transitional regime was established to include those impairment losses that had previously been tax deductible so that, as the subsidiaries recovered their value, the impairment losses recorded at the time would be included in their tax base.

RDL 3/2016 maintains that general rule, but introduces an **automatic system for including said impaired losses as of 1 January 2016**.

In short, all taxpayers who had recorded tax deductible impairment losses and are pending reversal should include these in their tax base, in equal parts, during the first five tax periods beginning 1 January 2016. **They should be included regardless of whether or not a recovery of value in the subsidiary has effectively occurred**.

Furthermore, if the recovery of value of the subsidiary (and the consequent impairment loss to be reversed) were greater than the amount to be included according to the rule mentioned above, the remaining balance should be included, in equal parts, among the remaining tax periods.

1.4. Limit on the application of deductions to avoid double taxation

Effective for the tax periods beginning as of 1 January 2016, an overall limit is established for the application of deductions to avoid double taxation, both international and internal (referring to dividends distributed against holdings acquired in tax periods beginning prior to 1 January 2015, pursuant to Transitional Provision 23 LIS), which is set at **50% of the taxpayer's full tax amount payable**.

Amounts not deducted as a result of this limit can be allocated to subsequent tax periods, as the rule itself establishes.

2. Other changes in relation to taxes

*2.1. Extension of the Wealth Tax (*Impuesto sobre el Patrimonio*, IP)*

The Spanish Wealth Tax is **extended to financial year 2017**. Those of Spain's Autonomous Communities wishing to do so will therefore be able to collect this tax, under the terms and with the deductions and tax relief considered applicable.

We will therefore likely have to wait until late 2017 to see if this extension is continued in subsequent financial years or if, as was announced at the time, this Wealth Tax is definitively eliminated in 2018.

2.2. Limit on the deferral or payment in instalments of certain tax debts

RDL 3/2016 adds new cases of non-deferrable tax debts, in order to increase tax revenue.

Taxpayers **will not be able to request the deferral of the debt or its payment in instalments**, nor will they be able to request that it be payable in kind, in the following cases:

- Payment on account for Corporation Tax.
- Output VAT, unless it is proven that these amounts were not paid by the recipient.
- Debts confirmed by a final (administrative or judicial) decision, whose payment was suspended while the tax appeal was underway.

2.3. Approval of coefficients for the review of cadastral values in certain municipalities

Certain coefficients have been approved to **automatically review the cadastral value of properties** located in those municipalities which applied to be subject to this automatic review system back in May. The automatic review will become effective as from 2017 and will therefore be taken into account for the purposes of **Real Estate Tax due in 2017** as well as other taxes referring to the cadastral value (for example, the Tax on the Increase in Value of Urban Land or, in some cases, the Tax on Business Activities).

The coefficients for the review of cadastral values range from 1.08 to 0.87, according to the year in which the corresponding property value report entered into force.

The cities of Madrid and Barcelona, which had previously undergone significant cadastral value reviews, will not be affected by this measure.

2.4. Non-deductibility of capital losses obtained in the transfer of holdings in a SOCIMI

The Spanish Act governing SOCIMIs has been amended to clarify, in relation to the shareholders of SOCIMIs (Article 10), that the exemptions established in the Corporation Tax Act (Article 21 LIS) will not apply to capital gains deriving from the transfer of holdings in a SOCIMI. Said Article 21 will apply, however, with regard to the capital losses derived from the transfer of shares in a SOCIMI (i.e. they will not be tax-deductible).

Thus, as of 1 January 2017, the tax treatment of shareholders selling shares of a SOCIMI and subject to Corporation Tax or Non-Resident Income Tax with a permanent establishment in Spain will be as follows):

- Taxes on the capital gains deriving from the sale of the shares in the SOCIMI will be paid by the shareholder, with it not being possible to apply any exemption on such income and irrespective of the percentage stake in the SOCIMI or the length of time such stake has been held.
- Capital losses deriving from the sale of shares in a SOCIMI will not be deductible by the shareholder when the stake in such SOCIMI is equal to or greater than 5% (or the acquisition value of the shares was more than 20 million euros) and the stake has been held for more than one year.

Clifford Chance, Paseo de la Castellana 110, 28046 Madrid, Spain