BARTOLOME & BRIONES

Legal Status

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TAX

Personal Income Tax news for business angels

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As of 2023 tax year, the applicable deduction base in Personal Income Tax (IRPF) has been increased for individuals who support the creation of new companies, commonly known as *business angels*. The recent regulation has raised the deduction rate from 30% to 50% of the amount invested in start-up companies and the maximum annual investment with the right to deduct has been increased from 60,000 euros to 100,000 euros.

The purpose of this measure is to stimulate investment in innovative and newly created companies, thus promoting entrepreneurship and the generation of employment in the national territory. In addition, the period during which the investment can be made has been extended to a maximum period of five years from the incorporation of the company, thus providing greater flexibility to investors. Consequently, the acquisition of shares may take place at the time of the incorporation of the company or in a subsequent capital increase carried out within the time frame established by law.

An aspect that may also raise doubts is whether the investment should be attributed to the year in which the agreement of constitution or capital increase (deed) is signed, or to the year in which the operation is registered in the Commercial Register (in case of not coinciding in the same year). However, the Tax Agency has clarified that the deduction must be applied in the year of subscription (deed), even if the registration is made the following year.

This regulatory amendment implies a significant increase in the applicable deduction base. By way of illustration and to make a numerical comparison, consider the following scenario: if a taxpayer invests 100,000 euros in a newly created company, the deduction applicable in 2022 would be 18,000 euros, while in 2023 the applicable deduction would rise to 50,000 euros. As a result, the tax savings would be 32,000 euros more in this last year.

	2022	2023
Investment	100,000 €	100,000 €
Deduction base (maximum investment with right to deduction)	60,000 €	100,000 €
% Deduction	30%	50%
Applicable deduction	18,000 €	50,000 €
Savings difference	**32,000 €**	

It is relevant to consider that the application of this deduction is subject to the fulfillment of certain requirements:

- The deduction remains applicable only to those temporary investors known as *business* angels, so it does not extend to permanent investors. The reason for this derives from the fixing of a maintenance period of a minimum term of 3 years and a maximum of 12 years for the disposal of the shares. In other words, if a shareholder contributes capital at the time of incorporation and benefits from the corresponding deduction but

does not transfer his shares within the maximum period of 12 years established by law, he must reimburse both the deductions applied and the interest accrued.

- The equity of the company at the beginning of the year in which the investment is made must not exceed 400,000 euros and the investor, together with his relatives up to the second degree, must not own a shareholding of over 40% of the share capital.

- It is necessary that, at the end of the tax year, the investor's net worth is higher than at the beginning of the same year, with a difference of at least the investments made during the year that allow him/her to access the deduction. In order words, to be entitled to the deduction, contributions must have been made with savings generated during the same period. Increases and decreases in value experienced by assets that at the end of the year continue to form part of the investor's equity, that is, unrealized capital gains or losses, are not included.

It should also be noted that the reinvestment exemption incentive continues to apply. In other words, the tax exemption will be applicable to gains obtained from the sale of shares as long as the requirements for reinvestment in newly created companies are met within one year from the date of the sale. If only part of the sale amount is reinvested, the exemption shall apply proportionately.

Additionally, in the event that the amount invested in the new shares exceeds the value obtained from the sale of the old ones, not only will the gain be exempt, but the surplus will allow the investor to enjoy the deduction for investment in newly created companies.

An illustrative example is presented below: An investor sells his shares in a newly created company and receives 150,000 euros, which he reinvests in another newly created company for an amount of 200,000 euros within the established legal period. In this situation, the investor is not subject to taxation for the sale of the shares (exemption) and, in addition, meets the necessary requirements to enjoy an additional deduction of 25,000 euros, equivalent to 50% of the excess of the investment made on the amount obtained in the sale.

However, in certain circumstances the exemption will not apply. This occurs, for example, when the investor acquires new shares in the same company during the year before or after the sale, when the shares are sold to a spouse or relatives up to the second degree, or when they are sold to a company of the same commercial group of the aforementioned relatives.

Finally, in the event that the investment is made in emerging companies or *start-ups*[1],

[1] Emerging companies are considered those that meet the following criteria: having 60% of the workforce with an employment contract in Spain, being involved in innovative entrepreneurship projects and not distributing dividends or being listed on regulated markets.

two additional improvements to those already mentioned will apply:

- The term to make the investment from the date of incorporation of the company extends from 5 years to 7 years.

- The founding shareholders of these companies are not limited in the maximum amount of participation they can have in the capital, unlike other companies that have a limit of 40%.

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DISPUTES

Multiple-property holders under the new housing law

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On 8 May, the draft of the new Housing Law, approved in the Spanish Congress on 23 April, was published in the Spanish Official State Gazette (BOE) and is expected to be approved by the Senate and published as a definitive law in May.

Among other new aspects, it now includes a definition of "multiple- property holder" and their housing obligations, which entails a potential problem of interpretation and practical application that is analyzed below:

1. Multiple-property holder concept

The new law defines a multiple-property holder as natural or legal person who owns 10 or more units (urban properties for residential use), or who owns a built-up area of more than 1,500m2 for residential use, excluding garages and storage rooms.

However, anyone owning five or more units in a stressed residential market environment owns 5 or more dwellings in a stressed residential market area.

All those who do not meet these requirements and own property are defined as small property holders.

It is worth noting that the law does not define what being a "property-holder" means. We understand from the word used and the generalising spirit of the law that it refers to any person having any percentage of ownership of a property, even if it is under 50%.

In this regard, the method to confirm whether or not a person is a large holder is simply to request the Spanish Land Registry information on how many residential properties any given person owns. Thus, anyone owning ten or more units would be considered multiple-property owner.

In any case, the interpretation that the Administration and the courts give to this concept will have to be monitored in the future, because it could be legally claimed that if any given person owns less than 50% of a property, they do not have the power to decide on the use of the property, and thus it should not count as ownership when it comes to checking whether this person is a multiple-property holder.

2. Legal effects of being a multiple-property holder

In terms of rental contracts by a multiple-property holder in a stressed are, the rent shall be the one stated in a price suppression index to be created by the government. The rent price is expected to be lower than that applied to small property holders' rentals.

For comparison purposes, if the same rental corresponded to a small property holder, the price would also be controlled, but in relation to the previous rental price applicable plus

the relevant index increase in force. It should be noted that this index is 2% in 2023 and 3% in 2024. For example, if a small property holder has a 1,000€ rental in a stressed area which it is rented to a new tenant in 2023, the rent cannot be higher than 1,020€.

A further legal effect of being a multiple-property holder is that the tax rebate that small property holders get on their rentals shall not apply.

3. Stressed area definition

For clarification purposes, it should be pointed out that stressed areas are declared as such by the corresponding Autonomous Community. However, at least one of the following two requirements must be met:

1) The average cost of the mortgage or rent plus basic expenses and supplies must exceed 30% of the average income of households in that area.
2) The average purchase or rental price of housing in the area must have increased at least by three points above the CPI of that Autonomous Community in the five years prior to the declaration of a stressed area.

4. Issues related to rented units that are owned by multiple co-owners with one or more being multiple-property holders and others being small property holders.

As noted above, there may be cases when a multiple-property holder has some of its property units in joint ownership with small property holders.

A dilemma would emerge in this case as to the applicable law in terms of the rental income limit corresponding to that property, taking into account what has been previously indicated regarding the rental income limit depending on the type of property holder involved.

While this issue will have to be clarified by the government or by the courts in the future, we understand that a reasonable interpretation would be to apply the law depending on the type of holder having the highest percentage of ownership of any given property: if the majority ownership (more than 50%) corresponds to multiple-property holders, the law applicable to them shall apply to the rental. Otherwise, the law applicable shall be that corresponding to small property holders.

Another potential interpretation would be that the law should favor the tenant, and thus the multiple-property holders' law should apply if any of the co-owners falls under this category. But this would unjustifiably disadvantage the small owners of this unit, so the first interpretation is perhaps more balanced and reasonable.

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COMMERCIAL

Preliminary draft law on structural modifications of trading companies in transposition of directive (EU) 2019/2121

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On 14 February 2023, the Council of Ministers approved an Anteproyecto de Ley de Modificaciones Estructurales de Sociedades Mercantiles en trasposición de la Directiva (UE) 2019/2121 del Parlamento y del Consejo, de 27 de noviembre de 2019 [Preliminary Draft Law on Structural Modifications of Trading Companies in transposition of Directive (EU) 2019/2121 of the Parliament and of the Council of 27 November 2019], which in turn amends Directive (EU) 2017/1132 (the "Preliminary Draft"). This will entail the repeal of Law 3/2009 on Structural Modifications in order to update the regime it provides for.

The aim of this reform is to ensure agility and transparency in corporate restructuring procedures, as well as the establishment of a common framework for both domestic and cross-border structural operations. According to the explanatory memorandum, *"(...) this alignment will prevent the regime for domestic structural changes from being more demanding than that for cross-border structural changes (...)*".

The Preliminary Draft regulates the structural modifications of domestic and cross-border trading companies operations involving a transformation, merger, spin-off and global transfer of assets and liabilities, with certain limitations and exclusions. The following are some of the most relevant new features:

1. Developments in the project and publicity of the agreements

Structural modification project

The minimum content of the Project is extended to include: (a) An indicative timetable for carrying out the operation, the implications of the operation for creditors and any guarantees offered to them; (b) Proof of being up to date with tax and Social Security obligations; (c) Details of the cash compensation offer to shareholders who may have the right to dispose of their shares, holdings or, as the case may be, quotas.

Furthermore, all cross-border structural changes must include information on the procedures determining the arrangements for employee participation in the resulting company or companies in accordance with the provisions of Law 31/2006 on the involvement of employees in European public limited liability companies and European cooperative societies.

Preparatory publicity of the amendment agreement

Publicity content is extended to include two new documents: a) A notice informing shareholders, creditors and employees of the

company that they may submit comments on the draft no later than 5 working days before the date of the general meeting; b) An independent expert's report, where appropriate, excluding any confidential information they may have.

2. New developments in the protection of creditors, employees and shareholders

Creditor protection

The traditional right of objection is limited to those creditors who have notified the company (no later than 5 working days before the date of the general meeting) of their disagreement with the guarantees offered in the draft and have demonstrated (a) that the satisfaction of their claims is at risk and (b) that they have not obtained adequate guarantees from the company.

Furthermore, the period for creditors to object (currently set at 1 month from the publication of the notice of the structural modification agreement) is extended to 3 months from the publication of the draft structural modification.

Protection of workers

A specific section is established in the Report of the Governing Body to regulate the rights to information and consultation of employees.

It recognises the right of workers to submit comments on the project before the meeting of the board (equating their intervention in this respect to that of shareholders and creditors).

Protection of partners

The dissenting shareholders' right of separation (now called "of alienation" in these cases) in favour of the company, the other shareholders or a third party, will also be possible in cases of structural modifications whereby the shareholders of Spanish companies become subject to a foreign law.

Dissenting shareholders have the right to challenge the exchange rate. They may claim supplementary compensation within 2 months of receiving the initial compensation.

3. New developments in the drafting of mandatory reports

Report of the Administrative Body

In the event that the company does not have a website, it is possible to send this report to shareholders and employees by e-mail one month before the date of the meeting (or 6 weeks in the case of cross-border structural modifications).

The shareholders' section must explain, first, the cash compensation proposed in the draft in the event of exercise by shareholders who have the right to dispose of their shares, holdings, or quotas, as the case may be, and the method used to determine such compensation. Second, The consequences of the structural modification for shareholders. Third, the potential gender impact of the proposed modification on the management bodies as well as its effect on the company's social responsibility. Fourth, The rights and remedies available to shareholders in accordance with this Act.

Independent Expert Report

The minimum content is extended to include an opinion on the adequacy of the cash compensation offer to members and, optionally, an assessment of the adequacy of the collateral provided to creditors.

This report shall not be required when (i) all shareholders with voting rights in the participating company or companies and, in addition, all persons who, where applicable, according to the law or the company's articles of association, hold such rights, have so agreed; or (ii) when this is established in the specific rules governing each structural modification.

4. Developments in cross-border structural modifications

The Commercial Registry may request from the relevant public body or agency any additional information they deem necessary on reasonable grounds for suspecting that the transaction is being carried out (i) for abusive or fraudulent purposes, (ii) for the purpose of circumventing Union or national law, or (iii) to serve criminal purposes.

Specific provisions are laid down concerning appeals against the refusal of the pre-existing certificate, its validity, and its transmission to the competent authority of the Member State of destination via the system of interconnection of registries.

For cross-border transactions outside Europe, the requirement for a prior certificate issued by the home State is replaced by a certificate from the foreign Registry or competent authority certifying that the transaction is lawful in that State and that all conditions and formalities required by the law of that State for the cross-border structural modification in question have been complied with.

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