

European Commission opens an infringement procedure against Spain regarding the obligation to declare assets and rights located abroad (form 720)

On the 19th of November, the European Commission decided to take action against Spain and opened an infringement procedure (ref. 2014/4330), challenging certain points of the Spanish legislation which set forth the penalties imposed for not complying with the existing obligation to declare assets and rights located abroad through form 720 (*Modelo 720*, in Spanish).

As from 2012, Law 7/2012 incorporated a new obligation into the Spanish legal system. Under this new regime, all tax residents in Spain are obliged to submit an annual return declaring all their assets and rights located abroad. Moreover, it laid down specific penalties connected to the non-submission of said return within the established deadline and to its submission with missing information or with inaccurate or false data.

In connection with this, Personal Income Tax Law (article 39.2) and Corporate Income Tax Law (article 134.6) set forth that the possession, declaration or acquisition of assets and rights of which the aforementioned obligation was breached, are in any circumstances considered as either unjustified capital gains or non-declared income and, consequently, must be included in the general taxable base of the oldest tax year open to tax audit.

In this respect, it is important to note that the tax rates applicable to the general taxable base differ among the different Autonomous Regions in Spain. By way of illustration, the maximum tax rate ranges from 44.50% in Madrid to 48% in Andalusia, Catalonia and Asturias.

Additionally, the regularisation itself is considered as an infringement whose penalty amounts to 150% of the tax due as a result of such regularisation

That being said, there are two aspects of this informative obligation that have been contested by the European Commission as being contrary to European Union law.

First, penalties deriving from the non-compliance with the obligation to submit this specific return in time and manner are notably more burdensome than those imposed on similar behaviours.

Secondly, the non-application of the 4-year statute of limitations in those cases when the reputed gain is attributable to a tax year already closed to tax audit, and the

finances amounting to 150% of the tax due have been considered as disproportionate by the European Commission.

It is the Commission's view that both features are contrary to the free movement of capital within the European Union. It is true that the Spanish rules at concern are aimed at fighting against tax fraud. However, the European Commission holds the rules as incompatible with the European Union tax law because they amount to an unjustified and disproportionate restriction of the free movement of capital, going beyond what is necessary to achieve their goal.

It must be highlighted that in the Spanish tax system the filing of an extemporaneous income tax return by the taxpayer without having being required to do so by the tax authorities prevents the application of tax penalties. The consequences of such late submission just entail the imposition of a surcharge and the payment of interest for late payment in some cases. Furthermore, in the event of the taxpayer not complying with the submission of a declaration, the penalties imposed are less severe than the ones established for the form 720 and the obligation eventually becomes statute-barred.

As a result of the infringement procedure, Spain has two months to put forward its justifications for laying down such regime. Should the European Commission remains not convinced, it could deliver a reasoned opinion in which the consequences of the infringement by the Spanish government would be established. Likewise, this reasoned opinion could suggest different alternatives to adequate this system so as to be compatible with the European Union law.

The potential consideration of the regime as opposite to the free movement of capital as a result of this procedure would entail important consequences not only with regards to EU/EEA countries -to which the Commission directly refers- but also to third countries that have an exchange of information agreement in force with Spain. It is important to remember that Spain has concluded such agreements with around 80 countries outside the European Union or the European Economic Area.

This procedure will presumably have a huge impact. This is due to the fact that it will make it necessary for the Spanish legislator, in all likelihood, to reconsider the consequences deriving from the non-submission of the form 720. Besides, it will probably open the gate to an extraordinary regularisation procedure that would allow taxpayers to present the form in a late stage, with less severe penalties and the possibility to allege the statute of limitations.

In addition to that, the opening of this procedure provides new defence tools to those taxpayers whose tax position have been regularised by the tax authorities, either for not having presented the return in time, or due to a correction from the tax authorities ex officio.

In any case, it must be remembered that the initiation of the infringement procedure does not exempt from the obligation to declare all assets and rights located outside Spain, which is currently in force in our legal system with the severe consequences explained above in case of non-fulfilment.

We trust that you find this information of interest. Should you require any further information, please do not hesitate to contact us directly. It would be our pleasure to analyse your personal situation and to provide you with a tailored solution to your personal circumstances.

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