ANDERSEN

Newsletter

# Private Client Services

**May 2023**
Tax Law
Andersen

# Private Client Services

| Newsletter | May 2023

Andersen in Spain

This first edition of the PCS Newsletter includes the main new developments and regulatory changes in tax matters that have taken place over the last few months, from January to May 2023.


Head of the Tax Department

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# INDEX

# Annual tax and customs control plan for 2023

*Analysis of the general guidelines of the Annual Tax and Customs Control Plan for 2023, published by the State Tax Administration Agency (AEAT)*

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The State Tax Administration Agency (AEAT) has recently published the general guidelines of the Annual Tax and Customs Control Plan for the year 2023, which establishes the main lines to be followed by the Tax Administration in terms of planning the activities considered priorities for the prevention and control of tax and customs fraud.

Among the different measures set out in this Annual Plan, the tax control of high-net-worth individuals (known as HNWI ["High Net Worth Individuals"] or UHNWI ["Ultra High Net Worth Individuals"]) stands out. In this regard, the AEAT has decided to increase and reinforce control over this type of taxpayer to try to avoid the simulation of tax residence outside Spain, especially in the case of individuals seeking more lax tax jurisdictions, to detect and regularise any irregular behaviour derived from the real relocation of direct taxation. To this end, consideration will be given to the application of new information methods that can be exploited through advanced techniques of massive data management and the optimisation of the use of the tools already available.

In turn, of relevance is the need to coordinate the AEAT's actions with the regional tax administrations to identify taxpayers who formalise their tax residence in a region other than the one in which they actually reside due to possible and quantifiable regional tax differences at the national level.

On the other hand, the AEAT intends to implement new guidelines and capacities to request and capture information from the General Council of Notaries on real estate and companies, to improve the detection and selection of risks and the subsequent tax verification of large estates (especially after the recent amendment of Law 19/1991 on Wealth Tax).

At the corporate level, there will be an increase in the monitoring of the beneficial owners of so-called opaque companies that hold ownership of real estate assets, and individualised monitoring of certain corporate processes in which these taxpayers participate (incorporation of entities, capital increase,

capital reduction, dissolution, liquidation, etc.) will be reinforced, in order to mitigate the reduction in the direct taxation (personal income tax) of the shareholders and/or participants in these commercial entities.

Finally, the Annual Tax and Customs Control Plan for 2023 includes the possibility for the AEAT to carry out verification and control actions on those individuals who reside in Spain for more than 183 days a year, but who are not taxed as residents, generating a consequent direct taxation exclusively on the income received in Spain through the Non-Resident Income Tax, thus avoiding direct taxation on all their income in the Personal Income Tax or, where applicable, in the Corporate Income Tax.


Among the different measures set out in this Annual Plan, the tax control of high-net-worth individuals (known as HNWI [“High Net Worth Individuals”] or UHNWI [“Ultra High Net Worth Individuals”]) stands out.

# Temporary Solidarity Tax on Large Fortunes *ITSGF*

*Analysis of the new temporary tax approved by Law 38/2022 of 27 December, which will apply during the financial years 2022 and 2023*

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The new Temporary Solidarity Tax on Large Fortunes (hereinafter, "ITSGF") approved by 38/2022 Law, of 27th December, is configured as a Tax, a priori, temporary, complementary to the Wealth Tax (hereinafter, IP) which is levied on the net wealth of taxpayers with an amount greater than 3,000,000 Euros.

It has a temporary nature as it is foreseen to be in force for 2 years and may be extended depending on the socio-economic circumstances, so that, in principle, it will be applied during the financial years 2022 and 2023.

## | APPLICATION

The ITSGF will be applicable throughout Spain, except for the Basque Country and Navarre which, because of their existing foral regimes, at the date of publication of this document, have not yet approved a similar tax.

## | WHO IS CONCERNED?

Taxpayers subject to the ITSGF will be residents in Spain with assets exceeding 4,000,000 Euros and non-residents in Spain subject to the ITSGF by real obligation whose assets exceed 3,000,000 Euros.

With regard to the taxation of non-residents with real estate in Spain, following the entry into force of the new wording of Article 5 of the Capital Gains Tax Law, non-residents holding securities representing equity interests in any type of foreign entity, not traded on organised markets, at least 50% of whose assets are made up, directly or indirectly, of real estate located in Spanish territory, will be subject to ITSGF by real obligation.

## | TYPES OF TAXATION

However, this tax liability must be considered in the light of the provisions of the Double Taxation Conventions (DTC) signed by Spain. Thus, two situations must be distinguished regarding the taxation of non-residents with real estate in Spain:

## - Taxation of non-residents owning property in Spain -

### 1.-Non-residents of countries without DTC or with DTC not covered by the Capital Gains tax law / ITSGF

Taxpayers resident in these countries will be taxed under both the IP and the ITSGF by real obligation for all their assets and rights located in Spanish territory, including those shares in non-resident companies more than 50% of whose assets are made up of real estate located in Spanish territory.

Albania, Andorra, Australia, Barbados, Brazil, Cabo Verde, Qatar, USA, China, South Korea, Philippines, Finland, Hong Kong, Irland, Italy, Jamaica, Japan, Malaysia, Malta, New Zealand, Oman, Pakistan, Poland, Portugal, Dominican Rep., Rumania, Senegal Singapore, Thailand, Turkey and Trinidad and Tobago

### 2.- Non-residents of countries with a DTC that have a Capital Gains Tax/ITSGF

#### 2.1. Non-residents of countries with a DTC without a section on real estate companies

They will only be taxed under Capital Gains Tax and ITSGF for the ownership of real estate located in Spain. Consequently, they will not be taxed under Capital Gains Tax / ITSGF for the ownership of shares in non-resident companies more than 50% of whose assets are made up of real estate located in Spanish territory.

Argelia, Argentina, Austria, Bolivia, Bosnia and Herzegovina, Bulgaria, Canada, Chile, Cyprus, Colombia, Costa Rica, Croatia, Cuba, Czech Republic, Denmark, Ecuador, Estonia, Greece, Holand, Hungary, Indonesia, Iran, Latvia, Lithuania, Morocco, Nigeria, North Macedonia, Russia, Serbia, Slovakia, Sweden, Suiza, Tunisia, United Arab Emirates, Venezuela

#### 2.2. Non-residents of countries with a DTC with a section on real estate companies

They will be taxed under Capital Gains Tax and ITSGF on the ownership of all the real estate located in Spain, including the ownership of shares in resident and non-resident companies more than 50% of whose assets are made up of real estate located in Spanish territory.

Germany, Saudi Arabia, Armenia, Azerbaijan, Belgium, Belarus, Egypt, France, El Salvador, Slovenia, Rep.of Georgia, Kazakhstan, Kuwait, Panama, Uruguay, India, Iceland, Israel, Luxembourg, Mexico, Moldova, Norway, United Kingdom, South Africa, States of the former USSR not mentioned above (except Russia) and Uzbekistan.

### | POTENTIAL UNCONSTITUTIONALITY

Finally, it should be noted that the regional governments of the Autonomous Community of Madrid, the Xunta de Galicia and the Junta de Andalucía have lodged appeals against this tax before the Constitutional Court, which have been admitted for processing, on the grounds of a more than possible violation of the principles of legal certainty and legitimate trust, economic capacity and non-confiscation, double taxation, as well as the political and financial autonomy of the Autonomous Communities. The Region of Murcia has joined this initiative by presenting an appeal of unconstitutionality which was submitted for deliberation on 9th May, having finally been admitted for processing, so that everything points to the future unconstitutionality of the tax. In this regard, our recommendation, pending the future pronouncements of the Constitutional Court, is to present the self-assessment of the tax, paying in the amount due and, once the unconstitutionality of the tax has been declared, to request the corresponding refund of undue income.

# Special Regime for workers posted to Spanish territory *- Beckham Law 2023 -*

*Analysis of the amendments introduced in the Startups Law in the objective and subjective scope in relation to the Personal Income Tax Act*

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To improve the conditions of application of the Special Tax Regime for workers posted to Spanish territory (better known as the Beckham Law), amendments are introduced in the 28/2022 on the promotion of the start-ups Law (hereinafter, "Startups Law") in the objective and subjective scope in relation to the Personal Income Tax Law (hereinafter, "LIRPF").

With effect from 1st January 2023, through the amendment of Article 93 of the LIRPF, the tax benefits for workers posted to Spanish territory are as follows:

- The general personal income tax base is taxed at a flat rate of 24% (up to €600,000);
- Tax is only payable on income generated in Spain, apart from earned income, which must always be taxed in Spanish territory;
- Wealth Tax ("IP") is only payable on assets and rights held in Spain, as is the case with the Large Wealth Tax ("IGF");
- There is no obligation to file form 720 during the years in which the special regime of the Beckham Law applies.

# New grounds for relocation to Spain the application of the scheme allows

- The requirements for the application of the scheme, from the current period onwards, are as follows -

## 01

To apply this regime, it will be sufficient for the taxpayer not to have been a tax resident in Spain in the 5 tax years prior to the date of their move to Spain (previously 10 years).

## 02

That moving to Spanish territory takes place, either in the first year of application of the scheme or in the previous year, for one of the following reasons:

1. As a consequence of an employment contract or of an order for the employee to move to Spain by his employer.
2. Working remotely from Spain, at the will of the taxpayer, through the exclusive use of computer, telematic and telecommunication means and systems, i.e., teleworking. On this point, two cases are differentiated:

a) In the case of third country workers, they will need to have an international telework visa ("digital nomad visa").
b) In the case of EU workers, for the time being, no permit will be required, nor do any requirements appear to be specified.

## 03

Company administrators (domestic or foreign), irrespective of the percentage shareholding held, except in the case of an asset-holding entity.

## 04

Carrying out an economic activity in Spain that qualifies as an entrepreneurial activity.

## 05

Highly qualified professionals, who provide services in Spain to emerging companies or who carry out training, research, development and innovation activities, receiving a remuneration that represents more than 40% of the total business, professional and personal work income.

## 06

The taxpayer's family members may also opt to benefit from this scheme for the spouse of the person moving to Spanish territory, as well as for their children under 25 years of age or whatever their age in the case of disability.

### | HOW TO BENEFIT FROM THIS SCHEME?

The option, waiver or exclusion from the special regime is made by means of form 149, the deadline for application of the regime being six months from the date of commencement of the activity stated in the registration with the Social Security in Spain or in the documentation that allows, where applicable, the maintenance of the Social Security legislation of origin.

However, as of today, the conditions for applying and requesting the scheme for the new cases introduced have not been specified, and it is not possible to communicate the option for the scheme in these cases and must wait for the publication of the Ministerial Order enabling the corresponding procedure.

### | DIGITAL NOMAD VISA

Regarding the visa for international teleworkers ("digital nomad visa"), 14/2013 Law, of 27th September, on support for entrepreneurs and their internationalisation ("14/2013 Law"), establishes the possibility of applying for a visa for international telework for those nationals of third countries who carry out a remote work or professional activity for companies located outside the national territory, through the exclusive use of computer, telematic and telecommunication means and systems. In this regard, we must emphasise that this visa can only be applied for by nationals of third countries, and therefore this visa cannot be applied for by EU nationals.

In this sense, although the international telework visa can be applied for in the case of exercising an employment or professional activity, the special regime of the Beckham Law establishes the application of this regime only to those workers who are employees, i.e., who maintain an employment relationship with a company because of an employment contract.

This has an implication since, according to 14/2013 Law, in the case of the exercise of an employment activity, the holder of the authorisation for international teleworking may only work for companies located outside the national territory. Therefore, those third-country nationals who want to opt for the special regime of the Beckham Law through the digital nomad visa, according to our opinion, must be employees who carry out their work activity remotely and whose employer is based outside the national territory.

Nevertheless, it should be noted that the IRPF regulations establish the possibility of benefiting from the special Beckham Law regime when the subject has an employment contract and the posting is ordered by the employer (i.e., there is a letter of posting) or, if not ordered by the employer, the work is carried out remotely, through the exclusive use of computer, telematic and telecommunication means and systems.

The LIRPF regulations establish the possibility of benefiting from the special Beckham Law regime when we are dealing with a person who has an employment contract and the posting is ordered by the employer or, if not ordered by the employer, the work activity is carried out remotely, through the exclusive use of computer, telematic and telecommunication means and systems.

# Tax regime for carried interest in the new start-up law

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The Start-Up Act has sought to regulate the performance fee earned by general partners/managers of private equity, venture capital and hedge funds, commonly known as carried interest.

Although this type of remuneration had already been regulated in the Basque Country and Navarre, the fact is that there was no such regulation in Spain, which contributed to the uncertainty surrounding carried interest and, ultimately, hindered the development and expansion of investment funds and similar structures established in Spain.

The Start-Up Act has, to a certain extent, alleviated the uncertainty existing to date, as the law now expressly provides for the classification of carried interest as earned income, establishing a favourable tax regime based on the 50% integration of the income obtained provided that certain requirements are met, in particular:

01 Firstly, the special economic rights granted must be in closed-end alternative investment funds as defined in 2011/61/EU Directive(venture capital and similar).

02 On the other hand, the recipient of the performance must be a director, manager or employee of the vehicle, management company or entities of its group (the participation can be either direct or indirect, this mention of indirect being a fundamental addition in relation to the first draft of the draft law).
One point that is not clear from the wording of the rule is whether the status of the recipient of the carried interest must be given at the time of the award of the performance or at the time of the actual payment.

03 Thirdly, a guaranteed minimum return is required for the remaining investors in the institution. This minimum guaranteed return must be defined in the rules or by-laws of the institution.

04 Finally, the units, shares or rights are required to be held for 5 years, unless:
(a) they are wound up early
(b) they cease to have effect because of a change of management body, or
c) they are transferred upon death.

In addition to the requirements mentioned above, the regulatory rule states that the application of the benefit will not be viable when the special economic rights do not come directly or indirectly from an entity resident in a country or territory classified as a non-cooperative jurisdiction, or with which there are no regulations on mutual assistance in the exchange of tax information in accordance with the provisions of the General Tax Law.

If all the requirements of the law are met, the tax regulation granted to the carried interest would, in principle, enable the taxpayer's effective personal income tax liability to be significantly reduced if the various requirements listed in the law are met.

# Developments in the regulation of stock options in the new start-up law

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Stock options represent a type of alternative remuneration to traditional remuneration systems that has been gaining ground in Spain in recent years, not only due to the beneficial tax regime provided for in personal income tax for this type of remuneration, but also because of their proven fit in the context of emerging companies or start-ups, imported from Anglo-Saxon countries.

The recently approved Law for the promotion of the start-up ecosystem (better known as the Start-up Act), in its task of promoting the activity of start-ups in Spain, did not want to miss the opportunity to improve the tax treatment of this type of remuneration.

Thus, through the measures adopted in 3rd FD of the regulation, the taxation of remuneration formulas based on the delivery of shares or participations to employees of start-up companies is improved. The measures embodied in the new rule are as follows:

- Firstly, the amount of the exemption is increased from 12,000 to 50,000 euros per year in the case of the delivery of shares or holdings to employees of business start-ups.

  This exemption would also be applicable when the delivery is the consequence of the exercise of purchase options previously granted to them.

  It is important to note that this exemption is applicable both to plans that remunerate in shares and to plans that remunerate in shares, so that the employees benefiting from this type of remuneration of a public limited company may also benefit from the exemption provided that the requirements for consideration as an emerging company are met at the time the option is granted.

- Secondly, for that part of the employment income in kind that exceeds the legally exempt amount, a special time imputation rule is established, which allows deferring its imputation until these instruments become liquid through the company's flotation on the stock exchange, their sale to third parties or until a period of 10 years has elapsed.

- Thirdly, the Startups Act introduces a special valuation rule for income from work in kind to clarify the value to be attributed to shares or holdings granted to employees of start-ups.

Thus, the rule provides that when shares or holdings are given to employees of start-ups, the income obtained will be valued at the value of the shares or holdings subscribed by an independent third party in the last capital increase carried out in the year prior to the year in which the shares or holdings are given to the employee.

In the absence of capital increase operations carried out in the previous year, the income in kind shall be valued in accordance with the general rule, i.e., at the market value of the shares or holdings at the time the worker receives them.

It is therefore clear that the legislator wanted to express in this new regulation its desire to encourage this type of remuneration in kind by improving its tax treatment, but also by trying to establish a clear framework of interpretation so that its application is generalised around start-up companies in Spain.

However, it should be noted that access to these benefits will be subject to the entity for which the employee works being considered as an emerging company in accordance with the provisions of the Start-Up Act.

# Cryptocurrency Taxation

*Answers to the binding consultations published by the General Directorate of Taxes (DGT) on cryptoassets*

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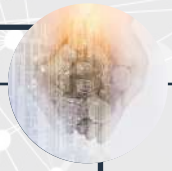
More and more users worldwide are interested in the blockchain environment and the world of cryptocurrencies, and Spain is no exception, which raises certain legal-tax issues surrounding the qualification of transactions with these assets.

Virtual currencies are a digital representation of value not issued or guaranteed by a central bank or public authority, not necessarily associated with a legal tender, which is not considered a currency or coin, but is accepted by natural or legal persons as a means of payment and can be transferred, stored or traded by electronic means.

In this context, with the use of virtual currencies as a means of exchange by society in general becoming increasingly frequent, some of the binding consultations published by the General Directorate of Taxes (DGT) on crypto assets are described below, which include the administrative doctrine published in this regard to date.


## 01 How is the purchase and sale of cryptocurrencies taxed for personal income tax purposes? What is the time of temporary imputation?

The sale of cryptocurrencies made outside an economic activity gives rise to a capital gain or loss for personal income tax purposes, which is taxed in the savings base, and which will be determined in accordance with personal income tax rules by the difference between the transfer and acquisition values. This change in assets must be allocated at the time of delivery, regardless of when the consideration is received, except in the case of a forward or deferred price transaction.



## 02 How are cryptocurrency exchanges taxed?

Exchanges between different cryptocurrencies generate a change in assets that must be declared as a gain or loss in personal income tax, in the savings base.

## 03 Is it possible to calculate a capital loss in the personal income tax derived from a virtual theft of cryptocurrencies and from the bankruptcy, fraud or swindle of the platform that stores them?

A virtual theft of cryptocurrencies or the bankruptcy or fraud of the platform that stores them, causes a capital loss that will be imputed to the general taxable base of the personal income tax declaration when the credit can be considered uncollectible from a tax point of view, i.e. when it is the subject of a write-off or out-of-court payment agreement within bankruptcy proceedings or when the period of one year from the start of the judicial proceedings other than bankruptcy proceedings aimed at the enforcement of the credit has expired without the credit having been satisfied.
The lodging of a complaint cannot be considered to constitute the commencement of legal proceedings for the enforcement of the claim.

## 04 How are cryptocurrencies declared in the wealth tax?

Bitcoins and other cryptocurrencies are treated in the same way for wealth tax purposes as foreign currency capital and should therefore be reported at their market value on the accrual date (31st December).

## 05 If the taxpayer loses his status as a personal income tax contributor due to a change of residence, would the Exit Tax rules be applicable to him with respect to the cryptocurrencies he owns?

For personal income tax purposes, Bitcoins are not shares or units, so the Exit Tax rules would not apply.

## 06
## For the purposes of calculating the change in personal income tax liability arising from the purchase and sale of cryptocurrencies, are the purchase and sale commissions considered, and in the case of partial sales, which cryptocurrencies are transferred first?

Commissions paid on the purchase and sale of cryptocurrencies at exchanges are included in the calculation of the capital gain if a direct relationship to the transaction is established. Bitcoins that can be counted in units or fractions of units originate from the same specific protocol and all have the same characteristics and are the same, which makes the different units or fractions of units of Bitcoin homogeneous goods. In partial sales, the cryptocurrencies that are transferred are those acquired first (FIFO method).

## 08
## How is the collection of crypto assets as consideration for certain online trading activities taxed?

Crypto assets acquired by an individual as consideration for certain online commercial activities (tutorials, promotion, influencer) must be included as a capital gain in the general personal income tax base. Subsequent transfer for another cryptocurrency or for euros (or another currency) will be taxed as an exchange or transfer, respectively.

## 07
## How is the free transfer of cryptocurrencies taxed?

The free transfer of cryptocurrencies is subject to inheritance and donation tax and its taxable base will be made up of the market value of the items transferred at the time of the transfer.

## 09
## Would the conversion of Bitcoin to euros by a non-resident individual be taxable in Spain?

Bitcoin is an intangible asset, so there is no point of connection with Spain in its sale by a non-resident unless the entity providing the storage services through websites is resident in Spain.

## 10
## Do cryptocurrencies count as non-productive elements for the purposes of the joint personal income tax–wealth tax limit?

For the purposes of determining the assets that are excluded in the calculation of the limit on the gross tax liability, their “nature or purpose” at the time of accrual of the tax must be considered. In this respect, those assets which, at that time, do not produce income taxed by the LIRPF, although later they may be subject to or used for income-earning transactions, shall not be taken into account in the calculation of the limit mentioned earlier.

The determination of the assets likely to produce income taxed by Personal Income Tax is a question of fact, and those that are not likely to produce such income will not be considered when calculating the joint limit of the Personal Income Tax Act.

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