

## ANALYSIS OF SPANISH TAX RESIDENCY RULES

### **Spanish internal law**

The law is contained in Articles 8 and 9 of the Impuesto sobre la Renta de las Personas Físicas (Law 35/2006) and the related regulations.

### **Definitions**

A person is tax resident in Spain when having habitual residence in Spain.

Habitual residence expressly exists when one of the two following situations exist:

- a) A person is present in Spain for 183 days or more during a calendar year. Note a) that the calendar year is the tax year and b) that there is no concept of days of arrival/departure, in other words presence for any time in a day in Spain means presence for that day.

Periods of absence from Spain are ignored (i.e. computed as being in Spain) unless the person is able to demonstrate tax residence in another country.

In the case of claiming tax residence in a country considered to be a tax haven by Spanish legislation, then the tax office may require that the person demonstrates physical presence in that country for at least 183 days in the calendar year.

- b) Spain is, directly or indirectly, the base or centre of a person's economic or family/ personal interests.

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Furthermore:

- c) Adopting the same principles as in A or B, it shall be *presumed* that a person is habitually resident (i.e. tax resident), subject to proof to the contrary, if:
  - i. His/her spouse, not legally separated, is habitually resident in Spain, and
  - ii. His/her minor children that depend on him/her are also habitually resident in Spain.

### ***Interpretation and commentary***

A person would certainly be tax resident in Spain if physically present for 183 days or more. It is commonly thought that this is the only rule that applies but this is not the case for the reasons that follow.

1. Periods of temporary absence from Spain will be disregarded and treated as physical presence in Spain – unless it is possible to prove tax residence in another country.
2. Because periods of temporary absence from Spain are disregarded, a person may be resident in Spain even if not physically present in Spain for 183 days or more. In effect, Spanish tax law does not define a minimum number of days for tax residence to apply.
3. A person is presumed to be tax resident in Spain if his/her spouse and minor children live in Spain – unless able to prove tax residence in another country.
4. A person can be tax resident in Spain if he/she has any economic or family interests in Spain, even if never present in Spain, unless able to prove tax residence in another country.
5. Claiming tax residence in listed tax haven jurisdictions is especially problematical because it may be necessary to prove physical presence in that jurisdiction for 183 days or more.

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### **TAX TREATIES**

Double tax treaties take precedence over internal law. It is important to note, however, that in certain matters the treaties leave it to the internal law of the two countries to provide relevant definitions. An example of this is the definition of tax residence, which each country is free to determine at will. The main purposes of tax treaties is to determine which country has the right to impose tax and to eliminate double taxation, should this arise.

### ***Spanish/UK double tax treaty summary***

This treaty is similar to those of other countries and is useful to use as an example. However, in the case that a person has tax residence status in another country that relevant tax treaty should be checked.

Article 1: This states that the treaty shall apply to a person who is defined as tax resident in either of the two countries.

Article 4: This states that 'resident of a country' shall be defined in accordance with the law of that country and sets out tiebreaker rules that would apply if a person is considered tax resident in both countries by virtue of their internal tax laws. The tie breaker clauses are as follows:

- a) *A person shall be resident in the country where he/she has a dwelling at his/her disposal and, in the case of having dwellings at his/her disposal in both countries or in neither country the person would be resident where the centre of vital or economic interests are located.*
- b) *If a) does not determine the country of residence then the country of residence where the person lives habitually.*
- c) *If b) does not determine the country of residence then the person's tax residence shall be the country of his/her nationality.*
- d) *If c) does not determine the country of residence then the two countries shall resolve the tax situation by mutual agreement.*

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### ***DEFINITION OF THE WORD ‘HABITUAL’***

This word is used several times in Articles 8 and 9 for the fundamental definition of tax residence in Spain. It is worth reflecting on the precise definition of ‘habitual’ that would apply in the case of interpretation by a Spanish tax court.

### ***Dictionary of the Spanish Language – Real Academia Española***

“That which is done, endured, or held continually or customarily”

This is subtly different to the definition of the word in the English language:

### ***Collins English dictionary***

“1. done or experienced regularly or repeatedly: the habitual Sunday walk 2. by habit: a habitual drinker 3. customary; usual: his habitual comment.”

### ***Comment:***

Despite the subtle difference in the definition in the two languages, it is obvious that a person who customarily resides in Spain could be regarded as being ‘habitually’ resident. This is the primary definition of tax residence and it appears in the first sentence of Article 9 of the Impuesto sobre la Renta de las Personas Físicas and the rest of the definitions expand on this basic concept or deal with situations that expressly cause a person to be tax resident in Spain.