



ANALYSIS OF SPANISH TAX RESIDENCY RULES

SPANISH INTERNAL LAW

The law is contained in Article 9 of the Impuesto sobre la Renta de las Personas Físicas (Law 35/2006).

Definitions

A person is tax resident when habitually resident 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.
- B. Spain is, directly or indirectly, the base or centre of a person's economic or personal interests.

Furthermore:

- C. 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.

Furthermore:

- D. Temporary absences of a person shall be regarded as presence in Spain unless the person can demonstrate *tax residence* in another country. In the case of tax residence in a listed tax haven, the Spanish tax office may require proof that demonstrates physical presence in that country for 183 days or more.

Interpretation and commentary

- 1. A person would be tax resident in Spain if physically present for 183 days or more.

2. Periods of temporary absence from Spain may be disregarded and treated as physical presence in Spain – unless it is possible to prove tax residence in a non tax haven country.
3. 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.
4. 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 a non tax haven country.
5. 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.
6. In the case of B or C, if tax residence is claimed in a listed tax haven it would be necessary to prove physical presence in that tax haven for 183 days or more.

TAX TREATIES

Double tax treaties take precedence over internal law. It is important to note, however, that in certain matters the treaties leave definitions to the internal tax law of the two countries and this includes the definition of tax residence status. 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 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 potential tax residence status with another country the relevant tax treaty definition of tax residence must be checked in case there is a difference.

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 has a dwelling at his disposal and, in the case of having dwellings at his 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 nationality.
- d) If c) does not determine the country of residence then the two countries shall resolve the tax situation by mutual agreement.

DEFINITION OF THE WORD 'HABITUAL'

This word is the primary indicator of tax residence in Spanish law. For the sake of precision the definition of this word is, literally, in English and Spanish as follows:

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."

Diccionario de la Lengua Española – Real Academia Española

"That which is done, endured, or held continually or customarily"

Comment:

It is clear from the definitions that a person who regularly or repeatedly or 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. The rest of Article 9 contains terminology that expands on this basic concept or deals with situations that expressly cause a person to be tax resident in Spain.

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