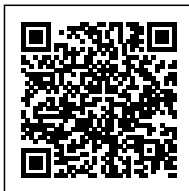


# NEW CORPORATE TAX AMENDMENTS - HERBERT SMITH FREEHILLS

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**Spanish Parliament recently approved Law 16/2013, October 29<sup>th</sup>, 2013, on certain measures related to environmental taxation and other tax and financial measures. Although it might seem that the main measures introduced by Law 16/2013 should relate to environmental taxation, a number of significant amendments also affect Corporate Income Tax, which have generated a greater degree interest in the Spanish market.**

The most significant change made has been the elimination of tax deductions for losses resulting from the impairment of stakes held in the share capital of other companies (whether Spanish or not), with effect in respect of the financial years falling on or after January 1<sup>st</sup>, 2013. In effect, and subject to certain requirements, to date Spanish companies were entitled to deduct tax losses from the impairment of stakes held in other companies, even if, in the case of group subsidiaries, no impairment was recorded for accounting purposes.

However, and with the objective of avoiding double deduction of losses (ie at the subsidiary level and, subsequently, at the shareholder level), such deduction will no longer be possible. However, a transitional regime has been introduced in respect of the amounts deducted prior to January 1<sup>st</sup>, 2013.

That said, losses crystallised upon the sale to third parties of the relevant shares should be deductible for tax purposes, although new rules are established where dividends have been previously distributed. In effect, the amount of losses that may be deducted for tax purposes will in some circumstances be reduced for the amount of dividends received from the relevant company in any financial year beginning after January 1<sup>st</sup>, 2009.

However, and in order to avoid impairment losses being deducted through the sale of the shares to another company of the group, Law 16/2013 establishes that computation of losses crystallised in intra-group transfers will be deferred to the financial year in which the shares are transferred to a third party or when the acquiring entity ceases to be part of the group.

A similar regime is also established in the case of permanent establishments and, thus, losses obtained by permanent establishments outside Spain will no longer be deductible for tax purposes, unless such losses crystallise as a result of the transfer or closure of the permanent establishment.

Moreover, Law 16/2013 introduces some amendments to the special tax neutral regime established for corporate reorganisations. Since the merger difference resulting from an upstream merger may either step-up in value for tax purposes the assets or be regarded as a tax-deductible goodwill (subject to compliance with certain requirements), Law 16/2013 establishes that such merger difference will be reduced by the amount of any tax losses pending carry-forward of the absorbed entity generated during the holding period and which are transferred to the absorbing entity.

Finally, Law 16/2013 extends the application of certain temporary measures that had been previously introduced and that were originally applicable up to 2013.

In particular, and aside from other temporary restrictions (eg tax deduction of depreciation charges, tax deduction of goodwill, etc), Royal Decree Law 9/2011, August 19<sup>th</sup>, 2011 (and subsequently Royal Decree Law 20/2012, dated July 13<sup>th</sup>, 2012) established certain limits to the set-off of tax losses pending carry-forward. In this regard, although Spanish tax legislation had traditionally allowed tax losses generated in previous financial years being offset without limitation against taxable profits in

the following 15 years, the aforementioned Royal Decree Laws introduced restrictions whereby companies with turnovers exceeding €60m would only be entitled to carry forward tax losses up to 25 percent of their positive taxable income (increased to 50 percent in the case of companies with a turnover lower than €60m but higher than €20m) and, in exchange, extended the carry-forward period from 15 to 18 years. Law 16/2013 has now extended the application of these restrictions to 2014 and 2015.

However, please note that Law 16/2013 establishes that restrictions on the use of tax losses will not apply to income crystallised as per waivers carried out by non-related lenders. This measure should facilitate debt restructurings which, to date, had faced the problem of giving rise to a potential significant tax leakage.

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