

Spain



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TAX AUTHORITIES

1. What are the main authorities responsible for enforcing taxes on corporate transactions in your jurisdiction?

Central tax administration

The Spanish Tax Agency (*Agencia Estatal de la Administración Tributaria*), a body within the Ministry of Economy and Treasury (*Ministerio de Economía y Hacienda*), heads the central tax administration. The Spanish Tax Agency enforces (except in the Basque Country and Navarra):

- Corporate income tax (CIT) (see *Question 4*).
- Value added tax (VAT) (see *Question 5*).
- Non-resident income tax (see *Question 7, CIT*).

Autonomous regions (*Comunidades Autónomas*)

The 17 autonomous regions have their own tax authorities which levy, in their jurisdictions:

- Transfer tax (*Impuesto sobre Transmisiones Patrimoniales*) (see *Question 3, Transfer tax*).
- Stamp duty (*Impuesto sobre Actos Jurídicos Documentados*) (see *Question 3, Stamp duty*).
- Capital tax (*Impuesto sobre Operaciones Societarias*) (see *Question 3, Capital tax*).

The autonomous regions of the Basque Country and Navarra have their own tax systems and pass their own income tax laws (which are not considered in this Q&A). The European Court of Justice is currently examining whether the Basque Country's income tax laws may constitute illegal state aid (among others, *case C-428/06* and *C-434/06*).

Municipalities (*Ayuntamientos*)

The tax authorities of the municipalities (Spanish local authorities) enforce local taxes.

See box, *The tax authorities*.

2. Is it possible to apply for tax clearances or obtain guidance from the tax authorities before completing a corporate transaction? If yes, provide brief details, including whether clearance or guidance is binding.

Taxpayers can apply for tax clearances from the tax authorities by submitting a tax ruling request. The relevant authority must issue a ruling within six months (in practice, it may take substantially longer). Rulings are binding if issued before the relevant tax is due.

Any taxpayer in identical circumstances can rely on the ruling, unless the applicable legislation or case law is modified.

In particular, companies interested in accomplishing a tax neutral corporate reorganisation in Spain can confirm that there is a valid business purpose for the transaction through a ruling request and, therefore, that the tax neutral regime is available (see *Questions 20 and 26*).

MAIN TAXES ON CORPORATE TRANSACTIONS

3. What are the main transfer taxes and/or notaries' fees potentially payable on corporate transactions? In relation to each tax/fee identified, explain briefly:

- Its key characteristics.
- What triggers it.
- Who is liable.
- The applicable rate(s).

Transfer tax

As it applies to transactions between persons engaged in a trade or business, transfer tax is an indirect tax levied on certain leases over real estate, the transfer of real estate and certain rights *in rem* over real estate, to the extent that such real estate assets are located in Spain.

Transfer tax will apply if the relevant transaction is:

- Not subject to VAT.

- Subject to VAT and exempt from VAT (unless the exemption is waived (see Question 5)).

In addition, a transaction subject to capital tax will not be subject to transfer tax (see below).

Transfer tax on the transfer of real estate is levied on the value of the real estate at rates ranging from 6% to 7%, depending on the autonomous region where the real estate is located. The buyer must pay transfer tax on the transfer of rights and assets. It is not recoverable.

Transfer tax is also levied on transfers of shares or participations in the share capital of entities with more than 50% of their assets composed of real estate located in Spain. This is provided that, as a result of the acquisition, the acquirer will control, directly or indirectly, more than 50% of the entity's share capital (or increases its holding to over 50%). The tax rate on these transactions ranges from 6% to 7%.

Transfers of assets other than real estate will be subject to VAT.

Stamp duty

Stamp duty is levied on the:

- Grant of notarial deeds over a valuable right or asset which may be registered in a public register (for example, real estate property). The deed must be capable of registration with the:
 - Commercial Registry;
 - Land Registry;
 - Industrial Property Registry; or
 - Movable Assets Registry.
- Tax rates range from 0.5% to 2% and are applied to the value stated in the deed. The taxpayer is either the:
- buyer of the right or asset;
 - company that requests the document or in whose benefit the document is granted.
- Issue of bills of credit, promissory notes and other draft documents where those documents involve a transfer of funds (*función de giro*). The tax is determined by using a sliding scale to the face amount of the document. For example, a document with a face value of EUR200,000 (about US\$300,000) would be taxed at a 0.28% tax rate.
 - Issue of certain administrative documents. The applicable tax rate is 0.5%.

Stamp duty cannot be charged if capital tax or transfer tax is charged on the same transaction.

Capital tax

This is an indirect tax levied on certain corporate transactions. These include the incorporation, increase of share capital,

merger, split-off, winding-up, and/or share capital reduction of Spanish entities and the transfer of a company's effective seat of management to Spain. It also applies to the setting up of Spanish branches of foreign head offices. The company benefiting from the transaction generally pays the tax at a rate of 1%. However, the shareholders are liable in cases of share capital distributions and on the liquidation of the company.

Notarial and register's fees

Certain corporate transactions and transactions which require access to public registries, such as real estate transactions (see above, *Stamp duty*), must be granted before a Spanish notary public and registered in a public registry. The grant and the registration trigger non-substantial fixed notary and register's fees. Notary fees must be negotiated in advance with the notary public in the case of large transactions.

4. What are the main corporate and/or capital gains taxes potentially payable on corporate transactions? In relation to each tax identified, explain briefly:

- Its key characteristics.
- What triggers it.
- Who is liable.
- The applicable rate(s).

CIT

Spanish resident entities are subject to CIT on their worldwide profits at the general tax rate of 30%. A reduced rate of 25% applies to certain credit institutions and insurance companies. Some collective investment undertakings are subject to a 1% rate, and certain pension funds are taxed at 0%.

CIT is calculated by reference to the taxpayer's profit and loss account drawn up in accordance with generally accepted accounting principles in Spain, as adjusted under the CIT Law (see Question 38).

As a general rule, revenues and expenses are generally allocated on an accrual basis (that is, when they are actually generated) both for accounting and tax purposes.

Expenses are not deductible unless they are correctly recorded in the profit and loss account. Deductibility is expressly excluded for certain expenses such as returns of equity or expenses arising from arranging the calculation and payment of CIT. In addition, expenses in connection with services performed by persons or entities resident or paid through tax havens are non-deductible, unless the taxpayer provides evidence of the existence of the service (*CIT Law*).

Depreciation and amortisation expenses are deductible in relation to effective depreciation during the useful life of the assets. It is possible to amortise goodwill, trade marks and other intangible assets for tax purposes, within certain limits and subject to

certain requirements. Generally, goodwill is considered to be a deductible expense, provided that:

- It has not artificially arisen in a transaction between related parties (*see below*).
- It has arisen as a result of a transaction made for consideration.

Depreciation of financial goodwill (that is, goodwill resulting from share acquisitions) is deductible for:

- Certain acquisitions of shares representing the share capital of non-resident companies (*see Question 10*).
- Tax neutral company mergers, provided certain requirements are met (*see Question 20*).

There are certain exemptions, depending on the type of income received and the type of taxpayer. CIT taxpayers can elect to be taxed as a single taxpayer within a tax group (subject to certain requirements).

The CIT Law provides transfer pricing rules. These rules mainly establish a duty for related parties (such as parent companies and subsidiaries) to value their transactions at arm's length (that is, fair market) value.

The taxpayer must pay CIT during the first 25 calendar days following the six-month period after the end of the relevant fiscal year. Payments on account are made in April, October and December.

Losses can be carried forward for 15 years.

5. What are the main value added and/or sales taxes potentially payable on corporate transactions? In relation to each tax identified, explain briefly:

- Its key characteristics.
 - What triggers it.
 - Who is liable.
 - The applicable rate(s).
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VAT

Generally, VAT is levied on transfers of goods made or services provided by VAT taxpayers (that is, companies carrying out a trade or business, or that provide certain supplies within the EU or import goods). No VAT is levied in the autonomous region of the Canary Islands Ceuta and Melilla (Spanish enclaves in northern Africa). In these territories, other indirect taxes apply.

The supply of certain goods and services are exempt from VAT, including:

- Second and subsequent transfers of real estate (this exemption can be waived under certain circumstances).
- Financial transactions.
- Transfers of securities.

VAT rates depend on the type of goods delivered or services provided. The standard rate is 16%. Reduced tax rates (7% or 4%) apply to certain goods or services.

VAT taxpayers can deduct the input VAT paid within a taxable period from the output VAT collected within the same period. They must pay any excess of output VAT to the tax authorities. They can set off any excess input VAT against future output VAT or request a refund to be paid at the end of the following fiscal year. The tax authorities can delay the refund for up to six months. After that, they must pay late interest to the taxpayer.

A taxpayer that provides both exempt and taxable goods or services is usually entitled to recover input VAT on a pro rata basis.

Non-Spanish taxpayers have a special procedure to obtain a refund of input VAT paid on transactions that they perform within a taxable period. They must request the refund within six months of the end of the calendar year in which they paid VAT. The refund is limited to residents of EU member states and other states with reciprocal arrangements.

Capital tax and stamp duty can also apply to certain VAT taxable supplies (*see Question 3*). VAT and transfer tax cannot both be charged on a transaction. However, VAT can be charged if capital tax or stamp duty is also charged on the same transaction.

6. Are any other taxes potentially payable on corporate transactions? In relation to each tax identified, explain briefly:

- Its key characteristics.
 - What triggers it.
 - Who is liable.
 - The applicable rate(s).
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Local tax on the increase of value of urban land (*Impuesto sobre el Incremento de Valor de los Terrenos de Naturaleza Urbana (TIVUL)*)

The sale of urban real estate and certain rights *in rem* trigger TIVUL. Each municipality provides regulations within the framework set out in the Local Entities Financing Law.

The tax basis consists of the increase in the value of the urban land since its acquisition by the seller, depending on certain circumstances. The seller is liable to pay the tax. The rates vary but may not exceed 30% of the cadastral value (the rateable value of a property determined for these purposes by the government) of the land.

7. In what circumstances will the taxes identified in Questions 3 to 6 be applicable to foreign companies (in other words, what "presence" is required to give rise to tax liability)?

Transfer tax

Generally, a non-resident company is liable to transfer tax if it acquires real estate rights or assets located, exercisable or to be fulfilled in Spain (*see Question 3, Transfer tax*).

Stamp duty

Stamp duty applies on certain documents that are formalised or whose effects are triggered in Spain (see *Question 3, Stamp duty*).

Capital tax

Capital tax is levied on:

- A Spanish company's share capital distribution to a non-resident shareholder.
- The formation, distribution of shares and liquidation of a Spanish permanent establishment (PE) (see *below, CIT*) of a non-resident company, unless the non-resident company is established in an EU member state that levies a tax similar to Spanish capital tax.

In addition, capital tax is charged on the net equity of a non-resident company whose effective seat of management or corporate domicile is transferred to Spain (see *Question 3, Capital tax*).

CIT

Non-resident companies are liable to CIT on profits attributable to a Spanish PE (see *Question 4*).

A PE requires the existence of a fixed place of business from which the business activity of the company is partially or fully carried out. This includes:

- A place of management.
- A branch.
- An office.
- A factory.
- A workshop.
- A place of extraction of natural resources.

A PE also exists if the foreign entity has a dependant agent in Spain that:

- Acts on its behalf.
- Has and habitually exercises in Spain the authority to conclude contracts in the foreign entity's name.

The tax treatment of a Spanish PE is mainly based on the CIT Law's regulations. It is substantially the same as the treatment given to Spanish entities subject to CIT. However, the following payments that PEs make to their head offices are not tax deductible for the PE:

- Royalties, interest or commissions.
- Payments in consideration of technical assistance.
- Payments for the use of goods or rights.

A reasonable part of the management and general administration expenses that the head office incurs relating to the branch are deductible for the branch provided that certain requirements are met.

The Non-Resident Income Tax Law levies an 18% branch tax on the amount of profits the branch transfers to the head office. It applies unless the head office is resident in either:

- An EU member state (excluding tax havens for Spanish purposes, such as the Channel Islands, Isle of Man and certain Luxembourg entities).
- A country which has signed a tax treaty with Spain providing a reciprocal treatment on branch tax.

Non-resident companies without a PE in Spain pay non-resident income tax on their Spanish source income.

VAT

A non-resident company is charged VAT depending on where the supply occurs and taking into account the taxpayer rules (these mainly depend on the features of the supply and the location from which the supplier is acting) (see *Question 5*).

Non-resident companies may be required to register for VAT purposes in Spain if they:

- Make supplies of goods or services in Spain.
- Have a PE which is a Spanish VAT-taxable supplier (such as a warehouse).

TIVUL

A non-resident company is liable to TIVUL under the same terms as a Spanish resident company (see *Question 6*).

DIVIDENDS**8. Is there a requirement to withhold tax on dividends or other distributions? If yes, provide brief details.**

Dividends and profit distributions are withheld at an 18% rate. Payments are exempt if one of the following applies:

- The company making and the company receiving the payments are members of the same tax consolidated group.
- The receiving company has a shareholding of at least 5% in the paying company for at least one year prior to the date of payment.
- The receiving company is a non-Spanish shareholder entitled to the benefit of Directive 2003/123/EC amending Directive 90/435/EEC on the taxation of parent companies and subsidiaries.
- The payment is exempt under an internal exemption (for example, distributions of share premium, payments of interest to certain banks) or because an international tax treaty applies.

SHARE ACQUISITIONS AND DISPOSALS

9. What taxes are potentially payable on a share acquisition/ share disposal?

Transfer tax

Transfer tax is not levied on share disposals except on the transfer of control of (or the increase of control over) a company owning Spanish real estate (see *Question 3, Transfer tax*).

Stamp duty and VAT

Stamp duty and VAT do not apply as the public deed documenting a transfer of shares cannot be registered in a Spanish public registry and the transfers of securities are exempt from VAT (see *Questions 3 and 5*).

CIT

A company can be subject to CIT on capital gains arising from the disposal of shares. The tax base is generally calculated on the difference between the price received on the shares transferred and their tax book value (see *Question 4*).

10. Are any exemptions or reliefs available to the liable party? If yes, provide brief details.

The following exemptions and relief may be available:

- Under the special reinvestment deduction, a 12% tax reduction on the CIT rate from 30% to 18% is available for capital gains resulting from the transfer of fixed assets used in a trade or business that have been held for at least one year in advance to the transfer. The assets can be tangible or intangible, and include shareholdings of 5% in the equity of a company engaged in a trade or business. The proceeds must be reinvested within a certain time period in other eligible fixed assets. If only part of the proceeds is reinvested, the tax deduction is only partially available.
- Under a domestic participation exemption, a relief is available for a Spanish resident company's sale of shares in a Spanish company, if the seller has held a minimum 5% interest in the company's capital or net equity for at least one year. In that case, the seller is entitled to a full tax credit on the CIT payable on that part of the capital gain equivalent to the company's retained earnings during the time the seller was a shareholder, pro rata to the size of the seller's participation.
- A Spanish company's capital gain on the sale of shares in a foreign subsidiary is exempt from CIT under the participation exemption regime on foreign source capital gains and dividends, provided that the:
 - company holds a minimum 5% interest in the foreign subsidiary's capital or net equity. There is an alternative tax regime which is available for holding company called an *Entidad de Tenencia de Valores Extranjeros*

(ETVE). In that case, the ETVE also complies if it directly holds an acquisition interest in the foreign subsidiary of EUR6 million (about US\$9 million);

- company has held the interest (directly or indirectly) in the foreign subsidiary for at least one year (special rules apply for the purpose of calculating the time);
- foreign subsidiary is subject to and not exempt from a tax similar in nature to CIT and it is not resident in a tax haven country or jurisdiction. This requirement is met if the foreign subsidiary resides in a tax treaty country if the treaty includes an exchange of information clause. All tax treaties entered into by Spain qualify;
- the foreign subsidiary is engaged in an active trade or business outside of Spain. The subsidiary can generate passive income (for example, rental income) if it does not exceed 15% of its total turnover. A foreign subsidiary that acts as a holding company is deemed to be carrying out an active business where, in relation to its own foreign subsidiaries, it:
 - holds a minimum 5% interest; and
 - exercises management and control through proper human and material resources.

Should those foreign subsidiaries hold interests in other foreign subsidiaries, then they must comply with those requirements in relation to the lower tier subsidiaries.

- Where the seller and the purchaser are members of the same tax consolidated group, the capital gain arising from the sale of the shares is eliminated from the group's taxable base and the gain will not be taxed. However, it will be taxed if the:
 - shares are subsequently sold to a third company which is not a member of the tax consolidated group;
 - seller or purchaser ceases to be a member of the tax consolidated group.
- A regulated venture capital entity that sells shares in qualified active non-financial and non-listed affiliates can be exempt from 99% of the capital gain on sale. The sale must occur after the beginning of the second year and before the end of the fifteenth year (twentieth year in some cases) it has held the shareholding. In addition, regulated venture capital entities can obtain the relief available under the domestic participation exemption (see *above*). In the event of sales of shares in a venture capital entity by a non-resident shareholder (not located in a tax haven jurisdiction), the capital gain is not deemed to be obtained in Spain (see *Question 7, CIT*).
- It is possible to depreciate financial goodwill on the acquisition of shares of certain non-resident companies which meet the requirements set forth for the Spanish participation exemption (see *Questions 4 and 10*).

11. Please set out the tax advantages and disadvantages of a share acquisition for the buyer.

Advantages

A share acquisition has the following advantages for the buyer:

- Stamp duty and VAT do not apply to a transfer of shares (see *Question 9, Stamp duty and VAT*).
- Transfer tax only applies to certain sales of shares in companies owning Spanish real estate (see *Question 9, Transfer tax*).
- Losses of the acquired company can be carried forward to be offset against future profits. However, an anti-abuse provision places restrictions on offsetting losses, when there are no business reasons to purchase the company other than to take advantage of its tax losses (*CIT Law*).
- It is less complex, quicker, and less expensive in terms of execution costs than an asset acquisition.

Disadvantages

There are the following disadvantages of a share sale for the buyer:

- It is not possible to deduct embedded financial goodwill (this is the difference between the purchase price of the shares and their book value).
- The buyer may be taxed on embedded gains in a future sale of assets.
- There is no step up of the assets of the acquired company for tax or accounting purposes, unless a tax neutral merger between the buyer and the acquired company is implemented (see *Question 20*).
- Liability for unpaid taxes is transferred from the acquired company to the buyer, within the standard four-year statute of limitation. This liability may be limited by law in an asset acquisition.
- The cost of the debt the buyer incurs in the transaction may not be set off against the business profits of the acquired company (except if a tax group is formed (see *Question 13*)).

12. Please set out the tax advantages and disadvantages of a share disposal for the seller.

Advantages

There are the following advantages of a share sale for the seller:

- A tax deduction of 12% of the tax payable is available, subject to the reinvestment of the proceeds obtained (see *Question 10*).

- Full tax credit is available on the CIT payable on the part of the capital gain equivalent to the retained earnings generated by the Spanish company (see *Question 10*).
- The tax liabilities of the company being sold remain with the company and are transferred to the buyer (see *Question 11, Disadvantages*).
- The transaction is simpler, quicker and with lower execution costs than an asset sale.

Disadvantages

Tax liabilities may arise if the transferred company formed part of a tax group of companies, as taxable gains eliminated in prior years from the group's taxable base will reappear as adjustments subject to tax.

13. What transaction structures (if any) are commonly used to minimise the tax burden? Give brief details of the effect of each structure.

Leveraged buyout structures, using a newly incorporated Spanish vehicle company to acquire the shares in the target company, are fairly common. The vehicle is partially funded with intra-group and third party debt to make the acquisition. Once the target shares have been acquired, the buyer and the target company can form a tax group (see *Question 10*). In addition, they can enter into a tax neutral merger, subject to certain requirements (see *Question 20*).

The aim is to obtain tax advantages, similar to those on an asset transaction that cannot be achieved through a direct acquisition of the target. When the tax group is formed, the buyer's interest charges on the debt are deducted from the profits of the target company. The merger option offers the possibility of stepping up for tax purposes the fixed assets of the target company to their fair market value and recognising any existing goodwill (enabling depreciation) in the target company.

However, tax neutrality and other advantages on a merger only apply if the merger is made for valid business purposes other than merely generating a tax advantage. A ruling can be obtained from the tax authorities confirming the validity of the business purpose that drives the merger (see *Question 2*).

ASSET ACQUISITIONS AND DISPOSALS

14. What taxes are potentially payable on an asset acquisition/asset disposal?

Transfer tax and stamp duty

Stamp duty will be charged on the value declared on a deed of acquisition of real estate assets if the sale is subject to and not exempt from VAT (see *Question 3, Stamp duty*).

If the VAT exemption applies to the sale of real estate, and if it is not waived, the sale is subject to transfer tax (see *Question 3, Transfer tax*).

The transfer of real estate assets forming part of an ongoing business concern is subject to transfer tax.

CIT

A Spanish tax resident company's sale of assets is subject to 30% CIT on the gains (see *Question 4*). These capital gains can benefit from the reinvestment deduction (see *Question 10*).

VAT

Unless the business is sold as a going concern (see *below*), the sale of each asset must be analysed separately as the VAT treatment depends on their specific qualification for VAT purposes. Generally, the sale of assets is subject to VAT at the standard rate of 16% (see *Question 5*).

Transfers of a business as a going concern are not subject to VAT, but are subject to transfer tax (see *above*, *Transfer tax and stamp duty*).

Second and subsequent transfers of real estate located in Spain are considered VAT exempt transactions (*VAT Law*) (see *Question 5*). However, the seller can waive this exemption and charge output VAT if the:

- Buyer provides the seller with a written declaration and a certification of being a VAT taxpayer entitled to deduct all the input VAT borne on the sale.
- Seller formally notifies the buyer of the waiver on or before the sale is executed.

In that case, the sale of real estate is subject to VAT at the 16% rate.

TIVUL

TIVUL is levied on the sale of urban real estate (see *Question 6*).

15. Are any exemptions or reliefs available to the liable party? If yes, provide brief details.

The seller may benefit from the reinvestment deduction on the capital gain resulting from the transfer of fixed assets (see *Question 10*).

16. Please set out the tax advantages and disadvantages of an asset acquisition for the buyer.

Advantages

The buyer has the following advantages on an asset acquisition:

- Step up of the tax value of the assets acquired.
- Deduction of goodwill is available (see *Question 4*).
- It may have access to the accelerated amortisation of assets acquired under the second-hand amortisation scheme, which enables the taxpayer to apply a double amortisation rate.

- Transfer tax on the transfer of real estate only applies to the extent that it is not possible to waive the VAT exemption or within a transfer of an ongoing business concern (see *Question 14*).
- It can avoid responsibility for tax liabilities of the acquired entity.
- It can deduct interest charges on debt financing directly from the profits that the acquired entity generates.

Disadvantages

The buyer has the following disadvantages on an asset acquisition:

- VAT represents a cost for the buyer, if it is not entitled to fully deduct the input VAT (see *Question 14*, *VAT*).
- It may be liable to stamp duty, depending on the nature of the assets purchased (see *Question 14*, *Transfer tax and stamp duty*).
- The allocation of the purchase price among the purchased assets may be costly and complicated.

17. Please set out the tax advantages and disadvantages of an asset disposal for the seller.

Advantages

The seller has the following advantages on an asset disposal:

- A deduction is available under the tax reinvestment regime (see *Question 10*).
- The seller may offset any capital gains with existing carry forward losses.

Disadvantages

The seller has the following disadvantages on an asset disposal:

- Full tax credit on the CIT payable on the part of the capital gain equivalent to the retained earnings is not available (see *Question 10*).
- The tax rate applicable to an individual selling its shares in the target entity holding the assets may be lower than that applicable to the target entity if it sells the asset.

18. What transaction structures (if any) are commonly used to minimise the tax burden? Give brief details of the effect of each structure.

For companies holding real estate assets, it is common to implement structures seeking to avoid transfer tax. Companies can be reorganised before selling the assets by demerging the assets that are going to be sold from the assets that are remaining in the company. The shares in the demerged entity are sold instead of the assets. The tax authorities can question whether these reorganisations have valid business purposes under the tax neutral regime (see *Question 20*).

In addition, steps may be taken to ensure that the transaction does not qualify as a transfer of an ongoing business concern, by one of the following methods:

- Using multiple buyers.
- Selling the real estate assets in isolation.
- Not disposing of all the assets originally forming the business concern.

LEGAL MERGERS

19. What taxes are potentially payable on a legal merger?

Transfer tax, stamp duty and VAT

Legal mergers can be subject to transfer tax, stamp duty and VAT as a transfer of all the assets and liabilities of the transferring company (see Questions 3 and 5).

Capital tax

The receiving company is liable for capital tax on the value of the capital increase resulting from the issuance of shares allocated to the shareholders of the transferring company (see Question 3, *Capital tax*).

CIT

The entity transferring the assets will trigger a capital gain on the difference between the market value of the assets transferred and their tax book value (see Question 4).

Shareholders of the transferring company being merged into the receiving company may obtain a capital gain on the difference between the market value of the shares received and the tax book value of the shares cancelled.

TIVUL

The receiving company will be liable for TIVUL if Spanish land is transferred (see Question 6).

20. Are any exemptions or reliefs available to the liable party? If yes, provide brief details.

There is a special tax regime for mergers, demergers, special in kind contributions and share exchanges (based on Directive 90/434/EEC on the common system of taxation applicable to mergers, divisions, transfers of assets and exchange of shares concerning companies of different member states) that allows for tax neutral reorganisations (*CIT Law*). In that case, CIT does not apply to the parties involved in the transaction (see Question 4). The receiving company will value for tax purposes the assets acquired from the transferring company at their tax value in the transferring company. The shareholders will value for tax purposes the shares received at their tax book value. Tax neutrality applies to any indirect taxes that would have been levied, such

as capital tax, VAT and transfer tax (see Questions 3 and 5). In addition, TIVUL is not levied (see Question 16). However, the exemption from VAT and TIVUL does not apply to special in kind contributions.

The tax neutral regime applies if there are sound business reasons for the merger other than merely to achieve a tax advantage. The tax authorities can confirm this through a binding ruling (see Question 2).

21. What transaction structures (if any) are commonly used to minimise the tax burden? Give brief details of the effect of each structure.

Not applicable.

JOINT VENTURES

22. What taxes are potentially payable on establishing a joint venture company (JVC)?

Spanish law provides a number of legal entities, mainly known as corporations and partnerships, which may be used as JVCs. Both corporations and partnerships are subject to tax on their income. The taxation is similar to that for a Spanish corporate vehicle used to leverage share acquisitions (see Question 13).

Other kinds of associations, most of which lack legal (and tax) personality, are available:

- **Temporary Union of Undertakings (*Unión Temporal de Empresas (UTE)*)**. These entities are often used in public work construction projects. Tax is not payable on establishing a UTE. In addition, the formation, increase and decrease of the UTE's operational funds, and the dissolution and winding-up of the UTE are exempt from capital tax (see Question 3, *Capital tax*).

UTES are subject to CIT (*CIT Law*) (see Question 4). They are not taxed under the general CIT provisions but under a special tax regime, the main characteristic of which is tax transparency. Profits corresponding to resident members are taxed at their level. Profits corresponding to non-resident members are taxed at the UTE level at the general 30% CIT rate (see Question 4). Profits that the UTE distributes to its non-resident members are subject to non-residents income tax, at the rate of 18% or at the reduced tax rate set forth in the applicable tax treaty, if any.

- **Economic Interest Group (EIG)**. This has legal personality separate from its members and seeks to complement or improve its members' activities. The EIG's taxable income, as well as the applicable tax credits and the entity's payments in advance, are imputed to its Spanish-resident members. The EIG entity is exempt from any payment in respect of the tax. In addition, negative taxable income or tax losses are also imputed to resident members without limitation. The establishment of an EIG is exempt from capital tax.

If its members are non-residents, the EIG is subject to corporation tax on the taxable income imputable to such members at the 30% rate. The tax treatment of the subsequent distribution of profits is the same as for dividends (see *Question 8*).

- **Co-operative agreements governed by specific rules, such as participative accounts (*cuentas en participación*).** In that case, a silent investor provides funding in exchange for a share in the profits (and losses) of the principal. Most of these associations allocate their taxable income to their members. However, the tax analysis may differ when the member is a non-resident entity. Capital tax is payable on the establishment of a co-operative agreement.

23. Are any exemptions or reliefs available to the liable party? If yes, provide brief details.

There are no specific exemptions or reliefs applicable to the liable party. However, general exemptions and reliefs are applicable to the JVC (see *Question 10*).

Services that UTEs and EIGs provide to their members can be exempt from VAT, provided that certain requirements are met (see *Question 5*).

24. What transaction structures (if any) are commonly used to minimise the tax burden? Give brief details of the effect of each structure.

Capital increases are subject to 1% capital tax (see *Question 3, Capital tax*). In the case of a JVC, it is common for the partners to make in kind contributions to the JVC. In this context, the in kind contribution can be made under the tax neutral reorganisation scheme (see *Question 20*). This can be done as one of the following:

- A contribution of a branch of activity.
- A contribution of shares, as:
 - an exchange of shares;
 - a special contribution in kind.

The JVC may also result from a tax neutral merger or demerger of entities (see *Questions 20 and 29*).

In all of these cases, capital tax is not due on the capital increase.

COMPANY REORGANISATIONS

25. What taxes are potentially payable on a company reorganisation?

Company reorganisations include a great variety of transactions which have a diverse tax treatment, including the following, which are regulated by Spanish law:

- Capital decreases with reimbursement of contributions to shareholders.

- Distributions of the share premium to shareholders.
- Mergers (see *Question 19*).
- Demergers (see *Question 28*).
- Special in kind contributions (see *Question 24*).
- Share exchanges.

CIT

The entity transferring the assets can obtain a taxable capital gain (or deductible loss) on the difference between the market value of the assets and their book value (see *Question 4*).

The tax treatment of the receiving party depends on the nature of the transaction. Where there is a capital reduction with reimbursement of contributions to shareholders, the reimbursement decreases the tax cost basis of the affected shares. There is taxation only if the amount distributed (the fair market value of the assets distributed), exceeds the acquisition price (or tax cost basis) of the shares in the company reimbursing the contributions.

This tax treatment also applies to distributions of share premium (although in this case withholding tax is not levied on the value of the distributed assets). On the company reimbursing the contributions or distributing the share premium there may be a capital gain (or deductible loss) on the difference between the market value of the assets distributed and their book value.

In the case of mergers, demergers and shares exchanges, the shareholders of the transferring company disposing of the assets may obtain a capital gain (or deductible loss) on the difference between the market value of the shares received and the tax book value of the shares cancelled.

Transfer tax, capital tax, VAT and TIVUL

These taxes may be payable, depending on the nature of the reorganisation (see *Questions 3, 5 and 6*).

26. Are any exemptions or reliefs available to the liable party? If yes, provide brief details.

Reorganisations may benefit from the tax neutral regime (see *Question 20*). The tax-neutral regime does not apply to capital decreases with reimbursement of contributions to shareholders, or to distributions of the share premium to shareholders.

27. What transaction structures (if any) are commonly used to minimise the tax burden? Give brief details of the effect of each structure.

Not applicable.

DEMERGERS

28. What taxes are potentially payable on a company demerger?

See *Question 25*.

29. Are any exemptions or reliefs available to the liable party? If yes, provide brief details.

See *Question 20*.

30. What transaction structures (if any) are commonly used to minimise the tax burden? Give brief details of the effect of each structure.

Not applicable.

SHARE BUYBACKS

31. What taxes are potentially payable on a share buyback?

Transfer tax

Transfer tax is potentially payable on a share buyback (see *Question 3, Transfer tax*).

Capital tax

The reduction of share capital by amortising treasury shares acquired from the shareholders is subject to capital tax. However, the tax base is equal to zero. Therefore, there is no taxation for the company amortising the shares following a share buyback. There will be a 1% capital tax on the value of the proceeds received by the shareholders if the shares are amortised in the context of a reduction of share capital.

CIT

The company selling the shares may obtain a capital gain (or deductible loss) on the difference between the market value of the shares and their tax book value. There is no taxable income or deductible loss for the company which acquires its own shares for their amortisation (see *Question 4*).

32. Are any exemptions or reliefs available to the liable party? If yes, provide brief details.

There are no specific rules. The transfer of the shares to the company may benefit from general tax deductions (see *Question 10*).

33. What transaction structures (if any) are commonly used to minimise the tax burden? Give brief details of the effect of each structure.

There are no commonly used structures.

THE TAX AUTHORITIES

Spanish Tax Agency (*Agencia Estatal de la Administración Tributaria*)

Contact details.

T +34 91 583 70 00 (switchboard)
+34 901 33 55 33 (general tax information)
W www.aeat.es

Contact for tax clearances. Applicants should contact the following:

General Directorate of Taxes (*Dirección General de Tributos*)

Contact details.

T +34 91 583 70 00
W www.meh.es/Portal/Areas+Tematicas/Impuestos/Direccion+General+de+Tributos

Autonomous regions (*Comunidades Autónomas*) and Municipalities (*Ayuntamientos*)

The 17 autonomous regions and the municipalities have their separate tax authorities, with differing contact details.

TREASURY SHARES

34. What are the tax implications for companies of holding their own shares in treasury?

There are no specific tax implications for companies of holding their own shares. A company may purchase its own shares and either hold them, sell them to a third party or amortise them in the context of a capital reduction. As of January 2008, these transactions do not trigger accounting profits or losses for the company. Therefore, CIT will not arise.

PRIVATE EQUITY FINANCED TRANSACTIONS: MBOS

35. What taxes are potentially payable on a management buyout (MBO)?

The tax treatment of MBOs does not differ from the general rules. Therefore, the taxes that arise are similar to those that arise on an ordinary share acquisition (see *Question 9*).

Stamp duty and VAT

Not applicable (see *Question 5*).

Transfer tax

Transfer tax can apply to certain transactions involving companies that own shares in real estate (see *Question 3, Transfer tax*).

Capital tax

Capital tax may be payable if the acquisition is accomplished through a newly incorporated Spanish company (see *Question 3, Capital tax*).

CIT

A company can be subject to CIT on capital gains arising from the disposal of shares (see *Question 4*).

A debt to equity ratio of 3 to 1 applies to net remunerated debt finance provided by related parties not resident in Spain (unless the lender resides in an EU member state).

36. Are any exemptions or reliefs available to the liable party? If yes, provide brief details.

See *Question 10*.

37. What transaction structures (if any) are commonly used to minimise the tax burden? Give brief details of the effect of each structure.

See *Question 13*.

REFORM

38. Please summarise any proposals for reform that will impact on the taxation of corporate transactions.

On 1 January 2008, new Spanish accounting rules entered into force. The new rules bring the Spanish accounting system more in line with international accounting standards. As CIT is calculated by reference to the taxpayer's profit and loss account, this reform of the Spanish accounting rules could trigger further tax consequences, although this is not the intention of the reform (as it is intended to be neutral from a tax standpoint).

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