

Corporate Aspects of Trading and Investing Spain

I. INTRODUCTION

This is a brief and simplified explanation of the ways of introduction to the Spanish Market. It highlights the main and most usual entities on the business life of Spain and the main consequences of their use under the Spanish Laws.

Special stress has been made on both the *Sociedad Anónima* and *Sociedad de Responsabilidad Limitada*, since these are, by far, the legal entities most commonly used to conduct business in Spain.

2. METHODS OF MARKET ENTRY IN SPAIN

Below you can find a brief summary on different ways to enter the Spanish market by means of foreign investments.

There are mainly three mechanisms to conduct such investment in Spain: a company (the most common one), a branch and a Permanent Establishment.

2.1 THE BRANCH

Branches are secondary establishments provided with permanent representation and with autonomy of management, through which they develop, whole or partially, the activities of the main company which is located abroad. It does not have own legal personality, though it has certain autonomy with regard to the principal establishment. This type of entities does not have share capital, although it disposes of proper funds of the main company in order to develop its activities.

In line with the above mentioned the incorporation of a branch does not require the incorporation of a new company, therefore there is no need to fulfil all the legal requirements foreseen to such purpose. Nevertheless, it is mandatory, for its later registration in the Commercial Register, to incorporate the branch in a public deed before Public Notary.

In addition a previous administrative authorization will be required for its operability in Spain in certain cases (for example, branches of foreign insurance or banking entities).

Branches of foreign companies are obliged to prepare and hold an independent accountancy system related to the operations done and the assets owned by the branch. Besides, they shall deposit the annual accounts in the Commercial Register.

A branch differs from a subsidiary basically on the legal personality of the latter. While the branch shares the legal personality of main company, the subsidiary is an independent juridical person from the parent company, and holds real juridical autonomy. The obligations of the subsidiary do not affect the parent company - in principle.

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2.2 PERMANENT ESTABLISHMENT

The Permanent Establishment is an institution created by the tax regulations, mainly to face evasive practices. The permanent establishment has not legal independent personality, but the tax regulations treats them as if they were independent entities from their “Central House”.

An entity is considered as a Permanent Establishment when it has facilities or places of work for the usual or continued accomplishment of its activity in Spain (a place of business), but the Central House is abroad. It will be also considered a Permanent Establishment if it acts in the Spanish territory by means of an agent authorized to contract on behalf of the non resident Central House. In summary, we can state that the concept of Permanent Establishment is quite wide, and for example the Branches are included in it and other figures. For instance offices, factory plants, garages, storehouses, shops or similar establishments accomplishing the mentioned requirements are likely to be considered as specific cases of Permanent Establishments.

Non resident entities that operate in Spanish territory by means of Permanent Establishment are forced to designate a natural or juridical person based in Spain to act on behalf the Permanent Establishment before the Tax Administration. The appointment shall be notified to the Tax Administration by means of communication to the Delegation of the State Agency of the Tax Administration.

Permanent Establishments are subject to the same formal, tax and accountancy obligations than the resident entities in Spain (given that tax regulation treats them as if they were independent from the Central House).

The taxation of a Permanent Establishment, which obtains revenues in Spanish territory, and is resident in a country with whom Spain has signed a Double Tax Treaty shall be adjusted to the terms of such Treaty.

The management and administration services received from the Central House would be tax deductible for the Permanent Establishment if the services are determined under a rationality and continuity basis and are described in a memory stating the amounts and the localisation criteria. This memory must be submitted to the Tax Authorities jointly with the annual Income return.

2.3 COMPANIES: “SOCIEDAD ANÓNIMA” AND “SOCIEDAD DE RESPONSABILIDAD LIMITADA”

As mentioned before, *Sociedad Anónima* and *Sociedad de Responsabilidad Limitada* (hereinafter jointly named “Limited Liability Companies”) are the most commonly used types of companies. A *Sociedad Anónima*, hereinafter S.A., is a capitalist corporation integrated by the contributions of its shareholders, which share capital is divided into shares. In this type of companies the shareholders are not personally liable for the corporate debts.

The share capital of the S.A. has to be at least of €60.000.

S.A.’s operational working-out is articulated by means of two social bodies. the Shareholders' General Assembly, the body that expresses the company’s social will and the directors, which hold the administration and representation faculties of the company.

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A “*Sociedad de Responsabilidad Limitada*” (hereinafter S.R.L.) is also a capitalist corporation which share capital is divided into “participaciones” and whose shareholders are not liable for the corporate debts either.

The incorporation and operative process of the S.R.L. is characterized, opposite to the S.A., by its major flexibility and simplicity (for instance there is no obligation to appoint an independent expert in certain transactions, publication of advertisements regarding certain agreements can be excluded, ...). However this type of companies have by nature some restrictions concerning the transfer of the shares.

The minimum share capital of the S.R.L is €3.000.

3. INCORPORATION OF A LIMITED LIABILITY COMPANY

Both the S.A. and the S.R.L. shall be incorporated in a public deed and registered before the Commercial Registry.

In general there is certain flexibility regarding the Rules of Governance for both kind of companies, being such flexibility wider in S.R.L.

For certain companies, such as the ones that take part in the stock exchange market, insurance companies or banking companies, it is mandatory by Law to be a “*Sociedad Anónima*”.

For the granting of the public deed in both cases it will be necessary to obtain a Certificate of the Spanish Central Commercial Register regarding the non-existence of a Company in Spain with the same –or similar- legal name of the new Company. It will be also needed a Bank Certificate of a bank entity in Spain stating that the share capital has been disbursed before the incorporation of the company, in a bank account that is held by the new Company.

The share capital can be contributed in cash and/or in kind. The contribution in kind requires an Expert Auditing Report in the case of S.A, but not in the case of the S.R.L (in lieu of the mentioned report, the shareholders become liable for the accuracy of the value of the assets that are part of the share capital). In the deed of incorporation the Articles of Association, the share capital, the number of shares issued, its distribution amongst the shareholders, the names of the first directors of the company, the Social Domicile of the Company and the Corporate Purpose, among other details, will be duly reflected.

The vast majority of companies in Spain are currently S.R.L.s. Nevertheless, if by reason of the developing business of the Company it is thought to be convenient to change the kind of Company, it is possible, and quite easy, to convert a S.R.L into a S.A.

4. THE SHAREHOLDERS MEETING AND THE DIRECTORS

The Shareholders Meeting comprises the totality of shareholders, and at least once a year shall meet in order to approve the Annual Accounts, the Performance of the Directors and the use of the results of the Company. Annual Accounts must be registered yearly on the Commercial Register.

Regarding the directors, Limited Liability Companies can be ruled by a sole director, several directors acting jointly or joint and severally or by a board of directors.

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The faculties of representation of the directors extend to all acts falling within the company's purpose. In the case of the Board of Directors, most of the faculties can be delegated to Managing Directors or to an Executive Committee of the Board.

In the S.A. directors shall be appointed for a maximum term of 6 years, but can be re-elected afterwards. In the S.R.L. directors can be appointed for an indefinite time, being the appointment revoked at any time at the decision of the Shareholders Meeting as well as in the S.A.

5. DIRECTOR'S LIABILITY IN LIMITED LIABILITY COMPANIES

Company Directors are liable to the Company for all losses caused by them as a result of acts that are contrary to law or to the company's by-laws, or acts carried out without due diligence. All board members who carried out the act or adopted the resolution in question are jointly and severally liable, except those who can prove that they did not take part in its adoption or execution and that they did not know of its existence, or, knowing it they did everything necessary to avoid the damage or at the least expressly opposed the act or resolution.

It shall be mentioned that under certain circumstances the Directors of a Company in Spain can be personally liable not only towards the company or the shareholders, but also towards third parties and creditors. Even in some cases for objective reasons.

6. ACCOUNTANCY/AUDIT

Accountancy

Every company is required to prepare financial year information. The Annual Financial Statements ("*Cuentas Anuales*") contain the Balance Sheet, Profit and Loss Account, the Notes to the Financial Statements ("*Memoria*"), the Changes on the Net Wealth ("*Estado que refleja los cambios en el patrimonio neto del ejercicio*") and a Cash-Flow report ("*Estado de flujos de efectivo*"). In addition to this information, some companies must prepare a Management Report ("*Informe de Gestión*"), which contains information about the company's expectations of growth and its general evolution.

Annual Financial Statements must be deposited in the Commercial Register, whatever the company's size or turnover is, but for small companies there are simplified models. The Company's Directors are responsible for preparing the Annual Financial Statements within three months from the year's closure. This information shall be submitted to the General Meeting of Shareholders approval within six months from the year's closure.

Consolidated Annual Accounts must be prepared by company groups which fall within the legally established limits.

Audit

The companies that fulfill certain requirements are required to submit their Annual Financial Statements to audit.

In any case companies listed in the Stock Market, financial intermediaries or insurance companies, amongst others, are required to have a statutory audit.

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7. TAXATION OF PROFITS

The tax rules governing non-resident companies in Spain vary substantially depending on whether the company derives its income through a permanent establishment. Among other things, a permanent establishment includes a head office, a subsidiary, a branch office, a factory, i.e. and fixed place of business where a company engages in business activities. If a non-resident company decides to set up a business in Spain via a permanent establishment on continued regular basis, it will be liable to tax at a flat rate of **35%** in respect all the income earned through that permanent establishment, regardless of where it arose. This amount of 35% is increased until **40%** in the hydrocarbons sector.

However, the income earned in Spain without the intervention of a permanent establishment is taxed individually depending on **each earning** subject to tax (withholding tax). This income cannot be used to offset losses to carry forward as there is not a taxable period. The general tax rate is **24%** but **19% is applicable for dividends, interests, and capital gains**.

Non-resident companies may also operate in Spain through a Spanish Company whose registered office and effective place of management are based in Spain. Such companies are liable to be subject to Corporation Tax. The tax base is calculated by adjusting the book income earned by the company through the application of relevant off-balance-sheet adjustments and through offsetting tax losses from the 18 previous tax years.

Corporate groups may opt to pay tax under the tax consolidation regime, which stipulates that the companies within the group are not liable for tax under the individual corporation tax regime. Under the tax consolidation regime, there is a controlling company that determines both the tax rate and the fiscal year of the group. The parent company must withhold a direct or indirect participation of at least 75% in the share capital of its subsidiaries. If the group qualifies for this regime, the group's tax liability will be calculated by applying the tax rate of the holding company to the taxable income of the fiscal group, which allows losses to be offset against the profits made by other companies within the fiscal group. **On the other hand, for VAT purposes is also possible to opt to pay VAT under a special tax group regime. The VAT group may be different of the tax consolidation group, as the percentage participation required for subsidiaries is only the 50%.**

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