

BITTERSWEET CHRISTMAS IN SPAIN – BECKHAM REGIME 2.0 AND SOLIDARITY TAX

Author

Luis Durá García

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Luis J. Durá García is the managing partner of Durá Tax & Legal, with offices in Madrid and Valencia. His practice is focused on inbound and outbound international tax planning, particularly with tax treaty interpretation, investment holding structures, and matters pertaining to the Beckham Regime.

INTRODUCTION

Last year, Christmas in Spain brought with it good news for some individuals and bad news for others. Regarding the good news:

- The special tax regime for certain immigrants (also known as the “*Beckham Regime*”) was amended by introducing changes to significantly improve its scope and benefits.
- The Spanish Parliament approved the Law 28/2022 of December 21, 2022, regarding the promotion of the “start-up ecosystem” (“Start-ups Law”). The final draft was published in the Official Gazette on December 24, 2022, and the new law entered into effect on January 1, 2023. Implementation regulations are pending.

Regarding bad news:

- The Solidarity tax addressed to high net worth individuals was approved. It is an add-on wealth tax that backstops the existing Wealth tax, so that Spanish residents that previously paid no Wealth tax will be subject to the Solidarity tax. Think of it as the equivalent of a minimum tax that backstops and income tax.

This article addresses the foregoing additions to Spanish tax law. The net effect is bittersweet.

BECKHAM REGIME 2.0

Main Amendments

The basic benefit of the Beckham Regime is that qualifying individuals are subject to tax in Spain as nonresidents for six tax years, beginning with the year of arrival. The first €600,000 of Income from employment is taxed at a flat rate of 24% rather than graduated rates of up to 43%. Income in excess of €600,000 is taxed at a flat rate of 47%. Other income and assets are subject to tax at ordinary rates, but the tax base includes only income from Spain and assets located in Spain. The regime is elective.

In order to benefit from this specific tax regime, an individual must not have been a Spanish tax resident for a specified period. Prior to the change in law, the period of nonresidence in Spain was 10 years. Under the change in law, the nonresidence period is reduced to five years.

The criteria for eligibility has been widened to cover more than employees:

- **Entrepreneurial activity.** Individuals coming to Spain to carry on an entrepreneurial activity may elect coverage under the Beckham Regime. This means that self-employed individuals may qualify, but only if the entrepreneurial activity is an innovative activity for which Spain has a special economic interest. A favorable determination from the State Administration (“ENISA”) will be required. Apart from the tax benefits, an individual who qualifies under this category is entitled to obtain a work visa.
- **Highly qualified professionals.** Individuals coming to Spain to provide services to start-up companies or to carry on research, training, or innovative activities may elect coverage under the Beckham Regime.¹ To qualify, the payment must represent more than 40% of the individual’s total personal income and the company must be a start-up. The definition of a “start-up company” is included in the Start-up Law. A company is considered to qualify where all the following conditions are met.
 - The company must be newly formed, or alternatively, cannot be recorded at the Mercantile Registry for a period of more than five years, in general, or for a period of more than seven years if operating in the biotech, energy, or industrial areas.
 - The company must not arise from a merger, spin-off, or change of corporate form involving entities that are not considered to be start-ups.
 - The company must not distribute, or have distributed, dividends, meaning that profits are reinvested in the business or held for future reinvestment.
 - The company must not be listed on a regulated stock exchange.
 - The principal place of business, registered office, or permanent establishment must be located in Spain.
 - At least 60% of the Company’s employees must have an employment contract in Spain.
 - The company must be based on an innovative entrepreneurship project which has a scalable business model.

Apart from the tax benefits, an individual who qualifies under this category is entitled to obtain a work visa.

- **Remote workers.** Remote workers coming to Spain may elect coverage under the Beckham Regime. Work must be carried out from home by the employee (known as a “*digital nomad*”). In the particular case of a remote work visa, the Beckham Regime is available for employees. Apart from the tax

¹ Beyond extension of the Beckham regime, the Start-up Law provides other benefits to emerging companies and individuals. These include favorable rules on stock option schemes, special valuation rules for shares and participations awarded to employees, tax credits for investment in new companies and reduced corporate tax rates. A discussion of these benefits is beyond the scope of this article.

benefits, an individual who qualifies under this category is entitled to obtain a work visa.

- **Managers.** Under prior law, a manager electing for tax benefits under the Beckham Regime could not own more than 25% of the share capital of the employer. The cap has been eliminated for managers coming to Spain to work for operating companies. Those who come to Spain to work for a holding company continue to be subject by the limit on the ownership of shares in the employer. A company is considered to be a holding company if its activity principally covers the management of passive assets, such as financial securities and real estate.

To sum up, income from the performance of qualified activities is taxed at a flat rate of 24% up to €600,000. Qualifying Spanish source income in excess of the ceiling is taxed at the rate of 47%. Income from sources outside of Spain is not taxed. Taxpayers that benefit from the Beckham Regime are subject to Spanish Wealth tax, but the tax base is limited to assets situated in Spain.

Beneficiary's Relatives

One of the primary advantages of the new law is that, beginning from January 1, 2023, the spouse and children under the age of 25 (or disabled of any age) of the qualifying individual are entitled to benefit from the Beckham regime. The favorable rate is capped for family members. The rate applies only to the extent the aggregate amount of income of all family members does not exceed the income of the qualifying individual. As with the qualifying individual, only Spanish source passive income is subject to tax.

Absence of Transitional Relief

The Start-up Law entered into effect on January 1, 2023, and involves significant improvements as to the scope and benefits of the Beckham regime. In this regard, a transitional regime for persons arriving in Spain prior to the effective date of the new law is not included in the Start-up Law. No indication exists that a transitional regime will be included in the regulations that may be issued by Spanish tax authorities. In comparable circumstances Spanish courts have held that once an individual establishes residence in Spain and does not qualify for benefits under the law in effect at the time, subsequent changes that lower the bar for qualification have no retroactive effect unless the legislation or implementing regulations provide relief.

SOLIDARITY TAX

Spanish Wealth tax is administered at the autonomous regional level. Some regions impose the tax, but provide relief for property located in the region. Think of a sale that is subject to V.A.T., but the rate is zero. To eliminate that practice, the government enacted a second wealth tax in addition to the existing tax that applies nationwide, but which provides relief for regional Wealth tax paid. On December 28, 2022, the final text of the Solidarity tax law was published in the Spanish Official Gazette. This second wealth tax is aimed at individuals with a net wealth exceeding €3.0 million.



Key Features

In comparison to the existing Wealth tax, the Solidarity tax cannot be managed at the level of autonomous regions. It is intended to target specific regions such as Madrid, Galicia, and Andalusia. Those regions provide Wealth tax allowances for assets physically located within the region. The new Solidarity tax applies to Spanish taxpayers having a worldwide net worth in excess of €3.7 million. It also applies to nonresident taxpayers holding assets with a value in excess of €3.0 million in regions where the Wealth tax was effectively abated by applicable allowances.

This difference of treatment between residents and nonresidents may violate European Union Law providing the right to free movement of capital between member States. It may also violate rights granted by Article 63 of the Treaty on the Functioning of the European Union, which prohibits all restrictions on the movement of capital and payments (i) between Member States and (ii) between Member States and third countries.

In broad terms, the Solidarity tax adopts most of the rules issued under the existing Wealth tax. Thus, for example, rules regarding the definition of covered taxpayers, the determination of the taxable base, and the allowance of exemptions merely refer to the Wealth tax Law.

As drafted, the Solidarity tax has a lifespan of two years. The first year is calendar year 2022 and the second year is calendar year 2023. An open question exists as to whether the government will extend the two-year period at the end of 2023.

Applicable tax rates are as follows:

Net Tax Base (up to)	Tax Burden	Remaining Tax Base (up to)	Tax Rate
€0.00	€0.00	€3,000,000.00	0.00%
€3,000,000.00	€0.00	€2,347,998.03	1.7%
€5,347,998.03	€39,915.97	€5,347,998.03	2.1%
€10,695,996.06	€152,223.93	€ Higher	3.5%

In order to avoid double taxation of assets, the Solidarity tax allows for the effective deduction of previously paid Wealth tax. That deduction implements the Government's goal of targeting Madrid and Andalusia, where a 100% Wealth tax allowance is applied for assets located in the region. As a result, the Solidarity tax effectively implements a minimum Wealth tax on a national basis.

Madrid and Andalusia have sought redress in Spanish courts to prevent the effective elimination of allowances each has granted for wealth tax purposes. The position of the two regions is that the Solidarity tax violates the rights of the Autonomous regions granted by the Spanish Constitution.

The Solidarity tax establishes an overall cap on the tax due, similar to the existing cap in the Wealth tax that takes into account the overall tax payable under the Personal Income tax and the Wealth tax. If the final amount of Solidarity tax, Personal Income tax, and Wealth tax exceed 60% of the Personal Income tax net taxable

base, the Solidarity tax payable is reduced. However, the reduction may not exceed 80% of the initial amount of Solidarity tax due.

Spanish Constitution

Several issues exist under Spanish law regarding the constitutionality of the Solidarity tax. For that reason, many advisers have urged clients to claim refunds of Solidarity tax paid.

Retroactivity

Because the Solidarity tax has effect for tax years beginning on January 1, 2022, even though it was published in the Spanish Official Gazette on December 28, 2022, it has retroactive effect. If that starting date confirmed, the Solidarity tax may be unconstitutional for taxpayers who became Spanish tax residents for 2022 and were physically present in Spain for more than 183 days prior to December 28, 2022. Retroactive legislation violates article 9.3 of the Spanish Constitution, encompassing the principle of legality.

The issue of retroactivity of tax legislation in general is pending in a case currently before the Spanish Supreme Court. It involves a specific tax approved in the Canary Islands and applicable to deposit and credit institutions. The tax was effective prior to the date of enactment – hence it was retroactive to time before enactment. While the decision in the Canary Islands case is not binding on the Spanish Supreme Court in a matter related to the Solidarity tax, it would illustrate the views of the court.

Violation of Right to Autonomy of Regions

The taxing rights related to Wealth tax are granted at the Autonomous region level and to tax the same assets a second time, at the level of the Spanish State, may be viewed as being contrary to Article 156 of the Spanish Constitution. Under that provision, the Autonomous regions are granted financial autonomy. The aspect of the Solidarity tax providing credits for wealth tax payments to Autonomous regions in effect imposes a minimum Wealth tax on residents of regions granting allowances.

Procedural Irregularity

The Solidarity tax was enacted by means of an amendment to an existing bill before parliament. This parliamentary procedure may be contrary to the principles of good regulation granted under Article 129 of the Spanish Constitution. The relationship between the State and the Autonomous regions must be arranged through specific laws in order to protect the financial rights granted via the Spanish Constitution.

In conclusion, it is likely that the Solidarity tax might be declared unconstitutional based on the above-mentioned criteria. Therefore, many advisers recommend that clients should claim a refund immediately after paying the Solidarity tax.

Spanish Real Estate Companies

Nonresidents are subject to Wealth tax in a limited way. The tax applies to assets located in Spain. Over the years, there has been debate over whether nonresidents holding Spanish real estate assets through foreign entities should be subject to Wealth tax. Initially, the Directorate General of Taxes (“the D.G.T.”) issued binding

“Several issues exist under Spanish law regarding the constitutionality of the Solidarity tax . . .”

rulings² stating that income tax treaties could create taxing rights for Spain, even though the Spanish domestic law did not contain a provision imposing tax. Recently, the D.G.T. changed its view. In binding rulings,³ it stated that nonresident taxpayers holding real estate assets directly or indirectly through foreign entities were not subject to Wealth tax.

There no longer is a debate on the application of Wealth tax to nonresidents holding Spanish real estate through an envelope company. The same bill introducing the Solidarity tax amended the Wealth tax in order to grant taxing rights in this specific scenario of holding Spanish real estate assets through foreign entities. This measure applies to the Solidarity tax as Wealth tax rules are adopted in applying the Solidarity tax.

Nonetheless, each case should be evaluated based on the particular income tax treaty involved. To illustrate, the current Spain-U.S. Income Tax Treaty⁴ does not include the Spanish Wealth tax within its scope. Consequently, the Spanish Wealth tax imposed on the value of Spanish real estate assets held through a foreign company does not conflict with the income tax treaty. In comparison, the Spain-Canada Income Tax Treaty⁵ provides that the imposition of Wealth tax may be imposed on real estate assets that are held directly. As a result, Canadian residents holding shares of foreign or Spanish companies would not be subject to Wealth tax even when the assets of the issuing company consist primarily of Spanish real estate.

CONCLUSION

An ambiguity exists between the Beckham Regime and the Solidarity tax. Does the Beckham regime override the Solidarity tax? Under one view, the wording of the Beckham Regime refers only to its application to Personal Income tax and Wealth tax. On that basis, the Solidarity tax could be applied to worldwide assets of an individual electing the benefits of the Beckham regime. The other view is that when the Solidarity tax refers to definitions and provisions of the Wealth tax, it adopts the limits on jurisdiction to impose the tax. Consequently, if wealth is not taxed under the Wealth tax, it cannot be taxed under the Solidarity tax. As with many debates of this kind, the answer is in the eye of the beholder. In the view of the author, taxpayers electing coverage under the Beckham regime are subject to Solidarity tax. However, the Solidarity tax may be imposed only on the value of assets located in Spain, and only if those assets exceed €3.0 million. The D.G.T. has recently confirmed this view in a ruling pending to be published.

² Rulings V4968-16, V1452-14, and V2521-13.

³ Rulings V1947-22, V2646-21, and V2070-21.

⁴ Originally signed on February 22, 1990, revised by a protocol signed on January 14, 2013, which entered into force on November 27, 2019.

⁵ Originally signed on November 23, 1976, and amended by a protocol signed on November 18, 2014.