

CONSEQUENCES OF BREXIT ON CORPORATION TAX AFTER 01/01/2021

SPECIAL MENTION TO GIBRALTAR

The Kingdom of Spain (SP) and of the United Kingdom (UK) have in place a Double Taxation Agreement (DTA) which came into force on 12.06.2014. Accordingly, incomes which which would no longer be exempt as a result of Brexit may still be under the DTA.

Article 21 of the Spanish Corporate Tax Law 27/2014 of 27.11.2014 (SPCT) provides for an exemption related to dividends and income derived from the transfer of securities representing the equity of residents and non-residents in SP. This article provides that dividends or profit share income of non-Spanish resident companies will be exempt when they are subject to, and not exempt from, a foreign Corporation Tax (CT) of a similar nature at a nominal rate of at least 10% (in the UK, the average rate is 20%). The participation must be at least 5% or have an acquisition value of more than 20 million euros.

In order to grant such exemption, it is required for the investee company to be resident in a country with which SP has in place a DTA to avoid double taxation (this is the case of UK as above indicated). The problem resides with investee companies that, complying with all of the above, are established in Gibraltar.

Gibraltar's CT sets an average nominal rate of 10%, and since it is an integrated territory in the UK, the exemption established under Article 21 of the SPCT will apply, since both requirements are met: minimum nominal rate of 10% and existence of DTA.

Notwithstanding the precept referred to above provides that: "In no case shall this requirement be deemed to have been fulfilled when the investee is a resident of a country or territory classified as a tax haven, unless it resides in a member state of the European Union (EU)".

Nowadays, despite the fact that Gibraltar is considered by SP as a tax haven, UK is a member state of the EU, so the exemption of Article 21 SPCT is put into practice. Following the effective departure of the UK from the EU, this exemption would remain without effect on Gibraltar companies, as the exception in the case of an EU Member State would not be fulfilled.

This being the case, Governments of the UK and SP have each approved in their Council of Ministers an information exchange agreement that would allow the exclusion of Gibraltar from the list of tax havens for SP, as long as the agreement is ratified by the Congress.

Patent Box

Article 23 SPCT – Reduction of income from certain intangible assets (Patent Box).

In accordance with Section 1 of Article 21 of the SPCT, in order for the application of the reduction to be applied, it is required that the assignee does not reside in a country or territory of zero taxation or classified as a tax haven, unless it is located in a EU Member State.

Therefore, this reduction may continue to apply to Gibraltar companies from January 2021, provided that the government of SP ratifies the agreement between the UK and SP which would exclude Gibraltar from being considered a tax haven.

In the rest of the UK territories the DTA will apply.

Exit Tax

Article 19 SPCT – Exit tax

When a company resident within Spanish territory transfers its residence outside of SP the difference between the market value and the tax value of the patrimonial elements owned by the company will be included in the tax base of the CT settlement in the year in that the transfer of residence occurs. However, when the transfer of residence is made to a Member State, the integration into the tax base will be deferred until the date of transmission of the affected assets to third parties.

In other words, the Member States enjoy a privilege vis-à-vis with third countries, being able in the first case to postpone the tax obligation resulting from the change of residence. From January 2021, this privilege will not apply to transfers made to the UK.

Article 14 SPCT – Provisions and other expenses

Article 14 SPCT includes the deductibility of the contributions made by pension provider companies provided for in Directive 2003/41 / EC to employment pension funds authorized or registered in another Member State (as long as certain requirements are met). After the effective exit from the EU, contributions to UK employment pension funds will not be considered deductible expenses as this is a purely financial matter.

Álvaro Diz Sánchez

SCORNIK GERSTEIN LLP