



Downturn planning: general Spanish tax points

This briefing summarises the typical tax subjects arising in downturn planning: reducing taxable profits for the year 2009 in combination with the carry-forward of tax losses, tax aspects involved in restructurings and additional legislative changes triggered by the financial crisis.

Introduction

This briefing sets out in general terms some potentially relevant tax points that may arise in the current economic climate for corporate taxpayers located in Spain. In these times of uncertainty and global recession, managing cash and protecting valuable assets are clearly of primary importance.

Tax losses

Tax losses can be carried forward for 15 years. No carry-back of losses is permitted.

Groups of companies should consider carefully whether their corporate and tax structures may result in tax losses being made in one part of the group (no cash benefit) while taxable profits are realised in other parts of the group (actual cash tax leakage). Should that be the case, the group may want to consider electing to be taxed as a tax group under the tax consolidation regime. This regime could also improve the group's cash position because no withholding tax would apply on interest and dividend payments within the group.

Realised losses will reduce the balance sheet net equity position, something that may lead to non-deductibility of interest due on related-party debt based on thin-capitalisation rules. These effects should be monitored during the financial year.

Reducing taxable profits for 2009

Typical ways of reducing taxable profits for 2009 without restructuring the taxpayer's operation would be as follows:

- given that no carry-back of losses is permitted, taxpayers may consider changing their fiscal year so that profits and losses are realised in the same tax period (taking into account not only the final tax due but the payments in advance that should be made during the fiscal year);
- exploring strategies to reduce or defer the recognition of taxable income – for example, by allocating the taxable income on a cash basis in deferred-payment transactions (which can be structured with efficient payment guarantees and alternative liquidity options);
- analysing the use of hybrid products as an efficient alternative to reduce the taxable profits for 2009;
- using the free depreciation relief facility for new assets acquired in 2009 and 2010 that was introduced on 1 January 2009;
- taking advantage of tax incentives and credits available when certain types of investments are made. For instance, research and development, renewable energy assets and film investments tax credits can create significant tax savings. In certain cases, these tax credits may be refundable, resulting in an immediate cash-flow saving; and
- effectively applying the re-investment tax credit scheme, under which capital gains derived from the transfer of certain qualifying assets are taxable in the tax period of the disposal, but give rise to a tax

credit of 12 per cent of the amount of the relevant capital gain provided that the proceeds of the disposal are re-invested in certain qualifying assets. The tax credit will be deductible from the taxpayer's gross tax liability in the tax period in which the re-investment is made.

In considering these steps, an estimate of 2009 taxable profit and how it breaks should be taken into account, as well as the effect of carry-forward rules and their limitations in time.

Transfer pricing

In the economic downturn, transfer pricing policies should now be 'front of mind' for multinational enterprises. Economic downturns present opportunities to review the tax efficiency of internal operations.

With the likelihood of losses growing, losses incurred in related-party transactions should be taken into account in the context of transfer pricing compliance. The resulting challenge for taxpayers will be to justify the commercial nature of the loss and to have documentation to support transfer prices.

Decrease in value of shareholdings

From 1 January 2009, any decrease in value of shareholdings in resident and non-resident subsidiaries will be deductible for Spanish tax purposes, regardless of its accounting treatment.

Restructurings

Companies in financial distress may be forced to restructure their outstanding debt or sell off assets. These types of restructurings may have a substantial tax effect and should therefore be carefully analysed.

Profits realised by restructuring indebtedness, selling shares in operating subsidiaries and selling business assets are in general treated as taxable income. To the extent that the relevant taxpayer has sufficient tax losses available there should not be any actual tax payable. Care should be taken that available tax losses are not lost as a result of restructurings that may result in a tax group break.

In the sale of shares, prior distribution of dividends may reduce the seller's taxable gain if domestic dividend tax credits are applied. In addition, the potential application of the roll-over regime to mergers, spin-offs, exchange of shares and other restructuring transactions should also be taken into account.

On the other hand, losses realised upon restructurings and sales of shares and assets will in principle be considered tax deductible.

In the case of real estate assets or real estate companies (or deemed real estate companies that own certain movable assets), special attention should be paid to the application of Spanish transfer tax and/or stamp duty. In principle, certain restructuring transactions will not be subject to Spanish capital duty or will be subject to, but exempt from, transfer tax and stamp duty.

VAT

VAT taxpayers may consider applying for the monthly VAT refund regime that was introduced by the Spanish government from 1 January 2009.

In the case of a sale of business assets, it is important to consider carefully whether the transfer may not be subject to VAT under the going concern non-taxable event for VAT purposes and the legislative changes introduced from 1 January 2009.

Alternatives to defer payment of VAT to the Spanish treasury may also be considered by VAT taxpayers.

Legislative changes

Apart from the legislative measures that have been introduced from 1 January 2009, other areas in which changes have been introduced or proposed are:

- reduction of late payment interest rate from 7 to 5 per cent;
- new accounting rules: care should be taken over the transitional regime approved on December 2008 that allows organisations to defer the tax impact of the first application of the new Spanish accounting rules for up to three years; and
- REIT scheme (*Socimi*): Spain is implementing a REIT scheme that will assist institutions that hold a high number of properties derived from unpaid mortgages.

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For further information please contact

Silvia Paternain
Tax partner
Restructuring and insolvency
(R&I) task force
T +34 91 700 3700
E silvia.paternain@freshfields.com

Adolfo Zunzunegui
Tax counsel
R&I task force
T +34 91 700 3700
E adolfo.zunzunegui@freshfields.com

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