



# EU Direct Tax Newsalert

## New Spanish rules to prove the tax residence of EU pension funds and UCIs

On 19 September 2019, an important amendment to the Spanish Non-resident Income Tax Act was published in the Official Gazette. It is key in the international tax practice since it states new requirements to prove the tax residency of foreign EU pension funds and collective investment undertakings to get access to the Spanish withholding tax exemptions for interest payments and capital gains.

### Scope

Withholding tax exemption on interest payments, or capital gains, to:

- (i) Pension funds equivalent to the pension funds under Legislative Royal Decree 1/2002 and Directive 2016/2341;
- (ii) Undertakings for Collective Investment in Transferable Securities (UCITs) regulated under Directive 2009/65/EU; and
- (iii) Undertakings for Collective Investment (UCI) subject to authorization, registration or supervision and managed by AIFM regulated under Directive 2011/61/EU.

### Particularities on the tax residency

The new rule differentiates between two potential scenarios:

1. Pension funds and UCIs treated as opaque entities for Spanish tax purposes:

- Pension funds regulated under Directive 2016/2341: the tax residence would be proved through a certificate issued by the competent body/regulator (i.e. the authority with competent to authorize and supervise the pension fund) of the jurisdiction in which the pension fund is located. The certificate should include: the nature of the pension fund under the aforementioned Directive; its denomination; its domicile; jurisdiction of incorporation; date of authorization; and registration number.

- Other pension funds, equivalent to the Spanish pension funds, should prove its tax residency through a general statement issued by the representative of the pension fund in the terms of the form to be published by the Spanish Ministry of Finance. This general statement would be valid for one year.

- UCITs: the tax residence should be proved by a certificate issued by the competent authority in the State of origin. It must contain all the items as the template certificate in Annex II of EU Regulation 584/2010, dated 1 July 2010.

- UCIs: the tax residence should be proved through one of the following means: (i) certificate issued by the competent authority of the State where the institution is established, the certificate must contain: name; domicile; State of incorporation; legal form; and, if applicable, the date of authorization or its registration number, as well as if the institution is managed by an AIFM as per Directive 2011/61/EU. This certificate would have an unlimited validity, unless there were any amendment in the data within the certificate; or (ii) Statement from the representative of the institution or its manager (e.g. AIFM) covering data as: name; domicile; State of incorporation; legal form; and, if applicable, the date of authorization or its registration number, as well as if the institution is managed by an AIFM as per Directive 2011/61/EU, and including the name and domicile of the depositary agent, following the form template to be prepared by the Spanish Ministry of Finance. This statement would be valid for one year.

2. UCIs treated as look-through entities for Spanish tax purposes. In case UCITs and UCIs treated as look-through entities for Spanish tax purposes, the withholding tax exemption would be applicable at the level of their members considering the following criteria:

- (i) The UCITs or UCIs receiving the income should prove the tax residency of their members through the procedures within Annex I and II of Directive 2011/61/EU;
- (ii) The withholding tax exemption would apply considering the percentage of participation of the UCITs/UCIs' member on 31 December of the previous fiscal year;
- (iii) The look-through nature and the percentage of participation of each member must be proved through a statement to be issued by the representative of the institutions, or its manager, following the template published by the Spanish Ministry of Finance.

### Takeaway

New rules dealing with the residence of foreign pension funds and UCITs/UCIs must be observed in order to get and ensure the access to the domestic withholding tax exemption on interest payments and capital gains.

These new rules ensure the compliance with EU law, i.e. free movement of capital, in case of European pension funds, UCITs and UCIs. However, the same treatment, i.e. access to the withholding tax exemption, should be also available to non-EU pension funds and non-EU UCITs/UCIs as long as they are equivalent to Spanish and EU pension funds and Spanish and EU UCITs/UCIs respectively.

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