

TAX ANNUAL REPORT 2015: SAVING YOUR MONEY AND YOUR REPUTATION

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As public opposition to tax avoidance schemes hardens, companies' tax structures are coming under increasing scrutiny and could potentially lead to a public relations disaster that could damage their reputation

Everybody's talking about tax. Even the man and woman in the street, as recent public protests against Starbucks tax "arrangements" in Europe prove. Suddenly, businesses are not only concerned about the financial implications of their tax structures, but also the possible impact on their brand and reputation. Company boards are now liable for their organisation's tax structures, so directors are taking a keen interest in their intricacies.

This is all good news for law firms in Spain and Portugal as clients seek a better understanding of various tax regimes. Many firms are anticipating that the revenue generated by their tax practices will increase in the coming year. However, the market for legal services relating to tax is getting

extremely competitive and law firms are fully aware of the threat posed by the 'Big Four' accountants as they battle for a share of what is an increasingly lucrative market. There is definitely a more positive outlook among tax lawyers now than there was 12 months ago. "There's more optimism and better quality deals," says Deloitte international taxation partner Brian Leonard. "Now it's not just vulture venture capitalists looking for good deals, but investors that want to be solid business partners." Leonard adds that Spanish companies are continuing the trend of international expansion and that this is "providing fuel for the economy".

According to Carlos Rodríguez, partner at DLA Piper, multinational companies are, and will continue to be, under the spotlight of tax authorities in Europe. Eduardo Gracia, Ashurst's Madrid managing partner, says that the reform of corporate laws means that company boards now have liability for tax affairs, and consequently companies will be "more conservative" when it comes to their tax structures. However, Cuatrecasas, Gonçalves, Pereira partner Andrés Sánchez doubts that companies will alter their tax arrangements because company boards are liable for them: "This is instead a chance to go to the board of directors and try and convince them [with regard to tax structures]."

According to Uría Menéndez partner Rafael Fuster says changes in corporate governance rules concerning tax risks – as well as recent amendments to the Criminal Code – will not only mean that companies will become more risk conscious and risk averse, but will also result in more pressure being exerted on their legal advisers. "People in the street and the media are starting to talk about corporate tax – tax is becoming a matter of public record and corporate reputation and this is raising the profile of companies' tax function."

Personally liable

Gómez-Acebo & Pombo partner Javier Vinuesa adds that companies whose customers are consumers are now concerned that any issue with their tax could affect their sales. Meanwhile, BDO tax director Eugenio García says that proper transfer pricing documentation is now part of companies' corporate image. Allen & Overy partner Carlos Albiñana says there is now a greater concern among company directors about tax issues. "It's not simply a tick box approach anymore, they now want to know if they, personally, are exposed to any risk."

The Organisation for Economic Co-operation and Development's base erosion and profit shifting (BEPS) initiative is currently casting a shadow over companies. The aim of the initiative is to combat company tax avoidance schemes and this is a concern for clients who now have doubts about the longevity of the tax structures they use. With regard to the issue of BEPS, Leonard says: "Clients are now saying, this strategy is fine for my business now, but will it still be appropriate in a few years' time?"

Rodríguez states the Spanish tax authorities are "widening the scope of their investigations". Meanwhile, Albiñana claims clients are concerned about whether or not the tax authorities will take a "reasonable approach" to tax laws especially in the international arena, taking into account the ongoing "joint efforts in various jurisdictions as well as some individual initiatives".

The situation must change

García says that the intention of initiatives such as BEPS is to harmonise tax at an international level. However, Gracia does not envisage the harmonisation of tax regimes across Europe, but he does anticipate "greater coordination of information-sharing". Fuster argues that for tax payers "it's about fairness, we cannot leave things as they were – international tax rules should change and result in taxpayers paying their fair share of taxes, but, at the same time, the rule of law should always be respected and taxpayers must be treated fairly".

Given this context, law firms are anticipating that their tax practices will grow. "There will be more business," says Gracia. "Clients want more information about tax structures." Sánchez says that, while transactional work will continue, one of the major demands from clients will be for compliance advice. "We have our criminal law department reviewing companies' procedures," he adds. Another

challenge for law firms, according to Leonard is the need to “look for technological solutions”. He adds: “You now need ‘techies’ and low cost centres which allow you to provide economical solutions on a global basis.” Fuster says his firm, Uría Menéndez, has experienced significant growth in its tax practice in recent years. “We’ve grown 50 per cent in seven years and we had 11 per cent revenue growth in the last year, and this trend will continue.”

Gracia says that the rights of taxpayers are not currently at the top of the agenda. “It’s all about how to secure collections, about the rights of the administrators – all the reforms in the last ten years have strengthened the rights of the tax authorities.” Meanwhile, Vinuesa says that there is a need to modernise the tax litigation system. He advocates the use of arbitration or mediation for solving tax disputes outside the tax courts. “An excellent opportunity to reshape the tax litigation framework would be the new general tax act, unfortunately, it is not in the agenda,” he says.

García says that clients in other countries in Europe have an “enhanced relationship” with tax authorities. “This offers more security for businesses as they don’t want tax treatments changing every year – there is fluent communication between tax authorities and the tax payers, tax payers say to the tax authority ‘I will do this transaction, I have this interpretation of the law, I’m not looking for a binding ruling, I just want to confirm with you if this transaction will be accepted in future tax audits.’” However, Leonard argues that, culturally, Spain is perhaps wary of relationships, which can become too personal. Meanwhile, Sánchez doubts whether in practice it is feasible for all clients to go to the tax authorities to explain their tax structures. Fuster says that what is needed is fairness. “You want fair rules for those paying taxes – the line is always moving, what is wrong? What is right?”

Doing more in-house

Rodríguez says there is increased pressure on rates and adds that clients are “trying to do as much as possible in-house”. Sánchez says there is an issue regarding the way in which law firms measure work they have done for clients. He adds: “How do we measure work in progress?” Leonard says there is a correlation between hours billed and risk in that the more time spent handling a matter, the more the associated risk is reduced. “For example, we have procedures such as ‘second partner’ reviews and client service assessments, which are essential in reducing risk and maximising quality control.”

Fuster says that law firms need to learn more from their clients. “We need to put the focus on the clients, talk more with them, learn from them, and understand better what their interests and priorities are – that’s the way to find where value lies and make a difference.” Leonard says success fees are not always viable, he argues: “How do you build success fees in tax litigation, when it takes so long?” Fuster’s solution is to not use “pure success fees”, but balance them with other fee arrangements. With clients showing an increasing tendency to do tax work in-house, Fuster says law firms will have to explain the benefit of using external advisers, for example, for complex tax litigation or for a second opinion on certain matters.

Leonard adds that, generally, the issue of tax is becoming more and more important to businesses as a whole. He says: “More and more people within organisations – and, in fact, people outside organizations, such as customers, are taking an active interest in companies’ tax affairs.”

Enforcing ‘up or out’ policy

Sánchez says: “We [lawyers] make a living from change – we have a new corporate income tax law, it’s a fantastic opportunity to contact clients and alert them.” Fuster believes the big challenge is how you “build up and retain talent” and at the same time enforce an “up or out” policy.

Vinuesa believes a big opportunity for law firms is “complexity”. He adds: “It’s easy to find complexity and this is where we want to focus, we want to avoid commoditised work.” Meanwhile, García says that tax structuring work in connection with inbound and outbound investments, transfer-pricing and ex-pat advice – such as creating proper compensation schemes for ex-pat employees as well as taking care of their personal and the companies’ compliance obligations – provide new opportunities for law firms. Silvia Paternain, Freshfields Bruckhaus Deringer partner and head of the

firm's global tax practice, says the volume of tax work in Spain is picking up as market sentiment has "completely changed". She adds: "There was a lot of large restructurings in recent years, but now investors are buying all types of loans, not just non-performing loans." Paternain says it is a busy market and that the increase in tax work correlates with increased activity in the market. "We have debt, equity deals and mergers, but we also still have restructurings – having restructuring and M&A work is optimal for lawyers." Paternain says her firm's tax practice has increased its revenue in the last year.

Clifford Chance partner Pablo Serrano de Haro says the tax environment is changing – with BEPS being an example of this – and it is a "major concern" of clients that they ensure they fulfil their obligations. He also notes that the tax authorities are "changing their approach and are no longer scared of international investors". Serrano de Haro adds that, as transactions increase, so does the revenue of law firms' tax departments: "The market is very active – we keep recruiting more lawyers, as we need more muscle."

In addition, Serrano de Haro remarks that the launch of listed SOCIMs (Spanish real estate investment trusts) in 2014 attracted "huge interest from international investors and translated into record investment figures in the Spanish real estate sector, approximately € 2.6 billion". Marta Esteban, counsel at Herbert Smith Freehills, says the new participation exemption regime has opened new alternatives for structuring transactions and has therefore created opportunities for law

Spain: What are the biggest challenges facing tax lawyers?	
"Practitioners must be aware of the trends and strategies followed in other countries, as these will be imported to our own jurisdiction sooner or later." Carlos Albiñana, partner, Allen & Overy	above savings." Luis Trigo, managing partner, Broseta
"Profitability, due to increased competition and pricing pressure." Rodrigo Ogea, partner, Baker & McKenzie	"Law firms must highlight the difference between the practice of law and the business of law, searching for the direct link between revenue and satisfied customers." Cristina López-Ventureira, partner, Dutilh
"Uncertainty. Clients ask for a legal framework that can be kept unaltered during the life of their investment." Javier García-Pita, partner, Linklaters	"Combating the current considerable legal uncertainty due to the regular legislative changes in taxation taking place in Spain." Felipe Alonso, partner, GTA Villamagna Abogados
"We believe growth area in the tax department is potentially limitless – we intend to grow more than the growth of the firm as a whole." Javier Fernández Cuenca, partner, Pérez-Llorca	"Strong competition with auditing firms, which are taking advantage of those areas in which they are traditionally stronger – such as transfer pricing, compliance and tax reviews – to offer additional services." Miguel Ángel Sánchez, partner, Hogan Lovells
"The need to create or maintain a good reputation based on solid and excellent advice, flexibility and availability to increasingly demanding clients." Javier Hernández Galante, partner, Ashurst	"The creation and consolidation of consistent, technically acute, and highly experienced teams that can provide the clients with sensible, business-focused, and added-value tax advice." Alberto Ruano, partner, King & Wood Mallesons
"Price competition and hiring promising young lawyers despite it being very difficult to receive fair compensation from clients." Víctor Hernán, partner, CMS Albiñana & Suárez de Lezo	"To get over and lead the clients' mentality concerning the crisis to increase the scope of the services demanded and raise fees." Miguel Ángel Albaladejo, partner, Lener
"Clients want their tax advisors to be problem-solving and very involved in all decisions, so tax advisors need to be also good risk managers." Javier Prieto, partner, Araoz & Rueda	"Increasingly fierce competition obliges law firms to adopt special measures to offer diverse and specialised services." José Blasi, senior associate, Monereo Meyer Marinell-lo Abogados
"The BEPS plan advanced substantially in 2014, with recommendations on the treatment of hybrid instruments, the fight against harmful tax practices and the abuse of tax treaties." Luis Rodríguez-Ramos, partner, Ramón y Cajal	"A decrease in fees charged, which in turn requires the firms to hire exclusively highly productive and qualified professionals that can cope with larger amounts of work." Yago Martos, partner, Olleros
"Clients should ask for our advice at the beginning of their endeavour, not in the middle or, worse, at the end of it – it is much easier to tax-plan everything from the start." José María Moyano, partner, Adarve Abogados	"Helping clients adapt to changes in corporate and personal income tax laws." Javier Zapata, head of tax, Rivero & Gustafson
"Globalisation – competition in the local market can come from foreign law firms." Luis Pérez, partner, Benow Partners	"The tax rulings acquire special significance vis-à-vis the tax authorities and previous agreements with them, APA ("Advanced Price Agreement)." Isidro Del Saz, partner, Roca Junyent
"Changing advice to a more preventive model that seeks security	"The main challenge for 2015 lies in identifying the opportunities arising out of the new regulations." Jorge Sarró, partner, Rousaud Costas Duran

firms.

rise of tax arbitration

"The year 2014 was a milestone for the Portuguese economy," says Vieira De Almeida partner Tiago Marreiros Moreira. "There has been corporate income tax reform and there are also challenges in the financial markets following the collapse of Banco Espírito Santo (BES), meanwhile tax arbitration is beginning to be seen as an alternative to litigation." Marreiros Moreira adds that there is a high level of expertise among arbitrators and, consequently, tax arbitration will speed up the settling of disputes. Morais Leitão, Galvão Teles, Soares Da Silva & Associados partner Francisco de Sousa da

Portugal: The

Câmara describes tax arbitration as a “breath of fresh air” in the field of dispute resolution. He adds: “It has introduced speed and the arbitrators are generally experienced, though it all depends on the arbitrators. Overall it’s a good system that is evolving – it can be improved with further interventions, including in relation to the automatic system appointing arbitrators by the ethics committee.”

Uria Menéndez - Proença de Carvalho partner Filipe Romão says that there have been a number of arbitrations that have made decisions on the same matter and that there is not a “mechanism to avoid discrepancies between the decisions”. However, he adds that the experience of tax arbitration has been good.

According to CMS Rui Pena & Arnaut partner Patrick Dewerbe says the advantage of arbitration is that “you get a decision in months rather than years”. Dewerbe adds that the issue for lawyers is “should we appoint an arbitrator or rely on the Arbitration Centre (Centro de Arbitragem) to appoint one?” He says one issue is that a lot of ex-tax authority personnel join the centre’s list of arbitrators. Caiado Guerreiro partner Tiago Caiado Guerreiro says that arbitrators are badly paid, and that they should be remunerated in line with personnel working other forms of dispute resolution: “If you want quality people, you have to pay more.” De Sousa da Câmara says that legislative and administrative efforts have been made to ensure that the arbitration system is, and is seen to be, fair. “Apart from this crucial aspect, clients particularly like the fact that arbitrations offer speedier resolution, with arbitrations resolving tax cases in less than six months on average,” he says. But Marreiros Moreira adds that it is important to “cherry-pick” which matters go to arbitration. “I wouldn’t go to arbitration if I feel the risk of losing is high because you have limited mechanisms to appeal,” he says.

Diogo Bernardo Monteiro, partner at F Castelo Branco & Associados, says the decision on whether or not to go to arbitration can depend on whether the basis of the case is “mere formalities”. He adds: “Arbitration would look at the matter in hand, but when dealing with formalities, it is advisable to go to court.” Dewerbe says that in an arbitration a case may be lost on formalities, “in some cases you should be able to approach the Arbitration Centre (Centro de Arbitragem) about this”.

Monteiro says that, on the issue of whether the parties or the Arbitration Centre (Centro de Arbitragem) should appoint arbitrators, while there is a view that arbitrators become sensitive to both parties and try to reach a consensus, this does not apply to tax arbitration because there is “no compromise, it’s a win or lose situation”.

Attracting foreign investors

Marreiros Moreira says that the challenge now is to create an environment that is attractive to foreign investors. He adds: “Corporate income tax reform has provided the tools that show the country is more willing to be competitive – now the economy is more open and there are new opportunities for different players, there are now private equity investors and Chinese investors.”

Caiado Guerreiro says the fact that Portugal is now attracting investment is a huge advantage for the nation’s lawyers, who are offering good products at good prices.

Romão says that, in recent times, law firm practices in Portugal have “had it all”. He continues: “We’ve had restructuring, acquisitions of distressed assets, new investment and wealth management, all this, along with arbitration has meant it has been an interesting year, full of activity.”

However, Caiado Guerreiro warns that, if no party has a majority in the forthcoming Portuguese elections, there may be a reduction in international investment and the country could “lose stability”. In 2014, there had been concerns about the ‘Big Four’ auditors providing increased competition for the nation’s law firms. However, fears were allayed when the Portuguese justice minister Paula Teixeira da Cruz said the creation of multidisciplinary firms of lawyers, auditors and consultants would be “not admissible” under revised rules for the Portuguese bar. However, lawyers describe the ‘Big Four’ as “hidden competitors” that are entering into the market. Monteiro says permitting multidisciplinary firms that included lawyers and auditors would not necessarily be a bad thing for Portugal’s law firms. Why? “We would then have to harmonise the tax rules applicable to law firms, we currently have to pay up to 35.5 per cent more tax [than the auditors],” he says.

Marreiros Moreira says that the entry of the ‘Big Four’ into the market will happen “sooner or later”

and law firms will have to be prepared for it. But he adds that law firms have already made considerable progress in this respect. "Portuguese firms have done a terrific job picking up management skills and 'soft' skills."

✖ Improving accounting skills

Dewerbe says the opportunity for lawyers is that they are "much closer [than the auditors] to the strategic decisions of clients". We need to increase our accounting skills – we need to understand the financial/accounting part of deals. Romão says changes to tax laws – such as the rules on "interest stripping" or tax credits related to deferred tax assets – as well as the tax authorities approach, particularly relating to transfer-pricing, means that "financial and accounting skills are now even more important for tax lawyers".

PLMJ partner Serena Cabrita Neto says "human skills" are also becoming even more important for tax lawyers: "It's important to reach the client and listen to them," she says.

According to Marreiros Moreira, the greatest challenge and opportunity for law firms is the "shift to an international model". He adds: "We can help clients internationalize and we are able to compete in certain niche areas at an international level." Caiado Guerreiro adds Portuguese firms are able to provide services internationally to clients "with no connection with our country, competing in the international legal market on price and quality and therefore reducing our dependence on the internal market".

De Sousa da Câmara observes that the tax world is changing dramatically – domestically and internationally – and that firms and lawyers have to "comprehend and analyse these changes, help clients to stay aware and up-to-date, and strive to ensure tax justice". Bernardo Monteiro says the challenge for law firms is to adapt to different jurisdictions. "There is also the knowledge challenge, things are changing all the time."

Diogo Ortigão Ramos, partner at Cuatrecasas, Gonçalves Pereira and head of the firm's Portuguese tax practice, says a big challenge for law firms is defining the market in which they want to focus on. He adds: "Should it be the domestic or cross-border market? Or both?" Other challenges include the fact that the courts do not resolve cases quickly and so clients sometimes are "not able to immediately perceive the differences in quality of different firms operating in the market".

Being able to say 'no'

Cabrita Neto says the financial crisis "changed everything". She adds: "Tax issues are now major issues for companies, we're now dealing with CEOs and even shareholders." Cabrita Neto adds clients want lower fees, success fees, and quick decisions, and being able to respond to these demands is the challenge for the "near future". Dewerbe says that lawyers' work now needs to be more cautious: "We cannot put clients at risk, we need to be able to say 'no'". Romão says the recovering Portuguese economy could put Portugal in a "good position to benefit from foreign investment". He adds that law firms have an opportunity to increase their work, particularly in relation to BEPS and tax planning, which will become "more challenging".

Pedro Pais de Almeida, partner at Abreu Advogados, says one of the biggest current opportunities for law firms is presented by the Portuguese Tax Authority concentrating its efforts on combating tax fraud and evasion, which is giving rise to a number of tax litigation cases. Clotilde Celorico Palma, consultant at Eduardo Paz Ferreira & Associados, says problems arising from the implementation of the tax reforms represents one of the biggest opportunity for law firms. "Perhaps tax administration is not prepared to deal with all these reforms," she adds.

The tax environment in Spain and Portugal is changing rapidly, and consequently clients are becoming more anxious as they realise there is a great deal of uncertainty about how the international tax environment will change. But this uncertainty is something the most client-oriented firms can expect to benefit from as companies increasingly turn to their legal advisers in an effort to make sense of the evolving landscape.

Tax in Portugal: How are clients' demands changing?

"Clients seem increasingly more concerned about getting quick, straightforward advice on very specific matters, rather than an extended analysis of the relevant tax framework." **Inês Pisco Bento, associate, Linklaters**

"Clients must be kept regularly informed, and we need to assure the existence of adequate corporate and tax structures, fully in line with clients' needs." **André Gonçalves, AAA Advogados**

"On cross-border work, clients are becoming more demanding in terms of expecting firms to coordinate the work with law firms and peers in other jurisdictions." **António Moura Portugal, partner, ABBC Advogados**

"Clients want to take part in the essential decisions about how legal services should be delivered – including staffing, planning, and so on – legal services is changing from a sellers' market into a buyers' market." **José Pedroso de Melo, associate, SRS Advogados**

"Interpreting clients' demands from an international perspective – our services frequently include not only the local or national scenario but also the international scope." **Carla Matos, associate, CCA Ontier**

"Due to timid growth in the national economy, clients are now turning to global solutions, expecting to benefit from tax incentives to export business." **Frederica Marques Pinto, head of tax, Raposo Bernardo**

"Clients increasingly want in-depth knowledge of the various solutions related to the Portuguese fiscal system, be it the general regime, the regime for non-habitual residents or the investment tax code." **Diogo Feio, counsel, Sérvulo & Associados**

"They are not changing – they always ask for clear and fast answers to their demands." **João Marques Pinto, counsel, pbb**

"Clients are more cost-conscious and demanding of quality, thus pushing us to improve our service with the goal of adding more value to their businesses." **Rogério M. Fernandes Ferreira, partner, RFF & Associados**

"Clients are now more aware of the risks arising from tax planning and seek more value added solutions instead of mere tax advice." **André Vasques Dias, partner, Macedo Vitorino & Associados**

"Corporate clients have to adjust to the new rules implemented by the tax reforms." **Vasco Carvalho Marques, partner, TFRA – Sociedade de Advogados**

"Law firms have to blend their traditional expertise with expertise once the purview of international tax consulting and accounting firms." **António Fernandes de Oliveira, tax lawyer, AFDO**

"Clients are more conservative in their internal tax strategy." **Henrique Nogueira Nunes, associate, Albuquerque & Associados**