

TAX ANNUAL REPORT 2017: WORTH THE TROUBLE?

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Tax authorities could be pushing the boundaries of legality as they seek to increase the revenue they collect, say lawyers – meanwhile, the risk of being held liable for facilitating tax evasion could mean some law firms consider scrapping their tax practices

Given that the Spanish and Portuguese governments are looking to raise more money for the public purse, the respective nations' tax authorities are being set even higher targets in terms of the amount of cash they need to collect. Consequently, lawyers claim, corporate taxpayers are being increasingly squeezed by the taxman, to the extent that, in the view of some, they may even be going beyond what is legally permitted. As a result, tax demands are increasingly being disputed with the result that litigation is on the rise. While this means more instructions related to contentious matters, there are other forces at work that mean there is also considerable cause for concern among tax lawyers. There is a fear that the tax advice provided by law firms to their clients could potentially be viewed, in some quarters, as facilitating tax evasion. If the relevant authorities were to take a dim view of such practices, there is the chance that law firms could be held liable, with the result that they could suffer severe financial and reputational damage. In this context, some lawyers

suggest that law firms could cease investing in their tax departments because of the potential liabilities or even go as far as to scrap them altogether.

More aggressive

The Spanish tax authorities are adopting an increasingly aggressive position, particularly in relation to their efforts to tax businesses on profits obtained abroad, says Juan Alberto Urrengoechea, partner at Roca Junyent. He adds that transfer pricing issues and an increase in tax litigation are also generating an increase in work for lawyers. Meanwhile, providing tax-related advice on cross-border deals is becoming increasingly challenging for lawyers, according to Latham & Watkins partner Jordi Domínguez, as it is difficult to make an assessment on the “practical implications of BEPS [base erosion and profit sharing] and the extent of the changes that will derive from the implementation of the multilateral instrument to modify bilateral tax treaties”.

The fact that some countries are taking measures to attract investment by reducing tax rates is creating opportunities for lawyers, according to Javier González Carcedo, partner at PwC Tax and Legal Services, who adds that tax transparency – in relation to the Organisation for Economic Co-operation and Development's BEPS initiative – is also providing considerable work for law firms. The fact that it is difficult to predict the outcome of inspections carried out by the tax authorities is a significant challenge for lawyers when advising clients, according to Ashurst partner Eduardo Gracia. He adds that the authorities are becoming more aggressive because the “goals they are set are more difficult to achieve in terms of collections”. Gracia also says that there is considerably more tax litigation taking place, to the extent that the courts are overcrowded.



“There is no clear picture in the current tax environment and this shapes our relationship with the authorities and clients.”
Víctor Viana
Uría Menéndez

“The tax authorities are aggressive, but are they properly applying the law? Are they going beyond the law?”
Silvia Paternain
Freshfields



Tax in Portugal: What are currently the biggest opportunities for law firms in this practice area?

“In the last 12 months, we have seen an increase in private client matters, real estate transactions requiring tax advice and structuring, and an increase in tax litigation.”
Patrick Dewerbe, partner, CMS Rui Pena & Arnaut

“Tax litigation continues to increase due to the aggressiveness of the tax authorities. There is also a steady flow of new clients for M&A and real estate transactions.”
Diogo Bernardo Monteiro, partner, FCB Sociedade de Advogados

“Tax consulting is an opportunity because clients require permanent assistance on tax issues; also litigation, because the tax authorities have increased their technical capacity and the number of tax inspections have increased.”
José Alves do Carmo, partner, AVM

“Tax regimes like the non-habitual resident regime and the Golden Visa, are contributing to Portugal's growing reputation for attracting foreign direct investment – this is an opportunity, advising on investment structures and creating appropriate legal and tax vehicles.”
Elsa Rodrigues, partner, Espanha e Associados

“Helping new foreign investors to expand their activities in Portugal by benefiting from a more favourable tax framework. Law firms should take these successful cases as examples to attract more foreign investment, with international networking playing a major role.”
Duarte Amaral da Cruz, lawyer, MC&A – Marques da Cruz & Associados

“There is a real opportunity for growth in tax litigation as the Portuguese tax authorities are becoming increasingly more aggressive.”
Henrique Nogueira Nunes, partner, Albuquerque & Associados

“The real estate market and the growing tourism sector – a significant amount of ongoing deals involve real estate purchases by foreign clients.”
Frederica Marques Pinto, senior lawyer, Pares Advogados

Andrés Sánchez, partner at Cuatrecasas, Gonçalves Pereira, says the outcome of recent cases means there is more certainty about what to expect in terms of court rulings. “The courts are becoming more pro-taxpayer, so there are some reasons for hope,” he adds. A key concern is “soft law” – mainly derived from the BEPs recommendations – and its application by the tax authorities and courts, according to Víctor Viana, partner at Uría Menéndez. “There is no clear picture in the current tax environment and this shapes our relationship with the authorities and clients,” he says. “The changing, and more restrictive, rules and criteria may result in growing tension regarding the lawyer's role and relationship vis-à-vis clients and tax authorities.”

Many transactions involving companies

need to be reported to the board so in-house lawyers are “no longer willing to accept vague advice”, says Francisco Martín Barrios, partner at Deloitte Abogados. “Multinationals are now reacting to BEPS, there was more activity in this area in 2016 and it will increase in 2017,” he adds. Silvia Paternain, partner at Freshfields, says there are reservations about the implementation of BEPS. She

adds: "It will be difficult to read between the lines, the European Union is keen on multilateral tax treaties, but who else is really committed?" Meanwhile, Paternain says there are also doubts about the application of tax law. "The tax authorities are aggressive, but are they properly applying the law? Are they going beyond the law?"

Linklaters partner Javier García-Pita says that regardless of how well a tax lawyer is prepared from a technical perspective when dealing with the tax authorities, the authorities have strict targets they have to meet in terms of collections. "The authorities are increasingly pressured to comply with their cash objectives and sometimes it seems they are more keen on getting to the figure than they are on the technical support of the assessment," he says. García-Pita adds that, due to the uncertainty around tax, one strategy is for clients to ask the tax authorities for an opinion on a proposed tax structure. However, Domínguez says that timing can be an issue when seeking to obtain a ruling from the tax authorities on M&A deals. He adds: "Despite the excellent team within the General Directorate of Taxation, on some occasions the timing of the transactions makes it very difficult to seek an opinion."

'Robin Hood' mentality

Media coverage of tax issues is often negative, says Paternain, highlighting "corporate tax issues being reported upon in a way that implies those in question are guilty of tax avoidance or paying little taxes, but without much further thought or analysis". She adds: "This enables a 'Robin Hood' attitude, but the press should take it seriously because tax is law and there are many legal reasons why a company can pay less taxes in Spain and not be publicly ashamed." Araoz & Rueda partner Javier Prieto says a growing global trend is an "increase in the level of managers' liability for companies' tax matters". He adds that tax law is constantly changing and this is a "big risk", but also a great opportunity for law firms, though the challenge is to "persuade clients of the added value provided and convert this into good fees". Meanwhile, uncertainty regarding the participation exemption regime is proving challenging for lawyers, according to Clifford Chance counsel Roberto Grau. He adds that, as some tax demands are retrospective, there have been situations where clients have "asked for financing to pay the tax authorities".

Clients are reluctant to sue the tax authorities, partly due to the fact that it can take up to ten years before a case is resolved if it goes to the higher courts, say some lawyers. Meanwhile, Antonio Montero, counsel at CMS Albiñana & Suárez de Lezo says: "In some instances, especially in the most complex cases, it's very difficult to give an opinion with certainty on what the decision of the courts will be." He adds that, in the last 12 months, political uncertainty in Spain "meant there has been no new tax laws in development at a time when everybody (the tax administration, taxpayers and tax lawyers) needs more precision in relation to the tax rules".

Generally speaking, tax is becoming a more important aspect of every transaction, Gonzáles Carcedo says. "Because tax is becoming more relevant and more complex, structures need to be amended as there is a reputational risk," he adds. Sánchez says one concern for law firms is that companies' in-house legal departments are becoming larger and therefore they are able to handle more tax-related legal matters in-house.

“Clients will increasingly need assistance to ensure they are conducting their tax affairs legally.”
Miguel Torres
Telles De Abreu



Tax in Spain: What have been the major developments and trends in tax in the last 12 months?

"Budgetary difficulties have given rise to changes in Spanish corporate taxation. These changes are of a complex, technical nature and have been quickly announced/implemented. Hence clients have sought advice to fully understand the ramifications of these changes." **Rodrigo Ogea, partner, Baker McKenzie**

"Spanish tax regulations have been modified in recent months. In particular, due to the base erosion and profit shifting (BEPS) project, published by the OECD, and the Directive (EU) 2016/1164 which concerns tax avoidance practices that directly affect the functioning of the internal market (Anti-Tax Avoidance Directive). Many BEPS project recommendations are already incorporated into Spanish regulations, such as certain transfer pricing documentation requirements and the financial expenses limitation rule, although there are some features of these regulations that still need to be adapted to the new international standards." **Montserrat Turrado, partner, Bird & Bird**

"A new Royal Decree-Law was approved introducing amendments to the corporate income tax law aimed at increasing the amounts collected." **Marta Esteban, of counsel, Herbert Smith Freehills**

"With the same aim of transparency, as well as contributing information to the tax authorities, a new Immediate Information Supply system (SII- Suministro Inmediato de Información) entered into force in 2017. This new system will be compulsory to all taxpayers that submit VAT returns on a monthly basis (companies with a turnover higher than €6 million, VAT groups, and taxpayers registered into the VAT monthly refund scheme – mainly exporters." **Carlos López, partner, BDO Abogados**

"The government introduced corporate income tax measures that tend to increase the burden on taxpayers. Some of these measures have a degree of retroactivity and have had effects on the 2016 fiscal year, including limitations on the offsetting of negative tax bases and the reversal of impairment losses on shares." **Alejandro Capdevila, partner, RCD – Rousaud Costas Duran**

"The new VAT management system based on immediate supply of information, as well as tax measures to reduce the public deficit including modification of the corporate income tax regime." **Mabel Zapata Cirugeda, partner, Cremades Calvo Sotelo**

"The rebooted Spanish patent box regime applicable from 1 July, 2016. Only income from those taxpayers playing a major role in creating the intangible asset (through own resources or hiring third parties) is eligible for the corporate tax exemption." **Luis Gosálbez, managing partner, Metricson**

Flight to quality

There are currently many good opportunities for tax lawyers, says Viana. "One client trend is a 'flight to quality' in times of higher risk, while there are more opportunities due to an increase in litigation, and there is a lot of transfer-pricing and compliance-related work." A leading tax partner comments that some firms may start to ask themselves whether, as a law firm, "they are more exposed by having a tax department, they may wonder whether they would be better off without a tax group". Other lawyers say there is a possibility that, due to the potential liabilities associated with providing tax-related legal advice, law firms will limit future investment in their tax departments. One partner comments that the large auditing firms have an advantage in some fields of tax law, but law firms are better placed to handle more sophisticated tax work. Meanwhile, in reference to the competition between the legal arms of the 'Big Four' auditors and more

traditional law firms, one tax lawyer in the Madrid office of an international law firm says: "I think the principle of legal privilege will become more relevant, there is privacy – companies can speak to a lawyer knowing that the information is confidential."

While increasing legal activity may mean a higher volume of fees, this does not necessarily mean an increase in profitability, says Urrengoechea. He adds: "There has been a change in the provision of tax services, previously clients generally wanted tax planning schemes, now they want advice on how to avoid future tax problems. García-Pita says uncertainty creates opportunities for law firms and adds that tax governance, tax controversy, APAs [advance pricing agreements] and audits will mean a greater volume of work for lawyers in the coming year. He adds: "Deal flow will increase [in the coming year] and tax advice will be more relevant in deals." García-Pita adds that fees could go up: "I see restrictions on fees being removed." Martín Barrios agrees that there is currently an opportunity for law firms to increase fees and profitability. He says: "There is a higher demand for senior tax lawyers as there is a scarcity of them, it is therefore critical to bring talent into firms." Viana adds that there will be many opportunities for tax lawyers in relation to real estate, distressed assets, M&A and private equity deals in the coming months. Meanwhile, Grau says that an increase in transactions, including private equity deals, will generate significant work for tax lawyers in the next 12 months.

Portugal: Maximising collections

With regard to tax developments in Portugal, MLGTS partner Francisco de Sousa da Câmara says that due to corporate and personal income tax reforms, as well as the BEPS initiative, more rules related to tax transparency and the exchange of information have been introduced, with the effect that “greater tax transparency, accountability and compliance” is now expected from corporations and individuals. He adds that there has been an increased level of vigilance on the part of the tax authorities as they seek to tackle tax avoidance, and consequently, “on many occasions tax assessments have been made to maximise collection, which has led to significant levels of litigation”.

The shift of the Portuguese government to the left of the political spectrum brought a change in tax policy, PLMJ partner Nuno Cunha Barnabé says. “The planned reduction of the corporate tax rate to 17 per cent by 2019 was abandoned and the rate frozen at 21 per cent, while some measures perceived as having a regressive effect on personal taxation were revoked.” He adds: “A new tax on residential property (known as “AIMI”) was introduced on 1 January 2017. It appears that the new government will pursue the objective to increase tax revenues through indirect taxation and the property taxes, rather than by continuing to increase income taxes.”

The biggest tax-related opportunities for law firms relate to the structuring of real estate investments and the re-domiciliation of companies and businesses to Portugal, says Vieira de Almeida partner Tiago Marreiros Moreira. He adds that with the restructuring of the financial sector, clients' need for tax compliance advice, as well as tax-related litigation and arbitration, will also generate significant amounts of work. Marta Pontes, partner at Uría Menéndez-Proença de Carvalho, says the Portuguese tax authorities are now more aggressive, and consequently, tax litigation and arbitration will be an important area of opportunity. She adds: “Wealth management is expected to be an important area of development, especially considering the success of the Portuguese non-domiciled resident regime and golden visa programme.”

Planning problems

It is getting increasingly difficult for companies to plan their tax affairs, according to Telles De Abreu Advogados managing partner Miguel Torres. “This is a significant opportunity to conduct new business since clients, corporate and private, will increasingly need assistance to ensure that they are conducting their tax affairs legally and as efficiently as possible,” he adds. “As compliance costs rise and the risks of conducting business without obtaining proper tax advice become greater, clients will increasingly feel the need to seek out high quality tax consultancy services.”

Tax in Portugal: What have been the major developments and trends in tax in the last 12 months?

“At an international level, the fight against tax evasion continued to be a top priority, with the development of US Foreign Account Tax Compliance Act (FATCA) and the base erosion and profit shifting (BEPS) action plan being good examples of this.” **Mariana Lemos, associate, Linklaters**

“We witnessed an increase in real estate operations. Investment funds have lost some of their previous property tax benefits and are considering restructuring. Meanwhile, tax benefits for urban rehabilitation have become increasingly appealing.” **Diogo Feio, partner, Sérvulo & Associados**

“Reforms to the corporate tax system have been complemented in 2016 with a strong emphasis on start-up, venture capital and private equity investment, as well as with the introduction of a new collective investment vehicle tax regime that moves taxation from the entity to the individual.” **Rogério M. Fernandes Ferreira, founding partner, RFF & Associados**

“The 2016 budget announcements to stop the planned reduction of the corporate income tax rate (from 21 per cent to a rate between 17 per cent and 19 per cent) and to reverse some of the amendments to the corporate income tax code approved in 2014, including inter alia the rules on participation exemption and on carry forward tax losses.” **André Vasques Dias, partner, Macedo Vitorino & Associados**

“Re-domiciliation of companies and wealthy expatriates into Portugal (mostly from France, Russia, and Spain) due to reduced rates of income tax. Tax arbitration continues to be popular among large companies in major tax disputes.” **Nuno de Oliveira Garcia, partner, Nobre Guedes, Mota Soares & Associados**

“Portugal has become a very interesting jurisdiction for family businesses and private clients due to the increasing success of its resident non-domicile scheme, as well as the visa permit for investors.” **Vasco Carvalho Marques, partner, TFRA – Sociedade de Advogados**



“It appears the new Government will increase tax revenues through indirect taxation and property taxes.”
Nuno Cunha Barnabé
PLMJ

Tourism and real estate-related matters are on the increase in Portugal and this is generating more work for tax lawyers, says Cuatrecasas, Gonçalves Pereira partner Diogo Ortigão Ramos. “In parallel, financing transactions and the restructuring of both portfolio and banking sector entities were also a market trend in 2016,” he adds. “The favourable, and highly-praised, non-habitual tax resident regime continued to attract high-net-worth

individuals, and with them, a demand for estate planning and inheritance and family law advice.” Meanwhile, António Moura Portugal, partner at ABBC, says contentious matters provide a steady flow of work for tax lawyers in Portugal, though he adds that the constantly evolving nature of tax law provides a challenge given that clients are looking for stability.

The digitalization of the economy means that lawyers need to “speed up” their services to clients and provide a more “pragmatic international overview” when responding to enquiries, according to Tiago Caiado Guerreiro, partner at Caiado Guerreiro. He adds that, due to Portugal’s “stagnating economy”, fees for legal services are decreasing. pbb of counsel João Marques Pinto says competition from auditors is one of the biggest challenges law firms currently face. According to CCA Ontier partner Carla Matos, corporate income tax rate – which stands at 21 per cent – has had an “adverse impact” on corporate investment in Portugal. She adds: “Our biggest challenge is to convince investors to move to Portugal in spite of this.”

Tax in Spain: What are the biggest challenges law firms face in this practice area?

“The identification of potential competitors in the provision of tax services and new models for providing services. Also, the efficient use of technology for providing services, as well as developing new channels for communication with clients.” **Alberto Estrelles, managing partner, KPMG Abogados**

“The biggest challenge that law firms face is deciding whether they will continue to be a traditional tax department which provides advice based on national rules/laws, ignoring the new international tax environment, or evolve into a tax advisory team which is fully aligned with international trends.” **Pablo Ulecia, partner, Pérez-Llorca**

“Our big challenge is to understand the business we are advising and be able to accompany it in an efficient way. Tax advice disconnected from the economics of the business is not optimal.” **Javier González Carcedo, partner, PwC Tax and Legal Services**

“The poor quality of tax legislation and uncertainty in its application, as well as the frequent use of the general anti-abuse measures.” **Luis Rodríguez-Ramos, partner, Ramón y Cajal Abogados**

“Increasingly, firms of a certain size are perceived by the customer in an undifferentiated way, so we must maintain our efforts to innovate. All parties in a firm must internalise the same culture and focus on improving the perception or experience of the client. We must prevent the client from feeling that he is standing before just another legal services provider.” **Jordi Rovira, partner, AGM Abogados**

“The main challenge is keeping clients permanently updated on potential impacts on their business.” **Carlos Rodríguez, partner, DLA Piper**

“The tax transparency environment fostered by the tax authorities in line with the BEPS actions, as well as the significant increase in reporting information, has added to the complexity of handling very sensitive information.” **Enrique Ortega Carballo, partner, Gómez-Acebo & Pombo**

“The changes in the international tax rules (BEPS and EU Directives) and the uncertainty regarding the implementation of these new rules and principles.” **Santiago Díez, partner, Marimón Abogados**

“The world political and economic situation means a lack of stability in the tax environment. So the client needs constant advice on adapting to these changes.” **Enrique Viola, partner, Pinto Ruiz & Del Valle**