# Host Country
# SPAIN

**Eduardo Martínez-Matosas and Irene Durán**
Gómez-Acebo & Pombo, Barcelona

## I. Spanish Income Tax Consequences of IaaS and SaaS Transactions Between FCo and Spanish Customers

### A. Characterization of Transactions for Spanish Income Tax Purposes

In the digital world, one of the most common difficulties encountered by both taxpayers and tax administrations is determining whether payments for a digital transaction qualify as business profits or as royalties.

Under the Spanish Non-Residents Income Law Tax (the "IRNR Law"), payments made by a Spanish entity to a foreign corporation in consideration for the use of, or the right to use, any right of "computer software" are characterized as royalties and are subject to IRNR.

Where a tax treaty applies,[1] whether any particular payment is to be characterized as a royalty will have to be decided based on the meaning of the term "royalties" set forth in the relevant treaty.[2]

In this regard, it is important to note that the Spanish tax administration and the Spanish courts generally apply the Commentary on the OECD Model Convention as interpretative guidance in their decisions and judgments. Spain, however, has made Observations on some of the paragraphs of the Commentary on the OECD Model Convention that relate to the definition of the term "royalties" in a software/digital context, in particular, by expressing the opinion that payments relating to software should qualify as "royalties" where less than the full rights to the software are transferred if either:

- the payments are in consideration for the right to exploit commercially a copyright of software (except payments for the right to distribute standardized software copies not carrying the right either to customize or to reproduce the software); or
- the payments relate to software acquired for the business use of the purchaser, when, in this latter case, the software is not completely standardized but somehow adapted to the needs of the purchaser.

Thus, the payments made by Spanish customers to FCo relating to software (for their business use) that is "somehow adapted" to their needs (as opposed to standardized software) would be characterized as royalties.

In addition, Spain also made Reservations to Article 12(2) of the OECD Model Convention, under which it reserved the right to include in the definition of royalties income from the leasing of industrial, commercial or scientific equipment and of containers. Consequently, payments made by Spanish customers to FCo relating to the cloud infrastructure could also potentially qualify as royalties.

### B. Possibility of FCo Being Treated as Having a Permanent Establishment in Spain or as Otherwise Being Engaged in a Spanish Trade or Business That Would Subject it to Net Basis Taxation

Article 5(5) of the OECD Model Convention provides that where a person, other than an agent of an independent status, is acting on behalf of a company and has, and habitually exercises, in a Contracting State an authority to conclude contracts in the name of the company, the company will be deemed to have a permanent establishment ("PE") in that State with respect to any activities that that person undertakes for the company.

As regards the expression "authority to conclude contracts," paragraphs 32.1 and 33 of the Commentary on Article 5 of the OECD Model Convention state that the following factors (most of which are considered key factors by the Spanish tax administration[3]) are indicative of whether a person has such authority.

- The "authority to conclude contracts. . . ." may exist with respect to an agent who concludes contracts that are binding on the enterprise even if those contracts are not actually in the name of the enterprise.
- The lack of active involvement by an enterprise in transactions may be indicative of a grant of authority to an agent.
- A person who is authorized to negotiate all the elements and details of a contract in a way binding on the enterprise can be said to exercise this authority, even if the contract is signed by another person or if the agent has not formally been given a power of representation.
- For example, an agent may be considered to possess actual authority to conclude contracts where he/she


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solicits and receives (but does not formally finalize) orders that are sent directly to a warehouse from which goods are delivered and where the foreign enterprise routinely approves the transactions.

### 1. Spanish Supreme Court decision in Roche Vitamins

A situation in which similar factors were present was addressed by the Spanish Supreme Court in *Roche Vitamins*[4] (and by the Spanish Central Economic-Administrative Court ("TEAC") in *Dell*[5]). In *Roche Vitamins*, the fact that the Spanish subsidiary in the case had no capacity to contract or negotiate on behalf of its Swiss parent did not prevent the application of the dependent agency clause of the Spain-Switzerland tax treaty, as the Spanish subsidiary was obliged to promote the goods that were sold, which function was considered by the Court to indicate greater involvement in the Spanish market, as well as being a key element in the Court's arriving at the conclusion that the Spanish subsidiary did more than merely process purchase orders issued by its Swiss parent.

It should be noted that the OECD Model Convention contains an "auxiliary or preparatory activities" exception,[6] which provides that if the activities of a dependent agent are limited to those of a preparatory or auxiliary character (for example, advertising or the collection of information for the principal), such activities will not give rise to a dependent agent PE.

According to paragraph 24 of the Commentary on Article 5 of the OECD Model Convention, the decisive criterion for distinguishing between activities that have a preparatory or auxiliary character and those that do not is "whether or not the activity of the fixed place of business in itself forms an essential and significant part of the activity of the company as a whole."[7] In this regard, it is unlikely that FCo's activities in Spain—through FCo personnel (the sales representatives) located in Spain—would be considered auxiliary activities, since their main purpose is to increase sales of FCo's products in Spain (i.e., FCo's core business).

### 2. Spanish Central Economic-Administrative Court decision in *Dell*

The facts in the *Dell* case were that Dell computers were sold in Spain by Dell Spain (a commissionaire) under a commissionaire agreement with Dell Ireland (the "principal"). Dell Ireland's function was to sell computers and to manage/control their distribution in Dell's various markets through local distributor entities (such as Dell Spain) that, from a functional perspective, were characterized (and remunerated) as commissionaires, but that, from a business perspective, actually carried on substantive activities that went beyond the mere performance of a commissionaire function.

In particular, Dell Spain was directly and actively involved in logistics, marketing, post-sale services and administration for Dell Ireland's Spanish online store. Dell Ireland had no employees and no facilities in Spain (either owned or rented).

Dell Ireland operated under a direct sales model in which purchase orders were placed through a website or a call center. Dell Spain operated as a fully-fledged distributor, undertaking strategic activities in Spain up until 1995, at which point it entered into a commissionaire agreement with Dell Ireland under which it would serve medium and large-size customers requiring specialized, on-site attention.

The TEAC upheld the position of the tax administration and concluded that Dell Spain constituted a Spanish PE of Dell Ireland, under both Article 5(1) (fixed place of business) and Article 5(4) (dependent agent) of the Spain-Ireland tax treaty. In arriving at its decision, the TEAC referred to the Commentary on the OECD Model Convention for interpretative guidance.

Another important aspect of the TEAC's decision was the court's characterization of the online store as an "online PE," even though the server concerned was located outside Spain and no activity was performed through human means or assets located in Spain. In this regard, it should be noted that Dell Ireland carried out economically significant operations (such as sales and deliveries) in Spain, and that Dell Spain employees were involved in the maintenance of the online store.

The Court also held that Dell Ireland had a PE in Spain on the grounds that Dell Spain had the authority to conclude contracts in its name and acted as a dependent agent. In particular, Dell Spain had the authority to conclude contracts that were binding on Dell Ireland (even if those contracts were not actually in Dell Ireland's name). Other important factors were that Dell Spain acted under the comprehensive supervision and control of Dell Ireland, and that its activities were not limited to those of an auxiliary character.

In the case under analysis, whether FCo would be treated as having a PE in Spain would depend mainly on the authority of the FCo personnel (the sales representatives) located in Spain to conclude contracts that are binding on FCo (even if those contracts are not actually in FCo's name).

## C. Difference if FCo Provided IaaS or SaaS Capabilities Through Spanish-Based Servers Maintained by Spanish-Based Personnel

If FCo provided IaaS or SaaS capabilities through Spanish-based servers maintained by Spanish-based personnel, this would not affect the position set out above.

## D. Difference if Spanish Customers Could Download onto their Own Systems or Make Copies of FCo's Core Software or any Digital Content Made Available to Them

If Spanish customers could download on to their own systems or make copies of FCo's core software or any digital content made available to them, this would not affect the position set out above.

## II. Spanish Indirect Tax Consequences of IaaS and SaaS Transactions Between FCo and Spanish Customers

### A. Characterization of Transactions for Spanish Indirect Tax Purposes

The Spanish Value Added Tax ("VAT") Law distinguishes two forms of e-commerce — offline e-commerce and online e-commerce.

Offline e-commerce involves the sale of physical products through electronic media. In practice, this is no different from a traditional sale, except as regards the channel through which the sale is effected (i.e., the internet); therefore, the VAT tax treatment of offline e-commerce is exactly the same as that of traditional commerce.

Online e-commerce involves the sale of products where the entire sale is delivered through electronic media in the form of data storage and data compression services. Online e-commerce encompasses the provision of services such as remote e-learning or web hosting, and the electronic delivery of products such as movies, music and e-books. Since the object of an online e-commerce transaction is an intangible asset, such a transaction qualifies as the provision of services.

According to Article 70.*Uno*.4 B of the VAT Law, the terms "electronically supplied services" and "e-commerce" include the electronic delivery of anything immaterial, for example:

- web hosting;
- the remote maintenance of software and hardware;
- software delivery and updating;
- the distribution, and storage in databases of, images, text and information;
- the delivery of music, movies, games (including monetary betting and online gaming) and the delivery of scientific, artistic, sports, cultural and political content; and
- e-learning.

Spanish VAT law is not clear on whether cloud computing services are included in the above definitions. However, Regulation UE/282/2011, which is directly applicable in all EU Member States, provides that, e-commerce comprises services supplied through the Internet or an electronic network that, by their nature: (1) are essentially automated; (2) require minimal intervention; and (3) have no viability outside the information technology context. Thus, cloud computing services would, in principle, qualify as "electronically supplied services" for purposes of VAT.

### B. Liability of Transactions to Spanish Indirect Taxation, Rate of Taxation, Availability of Exemptions

The VAT treatment of electronically supplied services is as follows

- Business to business ("B2B") transactions: Spanish VAT accrues if the recipient of the services is tax resident in Spain. Spanish VAT may also accrue, where the recipient is not resident in an EU Member State, if the services were effectively used in Spain.
- Business to consumer ("B2C") transactions: a distinction is made between the following two scenarios:
  - when the service provider is established in Spain: Spanish VAT accrues unless the recipient is an individual who is not tax resident in an EU Member State;
  - when the service provider is established outside the European Union: Spanish VAT accrues if the recipient is an individual who is tax resident in Spain.

Where the service recipient is not an individual, the reverse charge mechanism does not apply, so that where the provision of a service gives rise to a charge to Spanish VAT, the VAT taxpayer is the service provider even if it is not established in Spain. In such circumstances, the special regime provided for in Articles 163 *bis* of Law 37/1992 and Directive 2002/38 / EC may apply. Under this regime, a non-EU service provider can register in any EU Member State and obtain an identification number (NOE) for purposes of declaring and paying the VAT chargeable on its B2C transactions effected within the European Union. It should be noted that, with effect from January 1, 2015, this special regime will be modified so that a registered service provider will be required to charge VAT in the country of residence of the service recipient.

In summary, the transactions between the Spanish customers and FCo will be taxed as follows.

- If the customer is a business, the transaction will be subject to Spanish VAT at the rate of 21% and the Spanish customer will be the VAT taxpayer, since the reverse charge mechanism will apply.
- If the customer is an individual, the transaction will be subject to Spanish VAT at the rate of 21% if the service provider (i.e., FCo) is tax resident outside the European Union. The service provider (FCo) will be the taxpayer.

Article 69.3.2ª of the VAT Law provides that a foreign company is deemed to have a PE in Spain for VAT purposes if it has a fixed place of business in Spain from which its business activities are performed. Article 69.3.2ª also contains a list of circumstances in which a PE is deemed to exist for VAT purposes (for example, where there is an office, an installation or an agent with the capacity to conclude contracts).

In the case at hand, the authors' understanding is that FCo would not be deemed to have a Spanish VAT PE.

### C. Difference if FCo Provided IaaS or SaaS Capabilities Through Spanish-Based Servers Maintained by Spanish-Based Personnel

If FCo provided IaaS or SaaS capabilities through Spanish-based servers maintained by Spanish-based personnel, this would not affect the position set out above.

### D. Difference if Spanish Customers Could Download onto their Own Systems or Make Copies of FCo's Core Software or any Digital Content That was Made Available to Them

If Spanish customers could download onto their own systems or make copies of FCo's core software or any digital content that was made available to them, this would not affect the position set out above.

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**NOTES**

[1] For the purposes of this analysis, the reference to a Tax Treaty will focus on the 2010 OECD Model Tax Convention on Income and Capital.

[2] This will be found in the provision in the treaty concerned that is equivalent to OECD Model Convention, Art. 12(2).

[3] DGT V2192-08, V2191-08, 10-12-92 RTEAC 2/3/06.

[4] Spanish Supreme Court, Jan. 12, 2011.

[5] Spanish Central Economic-Administrative Court, March 15, 2012

[6] OECD Model Convention, Art. 5(4).

[7] These words were cited by the Spanish tax administration in DGT V1305-09.