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International Tax Agreement between the United Kingdom and Spain regarding Gibraltar

H.M Government of Gibraltar has recently published the text of a tax treaty which has been agreed on the 4th March 2019 between the Kingdom of Spain and the United Kingdom regarding Gibraltar (the “Treaty”).

The Treaty seeks to assist the resolution of disputes as to tax residence of individuals and companies as well as improve co-operation between Gibraltar and Spain in the field of taxation. All the legislation and standards of the European Union (“EU”) as regards tax transparency, administrative cooperation, harmful tax practices and anti-money laundering will continue to apply in Gibraltar until the date EU law ceases to apply in Gibraltar. From the date on which EU law ceases to apply in Gibraltar, legislation equivalent to EU legislation which exists on that date shall be maintained by Gibraltar.

Tax residency for individuals

Under the Treaty individuals will continue to be tax resident in Spain or Gibraltar in accordance with their domestic law. However, the Treaty contains certain provisions that apply when determining tax residency in the event of “tax residency conflicts”. While the Treaty does not define a “tax residency conflict”, it would appear that a tax residency conflict would arise when an individual is resident in both Gibraltar and Spain and cannot be clearly categorised as a tax resident of either one.

In the event of a tax residency conflict, an individual will be considered to only be a tax resident in Spain if any of the following conditions are satisfied:

- the individual spends over 183 overnight stays of the calendar year in Spain (where sporadic absences from Gibraltar or Spain are attributed to where the individual spends the majority of their overnight stay); or
- the individual's spouse (or equivalent) or dependants reside or habitually reside in Spain; or
- the individual's only permanent home at their disposal is in Spain; or
- two-thirds of the individual's net assets are located in Spain.

If the application of the above conditions proves inconclusive, the individual “shall be considered tax resident only in Spain unless they provide reliable evidence that they have a permanent home for their exclusive use in Gibraltar and remain in Gibraltar over 183 days” (Art 2(1)(b)(ii)).

If there is still a difficulty or doubt in resolving the tax residency conflict, the case would be referred to the Joint Coordination Committee.

Rules for dealing with residency

Accordingly, the residency tests and rules under the Treaty would apply in the following manner.

- In the first instance, individuals are

classified as tax resident in Gibraltar or Spain according to the applicable domestic legislation.

- Identification of residency conflict (individual taxable in both Gibraltar and Spain and not categorised clearly as resident of either one). The use of 4 tests to establish if individual is only resident in Spain.
- If none of the tests are conclusively met, presumption that individual is tax resident in Spain unless they spend over 183 days in Gibraltar and have a permanent home in Gibraltar. If these latter conditions are met, the individual is tax resident in Gibraltar.
- If there is still a difficulty or doubt in resolving the tax residency conflict, the case is referred to the Joint Coordination Committee.

Special rules for determining residency

The following special rules for determining residency shall override domestic law of both Gibraltar and Spain, as well as the above provisions, and will apply to certain classes of individuals upon moving their tax residence from Spain to Gibraltar, as follows:

- Spanish nationals retain their tax residence only in Spain;

- non-Spanish nationals who have spent at least one complete tax year in Spain, retain tax residence in Spain for the year of change in residence and during the four subsequent years.
- registered Gibraltarians (as per the Gibraltarian Status Act or British citizens residing in Gibraltar for over 10 years) that have spent at least 4 years residing in Spain, retain tax residence in Spain for the year of change in residence and during the four subsequent years.

Cat 2 and HEPSS individuals

Participation in a tax regime under which assessable income is capped in Gibraltar, such as the Category 2 or High Executive Possessing Specialist Skills (HEPSS) status, does not prove tax residency in Gibraltar for the purposes of the Treaty. Such individuals would have to prove tax residency in Gibraltar under Gibraltar tax legislation, including rules regarding the issuance of tax certificates confirming residency (which would be different to a Cat 2 or HEPSS certificate).

Tax residency for legal persons, entities and other legal structures or arrangements (“Legal Persons”)

Under the Treaty Legal Persons could include companies, trusts, foundations and similar entities. Legal Persons registered and managed in Gibraltar shall be considered to be tax resident only in Spain, if any of the following four conditions are satisfied:

- the majority of assets are located in Spain; or
- the majority of income accrued in a calendar year derives from sources in Spain; or
- the majority of natural persons in charge of effective management are tax resident in Spain; or
- the majority of capital/equity, voting or profit-sharing rights are under the control of individuals who are tax resident in Spain or Legal Persons linked to tax residents in Spain.

The above conditions apply to all Legal Persons registered in Gibraltar after 16 November 2018. Legal Persons registered in Gibraltar prior to this date and that satisfy conditions (C) and (D) above, can benefit from an exclusionary clause to remain tax resident in Gibraltar, provided they satisfy all of the following five conditions as at 31 December 2018 evidencing genuine tax presence and economic substance in Gibraltar:

- the entity must have a fixed place of business in Gibraltar through which the business is wholly and partly carried out with adequate staff (number and qualifications) and expenditure to support its core income-generating activities; and



- it is liable to and has paid corporation tax in Gibraltar; and
- it has operated in Gibraltar from its incorporation to 31 December 2018 and there has been no interruption or change in its trade since 1 January 2011; and
- more than 75% of its income for the last financial year before 31 December 2018 accrued in and derived from sources in Gibraltar; and
- it has, for the last financial year before 31 December 2018, an amount below the following percentages of its income that accrues from sources in Spain:
 - 15% in Spain for Legal Persons with an annual turnover of not more than €3m.
 - 10% in Spain for Legal Persons with an annual turnover between €3m and €6m.
 - 5% in Spain for Legal Persons with an annual turnover of over €6m.

In order to avail themselves of this exclusionary clause in the Treaty, Legal Persons incorporated before 16 November 2018 will need to provide this information to the Gibraltar Income Tax Office.

Under the Treaty Gibraltar has agreed to supply Spain with a list of all those Legal Persons that would be deemed resident in Spain, on the basis of the rules on effective management and control by tax residents in Spain and meet all the tests set out in

the exclusionary clause. The list supplied to Spain shall be provided by 31 March 2020, and shall include beneficial ownership and governance details.

Spanish Legal Persons that move their tax residency to Gibraltar after the date of entry into force of the Treaty shall maintain tax residency only in Spain.

Rules for dealing with residency

Accordingly, the residency tests and rules under the Treaty would apply in the following manner:

- All four conditions apply to all Legal Persons incorporated after 16 November 2018.
- In the event that the last two conditions apply to companies Legal Persons incorporated before 16 November 2018, those affected Legal Persons can avail themselves of an exclusionary clause by meeting five conditions as at 31 December 2018, which establishes them as Legal Persons with a genuine tax presence and economic substance in Gibraltar.
- Gibraltar is required to provide a list of those Legal Persons that are tax resident in Spain by virtue of the rules on effective management and control and have satisfied the tests of genuine tax presence and economic substance.

Double taxation relief

Where a tax resident of one jurisdiction suffers double taxation in the other jurisdiction, the jurisdiction in which the taxpayer is resident shall relieve the taxation suffered in accordance with domestic law.

Exchange of information

The Treaty commits Gibraltar and Spain to enhanced administrative cooperation with a view of exchanging information that is foreseeably relevant to the administration, enforcement and collection concerning taxes of all kind. It also provides for further forms of administrative assistance, including joint audits, assistance in collection of tax debts, and the serving or transfer of documents. Furthermore, measures equivalent to the various EU Directives, in particular Council Directive 2011/16 EU of 15 February 2011 and its subsequent amendments, shall be maintained beyond the date of EU exit.

The Gibraltar tax authorities have agreed to provide the Spanish tax authorities with the following information:

- annual information on workers registered in Gibraltar as residents in Spain, fully identifying every aspect of the underlying employment relationship or any trade, business, profession or vocation carried on or exercised by these workers, including details of duration, economic terms and employer;
- six-monthly information on vessels, aircraft and motor vehicles registered in Gibraltar relating to tax residents in Spain;





- the direct and free access to the records of the Registrar of Companies in Gibraltar, provided for in the Directive on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, which amended Directives 2009/138/EC and 2013/36/EU, as well as to the Gibraltar Land Registry;
- direct access to beneficial ownership information as is public or, on request to the Commissioner of Income Tax in Gibraltar on companies, any body corporate, partnerships and foundations;
- direct access to information as is public or otherwise available to the Commissioner of Income Tax in Gibraltar on the settlors, trustees, beneficiaries, assets of all types of trusts, as well as to other legal structures or arrangements established or managed in Gibraltar, or governed by its legislation, when

the settlors, trustees, protectors, beneficiaries, are tax resident in Spain or the assets held by all types of trusts are located in Spain

The Spanish Tax authorities are required to provide the Gibraltar Tax authorities only with information as set out in (A) and (B) above as relates to Spanish registered workers registered as resident in Gibraltar (Art 3(10)(a)) and on vessels, aircraft, etc relating to tax residents in Gibraltar.

The first exchange of information in respect of (A) above shall be in respect of taxable periods commencing on or after 1 January 2014 until the date of entry into force of the Treaty and shall be exchanged within four months of the date of entry into force of the Treaty.

For the purposes of (B) above, information is to be exchanged every six months, on 31 March and 30 September commencing on or after the date of the first exchange under the Treaty.

Liaison bodies and Joint Coordination Committee

There shall be a requirement for both Gibraltar and Spain to identify competent authorities and establish a Joint Coordination Committee to supervise and co-ordinate the operation of the Treaty.

Information exchange, confidentiality and data safeguards

Information exchanges under the Treaty are safeguarded by the rules provides in Articles 21 and 22 of the Convention on Mutual Administrative Assistance in tax Matters of the OECD and the Council of Europe.

Duration and termination

Either party may terminate the Treaty by giving six months' notice before the beginning of the calendar year in which they wish it to cease to apply. In the event of such discontinuance, this will apply to taxes chargeable for any tax year commencing on or after 1 January in the calendar year after the year in which the notice is given.

When does this apply from?

The residency rules contained in the Treaty, except for in respect of Spanish nationals, will come into effect for the taxable periods beginning after the ratification of the Treaty by the two parties. The earliest Spanish tax period this can apply to begins on 1st January 2020.

What next?

As the Treaty will have implications for individuals and companies that have connections in both jurisdictions, we recommend that those who may be affected by the Treaty review their tax position and take full advice on their tax affairs as soon as possible in order to understand and potentially mitigate any impact arising from the terms of the Treaty.



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