RECENT TAX AMENDMENTS IN THE SPANISH SECURITIES MARKET ACT - ARAOZ Y RUEDA

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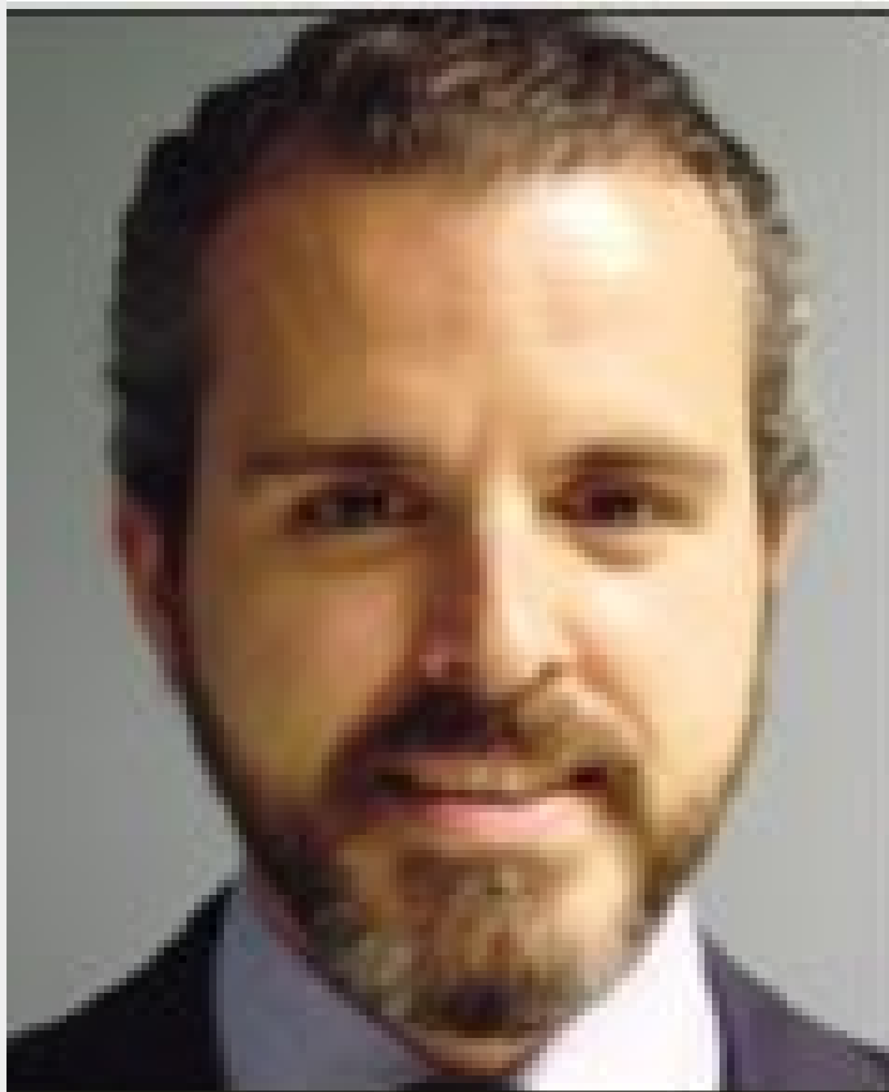

Category: Tax

Technically upgraded or extremely widened?

We are facing new times. Indirect taxes and specific anti-avoidance tax rules are gaining ground. However, tax reforms can sometimes be unbalanced and clause 108 of the Spanish Securities

Market Act 24/1988 could be viewed in this way.

In certain cases, the acquisition of shares in a real estate company (an entity 50% of whose assets are made up of real estate located in Spain and/or a company which holds a qualifying stake in a real estate company) is taxed. The acquisition of such shares is regarded as a new taxable event. The provision has now even been widened, and the following issues need to be considered:

Álvaro de la Vía, director del departamento fiscal del despacho de Araoz y Rueda, comenta los aspectos relativos a la reciente modificación del artículo 108 de la Ley 24/1988, de 28 de julio, del Mercado de Valores, que regula el régimen fiscal de las operaciones sobre valores en el sector inmobiliario. El autor señala que las enmiendas generan incertidumbre y aconseja prudencia cuando se formule la estructura de adquisición.

First, aside from the valuation of the assets (eg that approved by the Tax Authorities), the new rule refers to goods but not to rights, which, in our view, should also qualify as assets. Furthermore, the rule says nothing about latent goodwill. Should goodwill not be taken into account for the purpose of the 50% real estate asset test? Some feel that it should not, because it is not feasible to replace the net accounting value of an asset that has no accounting value by the fair market value, just because it was not entered into the accounts. And what about those assets that are totally amortised?

As for 'control', this is legally transferred whenever the purchaser directly or indirectly acquires more than 50% of the real estate company's share capital (regardless of the voting rights). The analysis is harder when holding companies are involved. Should the control test be carried out vis-í -vis each company? Should the tax be triggered in the event that the acquirer gains control of the 2nd-tier holding company, which, in turn, controls the 3rd-tier real estate company, even though the indirect stake in that company is less than 50%? Should the indirect stake the acquirer has in the 3rd-tier company be added to the direct stake, but only when the acquirer also controls the 2nd-tier holding company and the latter controls the 3rd-tier real estate company? Or should the indirect stake in the 3rd-tier company be added to the direct stake in that same company, even though the acquirer does not control the 2nd-tier company? It remains to be seen how this will be dealt with.

But some issues are slowly being clarified. What is key is that control is gained or increased on a group basis, with the company that acquires the stake being taxed even though control is gained by the parent company. It is also essential that the company qualifies as a real estate company prior to the transaction giving rise to control.

Until the new rule came into force, any further share acquisitions were tax-exempt once the investor had taken control of the real estate company. Now the tax is levied on all further share acquisitions, with no transition period. Under the former rule, tax was levied on the basis of 100% of the real estate value, regardless of whether the stake was lower than 100%. But what if, prior to the new rule coming into force, an investor acquired a 51% stake in the company and paid tax on the 100% value of the real estate assets? Will the investor now have to pay an additional tax if it further increases its stake? This makes no sense from a double taxation approach, and we welcome the Spanish Tax Authorities' recent ruling to this effect.

Finally, the new wording provides that the investor is taxed whenever control of the real estate company is obtained in "any other way". This means that certain transactions may trigger both transfer tax and capital duty, although capital duty excludes the transfer tax as a general rule. If control is gained/increased through a transaction subject to capital duty, but not through newly issued shares, no transfer tax should be triggered.

It is better to be safe than sorry. Thus, it is worth thinking carefully when deciding how an acquisition is going to be structured.

ílvaro de la Vía is Head of the Tax Department at Araoz & Rueda. He can be reached at delavia@araozyrueda.com.