holding corporation under tax treaty protection without German capital gains taxation. However, the purchaser of the shares of the holding corporation will not be able to benefit from a write down of the shares due to a dividend distribution pursuant to Section 50c EStG. But this disadvantage also exists if the 'Kombinationsmodell' is applied. Because of the target business being operated as a partnership (i.e., the GmbH & Co. KG), direct leveraging of the business by the non-resident purchaser is possible without restrictions due to the German thin capitalization rules of Section 8a KStG.

IV. Conclusion

The new German laws governing the reorganization of companies contain as new basically income tax free reorganization instruments the merger of corporations into partnerships with limited liability and the conversion of a corporation to a partnership conserving the identity of the company. These instruments can be used for the acquisition of a German company, entitling to a step-up of the book values of the assets of the acquired business without triggering trade tax on income. The 'Kombinationsmodell' remains applicable, but may be widely substituted by the new strategies in the future. Non-resident purchasers should not directly participate in a German partnership but through a German resident holding corporation.

Special Tax on Real Estate belonging to Non-resident Corporations in Spain

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I. Introduction

Many rules exist in Spanish Tax Law which attempt to prevent tax fraud by non-resident taxpayers. Within this context, the Sixth Additional Disposition of the Ley del Impuesto sobre la Renta de las Personas Físicas (LIPRF – Individual Income Tax Law, Law 18/1991, 6 June) introduced into our system a new tax on real estate for non-resident corporations whose closest predecessor is the tax on the market value of real estate belonging to corporations that are not domiciled in France. This tax is included in Article 990.D and the articles that follow it in the Code Général des Impots.

In addition to being regulated by the Sixth Additional Disposition cited above, the Impuesto Especial sobre Bienes Inmuebles de Entidades no Residentes (IEBI – Special Tax on Real Estate belonging to Non-Resident Corporations) is also regulated by Article 74 of the Rules of the IRPF (Royal Decree 1841/1991, 30 December) in a Ministerial Order dated 28 December 1992 and in a Resolution issued by the Dirección General de Tributos (General Tax Office) dated 22 January 1993.

Before 1991, the most important of these – even though it was not of much practical use – was the one that obliged non-resident income tax and corporate tax taxpayers to name a representative who was domiciled in Spain to deal with the tax administration. Law 5/1983 dated 29 June, which regulated the type of taxes non-residents with no permanent establishment had to pay, established the joint tax obligation of these representatives, which was subsequently deleted in the new income tax law (Law 18/1991, 6 June).

The new income tax laws (IRPF) and the law on Property Taxes (Law 19/1991, 6 June) have established joint tax obligations for the person responsible for paying out earnings to non-resident taxpayers in cases in which withholdings had not been taken (Art. 19 LIRPF), and for the trustee or manager of assets and rights belonging to non-residents (Art. 19 LIPRF and Art. 6 LIP).

In like manner, and corroborating this tendency, Article 19.1 h) of the LIRPF and Article 23.5 of Law 61/1978 of the IS (modified by the Fifth Additional Disposition of the LIRPF) stipulate that an amount equal to 10 per cent of the selling price of a piece of real estate located in Spain be withheld from the purchaser when that property is purchased from a non-resident taxpayer who operates without a permanent establishment.
The new tax is different, however, from the previous ones in that what it tries to prevent is not really tax evasion by non-resident corporations, but rather the attempts made by partners in these corporations to evade the taxes that are levied on real estate or improvements thereof by using conduit companies that reside in tax havens. This is the explicitly recognized intention of the law as found in the statement of purpose of the LIRPF.

The application of this tax poses numerous problems of interpretation, not only because of the possible infringement of the principle of non-discrimination found in international treaties and agreements to which Spain is a party, but also because subsequent rules have done little to develop this concept. This article will attempt to comment upon these points by analyzing the structural elements of the tax system. Finally, it is important to remember that the anti-evasion and sanctioning goals of this tax are of utmost importance in the interpretation of its fundamental elements.

II. Taxation

In Spain, taxation is based on the ownership of, possession of, or right to use and enjoy real estate.

No specialty is found in the law regarding the nature of the real estate and therefore the law covers urban as well as rural real estate and assets used for business purposes, provided that they are situated in Spain.

Nevertheless, Baena Aguilar\(^2\) feels that real estate should not be affected by business activity. He bases his opinion on Article 40.2 of the LIRPF, according to which: 'the leasing or purchase of real estate constitutes business activity only if it involves an individual with an employment contract and premises which are used exclusively for the operation of that activity.'

In our opinion, the aforementioned precept is not applicable to juridical persons because its purpose is to differentiate between returns on real estate capital and earnings from business activity for IRPF purposes, but it is not pertinent as regards corporations. Additionally, it is in no way possible to deduce from this rule that assets used for business purposes are exempt from estate-type taxes such as the IEBI. Furthermore, it seems equally incorrect to use the exemption found in Section Four c) of the Sixth Additional Disposition to determine that these assets are not subject to this tax. According to this section, the corporations that are exempt are 'those corporations in Spain that continuously or habitually carry out business activities that can be differentiated from those related to the real estate which is subject to the special tax'. This is because the literal tenor of the rule itself, and the development of the rule that is found in Article 74.2 of the Regulations confirm that the business activity that produces the right to an exemption must be different from the business activity of the real estate in and of itself. Therefore, it is implicitly recognized that assets (real estate) can be used for business purposes. Finally, Article 74.7 offers a new argument in favor of maintaining this interpretation by establishing that the amount of tax due can be deducted from taxable income when figuring Corporation Tax, which, when applicable, are meant to tax 'earnings derived from the use of real estate'.

A different matter altogether is the criticism that could justifiably be levelled against the rigorous requirements established by the regulations for taking an exemption when there is habitual and continuous activity. This issue is analyzed in another section of this paper.

The situation in which taxpayers find themselves in relation to these assets is even more difficult to define. Taxation is based on: ownership or possession of, or the right to use and enjoy real estate.

Ownership does not present any problems of interpretation as regards taxation as it coincides with the assessment of Municipal Taxes on real estate. Furthermore, for purposes of application, the Tax Administration can make use of the presumptions established in Article 119 of the Ley General Tributaria (General Tax Law) according to which: 'The Tax Administration has the right to consider the person whose name figures on any good, right, company, service, activity, exploitation or function in a tax register or any other public register as the owner of the same except when there is proof to the contrary'.

However, the law does not specify what should be understood as possession when both ownership and the right to use and enjoy real estate are taxed. It also fails to establish special rules for assessing divided property, i.e. cases in which legal ownership belongs to one person, the real rights to another and possession to a third.

As regards possession, it must refer to a type of possession other than the one inherent in

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ownership or in the right to use and enjoy real estate.\(^3\) In our opinion, the precept refers to the taxation of whoever seems to have the power or disposition over the real estate even though this figure does not own or have the right to use and enjoy it. The idea then is to tax the entity that appears to be the owner in the eyes of the Tax Administration even if it is not really the owner and only holds simple possession, but not to tax both ownership and possession at the same time.

Carbajo Vasco\(^4\) poses a question as regards possession under two sets of circumstances: first, situations in which a corporation indirectly possesses real estate through a corporate deed, as for example, in the case of membership in a time-share scheme; and second, if possession by any legal means also covers real estate that is controlled by conduit companies. As regards the first question, we agree with the author's affirmation of the inclusion of the member or partner who possesses the real estate because the law itself makes reference to possession 'by any legal means' and this includes not only the case of a member or partner but also more conflictive situations such as the one presented by Carmona: a non-resident corporation that leases real estate.

The use of a formula as broad as the concept of possession allows for taxation to include of all of those formulae through which the right to make use of real estate can be obtained, even those that do not derive from a real right. Let us take, for example, time-sharing schemes in which, in addition to the modality that consists of acquiring ownership of a percentage of the real estate, the business transaction could consist of a corporation which owns the property and partners which use it. Intermediaries between the owner corporation and the members or partners could also be used to administer the real estate.\(^5\)

As regards conduit companies, Carbajo Vasco states that Spanish law differs from French law on this point by not considering intermediaries to be taxable as there is only one taxpayer involved: the corporation that owns or possesses the real estate. However, Spanish law has attempted to deal with the problem of conduits or the existence of chains of corporations meant to conceal the true owners of a corporation in another way. It has obliged any corporation seeking an exemption to 'sufficiently' prove the 'origin of the resources invested in Spain' and the 'personality of the direct or indirect owners of the share capital of the corporation' in accordance with the procedure found in Article 74.six RIR-91.\(^7\)

In my opinion, however, the inclusion of possession in taxation is basically aimed at preventing the individual who really has the power of disposition over a piece of real estate from hiding behind someone else's ownership in order to avoid paying taxes. In short, a non-resident enterprise must pay taxes if it is the owner of the real estate and if it uses and enjoys it. We must not forget in this regard that the purpose of this tax is to prevent the use of conduit companies that reside in tax havens as a means of utilizing real estate situated in Spain. On the other hand, and contrary to Carbajo Vasco's interpretation, Article 990.D of the *Code Général des Impôts* does not state that it is the conduit company itself that can be taxed but rather the individual who holds ownership through a conduit company. This precept also offers a definition of possession through conduit companies. It considers this concept to refer to any juridical person that owns shares in a corporation which owns assets or rights and which, in turn, is a shareholder in a third corporation which owns assets or rights or is included in a chain of shares.

In short, I believe that Spanish lawmakers intended to impose the same taxes as their French counterparts: either on direct possession held by the owner, or indirect possession which can be held by a partner in the corporation that owns the property. The problem is that the expression 'ownership by any means' with no other specifications or definitions makes possible an interpretation that is excessively broad which might provoke cases of double taxation or the taxation of situations that are difficult to assess such as the leasing of assets.

Finally, as regards situations of real rights to use and enjoy real estate, Carmona feels that

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\(^3\) Article 423 of the Civil Code says: 'The possession of assets and rights can be found in one of these two concepts: the concept of ownership, or the concept of a holder of a thing of or of the right to maintain and use a thing even though it belongs to another person.' Likewise, Article 28 of the same Code establishes that: 'juridical persons can acquire and possess all types of assets'.

\(^4\) Carbajo Vasco, D.: 'Nuevas cuestiones acerca del Impuesto Especial sobre bienes inmuebles de Entidades no residentes' (New questions on the Special Tax on Real Estate belonging to Non-Resident Corporations) *Act, Trib.* No. 4, 1993, p. 64.


the makers of tax law focus directly on the ownership of the real estate, be that in terms of full ownership or as the beneficiary of a real right to use and enjoy it. This premise would lead to a situation in which in cases of unconsolidated ownership of a piece of real estate, the tax would be levied on the person who has possession (the tenant, for example) and not the owner of the bare legal title. It should also lead to a situation in which in cases in which the non-resident corporation creates a usufruct or a similar figure for the real estate in order to benefit a resident taxpayer or non-resident individual, the tax could not be applied.\(^8\)

We do not agree with this position for the following reasons: one thing is that in a case in which there are two non-resident corporations and one holds the bare legal title and the other the usufruct rights, a decision must be made as to whether both are taxable or if only one is. Another thing altogether is not taxing the bare legal title at all. If the real right to use and enjoy real estate is held by a person who cannot be considered a taxpayer because this person is a resident individual or corporation, then it is quite clear that the tax is assessed against whichever owner of the asset is a non-resident corporation. This problem only arises in the first case, in which there concur, on the one hand, a non-resident owner of a piece of real estate and a non-resident holder of a real right to use and enjoy it.

In this type of case there are several possible solutions: first, to keep in mind that both constitute a separate tax event and therefore, each should pay the tax which corresponds to the portion of the value of the asset that is assigned to their right to it; second, to apply in an analogous fashion the rules on the Impuesto sobre Bienes Inmuebles (Real Estate Tax) keeping in mind that, in the case of unconsolidated property, the taxable party is the usufructuary; and finally, to understand that this is a case of joint tax obligation.

The first solution does not seem to be acceptable since the law does not include any special rules regarding how to assign a value to each of the rights which would allow each party to pay the portion of the taxes that corresponds to him – as occurs with property transfer taxes. We also do not believe that the law intended to produce this type of discrimination in cases of unconsolidated ownership.

The analogous application of Article 65 of Law 39/1988 dated 28 December, which regulates local treasuries and which establishes who can be charged real estate tax, can also be questioned.\(^9\) First, because as legal doctrine has always maintained, real estate tax is by definition a tax on ownership even though in reality, it is levied on income. When there is a tax that is levied on income, it makes sense for the tax to be paid by the holder of the real right that produces profit or income from the asset – as occurs with personal income tax. For this reason, in cases of unconsolidated ownership, the tax should be levied on the tenant who is the person who has the asset at his disposal and who obtains any profits that are produced. But the IEBI is not taxing the income that is produced by these assets. It is rather a property-type tax meant to tax any subject who appears to hold the power of disposition over the asset be he the owner, the holder of a real right or simply a tenant.

In the case that we are analyzing, we also think that normally it would be the tenant who should pay the tax, but not because of an analogous application of the tax but rather because the tenant is the subject closest to the real estate, the one who normally holds the power of disposition over the asset. The solution offered by Article 990.F of the Code Général des Impôts is also in keeping with this line of thinking. This article establishes that when there exists a chain of participants, the one who must pay the tax is the juridical person that, within the chain, is the closest to the real estate and is not exempt from paying the tax.

The ideal solution, in our opinion, is to consider this situation as a case of joint tax obligation. According to Article 34 of the Ley General Tributaria: 'Concurrence of two or more subjects in the taxable event, means that as regards the Department of Treasury, all of them have an obligation to pay taxes, except when the law itself stipulates otherwise'.

There are several arguments that support this solution. First of all, joint tax obligation does not have to be expressly stipulated in the law. It suffices that there be a concurrence of several

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\(^9\) Article 65 of Law 39/1988, 28 December, which regulates Local Treasuries, establishes that 'individuals and juridical persons as well as the entities referred to in Article 33 of the General Tax Law, are subject to this tax if they are:

- a. Owners of taxable real estate to which there are no real usufruct or surface rights
- b. Holders of a real usufruct right to taxable real estate
- c. Holders of an administrative concession on taxable real estate or on the public services which affect them'.
subjects when taxes are assessed and in other situations such as substitution or responsibility. In the case that we are analyzing, if there exist several subjects and each one has one of the legal connections with the asset that are established in the taxable event, it is clear that there exists a concurrence of several taxpayers. In the second place, the effects that the system of joint obligation produces - basically that the Tax Administration can contact any of the co-taxpayers in order to collect the entire tax debt owed - are, in my opinion, the ones intended by lawmakers when they defined taxable event in such broad terms. In fact, under this system, the Administration can freely choose to contact the owner, the possessor or the tenant, and this facilitates taxing the one who appears to be most closely connected to the asset. Bear in mind that the purpose of the tax is to prevent the use of conduit companies that reside in tax havens, are difficult to locate and cannot provide any information to the Tax Administration. Therefore, by establishing a system of joint tax obligation, the Spanish Tax Administration can deal with the first member in the chain of conduit corporations that it locates.

We are well aware, however, that an essential part of the tax system - the taxpayer - is basically left undetermined in this law. It is clear that lawmakers intended to broaden the taxable event in order to be able to require any subject who appeared before the Tax Administration and had links to the real estate to pay taxes, but a true legal void has been created which, to a large extent, makes it quite difficult to collect the tax.

In terms of time, the law establishes that taxes will be levied 31 December of each year. This is really a periodic tax because a taxable event is something which is difficult to define in terms of time. However, the tax period, even though it coincides with the calendar year, has no real effects because it is based on ownership of the property on 31 December. There is no special rule as regards the duration of ownership within a tax period.

Perhaps it would have been better to establish the tax date as the first of January as occurs with the Impuesto sobre Bienes Inmuebles (Real Estate Tax) which would transfer the effects of a change in ownership to the following tax period.

III. The Taxpayer

Non-resident corporations are considered liable for this tax. We saw the problems involved in determining taxpayer status when the owner of the property and the possessor are not one and the same when we analyzed the topic of who is liable for tax payment in the previous section. At this point we are going to analyze two basic questions: if those liable for paying this tax have to have legal personality, and what exactly constitutes a non-resident corporation in Spain.

As regards the first question, when the bill was first presented (Boletín Oficial de las Cortes Generales, [Official Bulletin of the Parliament] dated 4 August 1990) this tax was called the ‘Special Tax on Corporations’. Later it appeared in the law with its current name: ‘Special Tax on Real Estate belonging to Non-Resident Corporations’.

This change in name led Carbajo Vasco to believe that the intention of the lawmaker was to clearly establish that corporations are not the only entities liable for this tax. Other types of entities are also liable: joint ownerships, trusts, and unsettled estates whether or not they have legal personality under our law.

This position is not very convincing for the following reasons: first of all, in my opinion, the change in name was the result of an attempt to clarify the true nature of the tax and not to modify the figure of the taxpayer. In fact, this tax is not a personal tax on the income of certain types of corporations but rather a real tax that is levied on certain types of real estate, and under no circumstances can it be considered a special tax regime for some corporations. In the second place, the name ‘non-resident corporations’ is the one traditionally used to refer to subjects that have a real obligation under Corporation Tax in order to differentiate them from non-resident natural persons and to include in the definition of this concept other entities that have legal personality - those liable for taxes under the Corporation Tax - and that do not fall within the classical models of commercial corporations or partnerships.

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10 It is thus established in Article 9.2 of the Reglamento General de Recaudación (General Regulations on Tax Collection): ‘When there concur several taxpayers or substitutes in the ownership of one tax debt, all will be equally obligated to pay that tax, unless the Law expressly stipulates otherwise’. In like manner, joint obligation is established when there are several persons who are liable for a tax be this through joint obligation or subsidiarity (Articles 10.4 and 11.4 of the Reglamento General de Recaudación).
11 Carbajo Vasco, D.: ‘El impuesto especial sobre bienes inmuebles de entidades no residentes’ (The Special Tax on Real Estate belonging to Non-Resident Corporations), op. cit. p. 3.
12 Moreno Fernandez, J.: ‘El impuesto especial sobre bienes inmuebles de entidades no residentes’ (Special Tax on Real Estate belonging to Non-Resident Corporations), op. cit. p. 812.
(foundations, associations, etc.) and other juridical persons constituted according to foreign rules that, while having legal personality, cannot be included under the denomination of corporation as defined by our law. Furthermore, Article 13.3 of the Reglamento del Impuesto de Sociedades (IS – Corporation Tax Regulations) establishes that ‘Those liable for this tax will be referred to succinctly and indistinctly as ‘corporations’ or ‘entities’ in the text of these Regulations’. Finally, – and this is the most important reason – when lawmakers wish to tax entities that do not have a legal personality, they should state so expressly. This can be deduced from Article 33 of the Ley General Tributaria when it stipulates that: ‘Under the tax laws which do so establish, unsettled estates, joint ownerships and other entities that, lacking legal personality, constitute an economic unit or a separate estate that is taxable, will be considered liable for taxes’.

In short, if we want to maintain a certain level of coherence, and taking into account the purpose of the tax itself, we must consider all entities that are non-residents for the purposes of Corporation Tax to be liable for this tax.

In Spain, non-resident corporations are considered to be those that do not meet any of the requirements established in Article 9 of the IS law. In other words, according to this principle, resident corporations are those that meet any of the following requirements: a. they were constituted according to Spanish law, b. their business office is located in Spanish territory, c. their real headquarters are located in Spanish territory.

The concept of a non-resident corporation encompasses not only those that operate with a permanent establishment but also those that operate without a permanent establishment.\(^{13}\)

In spite of this, we must consider the fact that real estate that is used for business activity related to the permanent establishment – if this is different from the activity of the real estate itself – is not taxable nor is real estate that is used to prove that the non-resident corporation is operating through a permanent establishment.

This can be deduced from Article 74.5 of the IRPF Regulations which establishes the requirements for the exemption of corporations that carry on continuous and habitual economic activity in Spain and stipulates that ‘When in accordance with the provisions of this section, it is not clear that there exists a differentiable economic activity, the tax liability under the Special Tax will be based exclusively on the assessed value of the portion of the real estate that is not used for economic activity’.

IV. Exemptions

The Additional Sixth Disposition of the law establishes four exemptions that are in keeping with the purpose of the tax. In other words, when it is clear to the Tax Administration who the owner of the assets is or who is entitled to exercise some type of control over the asset, then the tax is not needed.

Thus, in the first place, the law declares foreign states, public institutions and international organizations exempt from the tax. We do not agree with Moreno Fernandez\(^{14}\) when he calls for a restrictive interpretation of this concept which would prevent the exemption from being applicable to real estate that is not used or not directly related to the performance of the public functions of states or public institutions.

In my opinion, no distinction can be made that the law itself does not make, not even by broadening the law to cover non-profit corporations. But, in addition to this, the difference between performing public functions and carrying out business activity makes sense in terms of income tax but not in terms of this tax whose purpose is mainly to prevent tax evasion even though it uses capital assets as its index of taxable wealth. In fact, even though this tax uses an economic capacity index for assessment purposes, it is not this capacity that is being taxed here. It is also important to remember that there are other taxes levied on this capacity. The purpose of this tax is to dissuade and penalize situations in which there is a lack of transparency when dealing with the Tax Administration, and this type of situation could never arise as regards a public entity’s ownership of property.

\(^{13}\) Article 7.a of the IS Law, in accordance with the provisions of Article 5 of the Model Convention of the OECD, stipulates that ‘A corporation will be understood to operate in Spain by means of a permanent establishment when either directly or through an agent it has in Spanish territory headquarters, branches, offices, factories, workshops, facilities, warehouses, stores or other establishments; construction, installation or assembly projects when their duration exceeds twelve months; agencies or representatives authorized to enter into a contract on behalf of the taxpayer; when it owns mines, quarries, oil or gas wells, agricultural, livestock or lumber concerns or deals in any other type of extraction of natural resources, or if it carries out professional or artistic activities or owns other work sites at which all or part of its activities are carried out’.

\(^{14}\) Moreno Fernandez, J. I.: ‘El impuesto especial sobre bienes inmuebles de entidades no residentes’ (Special Tax on Real Estate belonging to Non-Resident Corporations), op. cit. p. 793.
The second exemption is established by law for ‘Corporations that prior to 4 August 1990, were residents of countries with which Spain has signed a convention for the prevention of double taxation in which there is a clause stipulating the exchange of information, as regards real estate and real rights to use and enjoy property which they held prior to said date’.

There are three requirements for the application of this exemption: First, corporations must have been residents of countries with which Spain has signed a convention for the prevention of double taxation.15

Second, the convention must have an exchange of information clause.16 Third, residence in these countries and ownership of the assets must predate 4 August 1990 (the date of publication of the bill in the Boletín Oficial de las Cortes Generales).

As in the prior case, the purpose of this exemption is found in the final ground for the tax. It is not necessary to establish a tax on corporations that can be monitored in the country where they reside if there exists a commitment to exchange information between Spain and the country of residence which thereby offers a sufficient degree of control to prevent the evasion of payment of Spanish taxes. Therefore the tax is meant to be a tax on corporations that reside in tax havens.

However, this exemption presents several problems. In the first place, the establishment of the duration of the validity of the exemption. In the second place, we have the case of Switzerland, the only country whose convention with Spain does not include an exchange of information clause.

As regards the first question, the purpose of setting a date, as Moreno Fernandez17 states, is to avoid the so-called ‘announcement effect’ which brings about changes of residence by certain subjects who then take advantage of this exemption and thereby evade paying the tax. We do not find this time limit to be acceptable, in the first place, because a change of residence should be made on the basis of effectiveness and it does not seem likely that a corporation would change residence in order to avoid paying this tax if by doing so it meant losing its residence status in a tax haven, and in the second place, because even if the company were willing to do this, the existence of a convention with the country in which the

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15 Spain has signed conventions on double taxation with the following countries: Germany (5 December 1966. BOE [Boletín Oficial del Estado - Official State Bulletin], 8 April 1968); Argentina (BOCG, 8 November 1993); Australia (29 December 1992. BOE, 10 March 1993); Austria (20 December 1966. BOE 6 January 1988); Belgium (28 May 1971. BOE, 27 October 1972); Brazil (11 November 1975. BOE, 1 December 1975); Bulgaria (6 March 1990. BOE, 12 July 1991); Canada (23 November 1976. BOE 6 February 1981; Korea (BOCG, 7 March 1994); Czechoslovakia (8 May 1980. BOE, 14 July 1981); China (22 November 1990. BOE, 19 October 1992); Denmark (3 July 1972. BOE, 28 January 1974); Ecuador (20 May 1991. BOE, 5 May 1993); the United States (25 October 1990. BOE, 24 February 1993); Finland (15 November 1967. BOE, 11 December 1968); France (27 June 1973. BOE, 7 May 1975); Hungary (9 July 1984. BOE, 24 November 1987); India (BOE, 20 March 1993); Ireland (BOCG, 15 March 1994); Italy (8 September 1977. BOE, 22 December 1980); Japan (13 February 1974. BOE, 2 December 1974); Luxembourg (3 June 1976. BOE, 4 August 1987); Morocco (13 December 1983. BOE, 22 May 1985); Mexico (BOE 23 November 1983); Norway (25 April 1963. BOE, 17 July 1974); The Netherlands (16 June 1971. BOE, 16 October 1972); Poland (15 November 1979. BOE, 15 June 1982); Portugal (29 May 1968. BOE, 31 March 1970); United Kingdom (21 October 1975. BOE, 18 November 1976 and 15 December 1976); Rumania (24 May 1979. BOE, 2 October 1980); Sweden (16 June 1976. BOE, 22 January 1977); Switzerland (26 April 1966. BOE, 3 March 1967); Tunisia (2 July 1982. BOE, 3 March 1987); USSR (1 March 1985. BOE, 22 September 1986).

16 Article 26 of the Model Convention of the OECD for the prevention of double income or estate taxation includes this clause with the following terms and conditions:

The competent authorities of the contracting States will exchange any information needed to apply the provisions of their convention provided that the taxes required by their convention do not contravene the Model Convention itself. The exchange of information is not limited by Article 1. The information received by a contracting State will remain secret in the same way that the information obtained pursuant to the Law of this state is, and it will only be made available to the persons or authorities (including courts and administrative organs) that are responsible for the management and collection of the taxes stipulated in the Convention, for the declarative or enforcement proceedings related to these taxes, or for the resolution of appeals related to these taxes. These persons or authorities will only use this information for the purposes stated. They can disclose this information in public court hearings or in judicial rulings.

2. Under no circumstances can the provisions of paragraph 1 be interpreted in such a way as to require a contracting State to:
   a. adopt administrative measures contrary to its law or administrative practices or to those of the other contracting State;
   b. provide information that cannot be obtained based on its own law or as part of its normal administrative practices or of those of the other contracting State; and
   c. provide information that reveals a commercial, industrial or professional secret or a commercial procedure, or any other information the divulging of which would be contrary to public policy'.

17 Moreno Fernandez, J. I.: 'El impuesto especial ...' (Special Tax ...), op. cit., p. 793.
company newly establishes residence would put the company in the same situation as those that are residents of that country. 18

The second question is more difficult. All of the conventions signed by Spain include an exchange of information clause although the exact terms and conditions vary somewhat from convention to convention. The only exception is the convention with Switzerland. This problem also existed in France when a Swiss corporation invoked the principle of non-discrimination established in the French-Swiss Convention. The conflict was resolved by the Court of First Instance in favor of the Swiss corporation. The General Tax Office filed an appeal in cassation arguing that the tax established in Article 990d of the Code Général des Impôts is based on residence outside of France and not on nationality. Ruling against this interpretation, the French High Court issued a decision dated 21 December 1990, which stated that ‘the discrimination that we are attempting to avoid is none other than discrimination based on nationality, which for a corporation is based in principle on the location of its real headquarters defined as the actual operational headquarters and presumed to be the statutory headquarters’. 19

Some Spanish authors 20 deduce from this interpretation of the ruling that, on the basis of the principle of non-discrimination, the tax should not be required of residents in those countries with which there exists a convention on double taxation even if it does not include an exchange of information clause.

In my opinion, and contrary to the transposition of the doctrine set by French jurisprudence as regards the case in question, the IEBI does not violate the principle of non-discrimination because it is not based on the nationality of corporations but rather on their residency.

The principle of non-discrimination is included in the conventions by means of the prohibition of discrimination based on nationality and on the requirement that the nationals of one contracting state, in accordance with the principle of reciprocity, do not receive less favorable treatment than do the nationals of the other contracting state.

Article 24 of the 1977 Model Convention of the OECD defines this principle in the following way:

1. The nationals of one contracting state will not be subject to any tax or obligation related to a tax in the other state that is not required of the nationals of that state or that constitutes a greater tax burden than that levied against nationals of that state in similar circumstances. However, in spite of the provisions of Article 1, this disposition will also be applied to nationals of both of the contracting states even if they do not reside in either of those states.

2. The term “national” is understood to mean:

a. Any natural person who is a national of a contracting state; and

b. Any juridical person, corporation or association constituted according to the law currently in effect in a contracting state.

In the first section of the 1992 Model Convention of the OECD, the principle of non-discrimination is defined in the following way: ‘The nationals of one contracting state will not be subject to any tax or obligation related to a tax in the other State that is not required of the nationals of that state or that constitutes a greater tax burden than that levied against nationals of that state in similar circumstances, especially as regards residency. However, in spite of the provisions of Article 1, this disposition will also be applied to individuals who are not residents of one or either of the contracting states’.

According to the interpretation offered by Gonzalez Poveda 21, the new wording of the precept confirms the position that the states have always taken that residents and non-residents cannot be classified as being in similar circumstances for the purposes of applying the principle of non-discrimination. According to this author, the non-discrimination clause

18 We must also bear in mind as regards the Member States of the European Union, that Article 2 of Royal Decree 1326/1987 dated 11 September which regulates the procedure for applying community directives on the exchange of tax information, establishes that: ‘The Department of the Treasury can request any data, reports or antecedents of import for the correct liquidation of the taxes referred to in Article 1 (IRPF, IP and IS) of this Royal Decree in relation to any person or corporation from the competent authorities of the other Member States of the European Economic Community, and they, in turn, can request the same from the Department of the Treasury’.

19 A commentary on this ruling as regards the Spanish case can be found in Ruiz Ayucar de Merlo, J. and Suarez, A., op. cit. p. 5, and Moreno Fernandez, J. I., op. cit. p. 796.

20 Ibidem.

only requires a state to concede the same treatment to non-resident foreigners as it does to its non-resident nationals.

The third exemption that is established by the law is concerned with those corporations that habitually and continuously carry out business activities that can be differentiated from the activities of the real estate that is subject to the special tax.

At first, this exemption seemed to refer to excluding those corporations that were not mere tenants of the real estate from having to pay taxes. However, further development of this precept – which was done in Article 74.5 of the RIRPF and which in my opinion exceeds the limits of the provisions of the law – has restricted the scope of this exemption. It defines differentiable business activity as existing when any of the following circumstances exist:

a. When the real value of the real estate or assets that are owned or are in the possession of a non-resident corporation or for which the real rights to use and enjoy the property belong to a non-resident corporation does not exceed five times the real value of the capital assets that are used for that business activity. For these purposes, in cases in which real estate is partially used for business activities, only the part that is actually used for such activity will be taken into account. When in accordance with the provisions of this section there is no differentiable business activity, the tax base for the Special Tax will be the assessed value that corresponds to the portion of the real estate that is not utilized for business activity.

b. When annual turnover from business activity is equal to or greater than four times the assessed value of the real estate.

c. When annual turnover from business activity is equal to or greater than 100,000,000 pesetas.

Some authors deduce from the requirements established in the Regulations that any corporation that is not simply a tenant of the real estate is exempt from the tax. We do not agree with this interpretation. In our opinion, this exemption should be interpreted in the following way: in order for a non-resident corporation to be exempt, it should carry on differentiable business activity, which means an activity that is different not only and obviously from the mere tenancy of assets – which in and of itself does not constitute any type of activity – but rather from the activity for which the use of the real estate that is subject to the tax is used.

The requirements established in the Regulations serve as a precautionary measure in order to prevent business activities from being carried out that are only minimally productive but which are different from the main activity of the real estate simply to avoid paying the tax. That is why it is not only necessary to carry out a different activity but also that certain requirements be met as regards mere tenancy of real estate or as regards the real estate activity in order to have a right to this exemption.

If we do not interpret this principle in this way, the result would be that non-resident corporations that use real estate situated in Spain would never pay taxes, and the purpose of the provision is precisely to tax this type of activity when it is carried out through corporations that reside in tax havens. That is why in order to consider differentiable business activity as more important than real estate activity, there must be a requirement that the assets not used for differentiable activity cannot exceed five times the value of the real estate that is used, or that turnover be sufficiently high.

However, the requirements established in the Regulations can be criticized for the following reasons: in the first place, the real value – which is quite difficult to ascertain – is used for purposes of comparison instead of the assessed value which is the one chosen by lawmakers to be used in setting the tax base for this tax. In any case, our feeling is that the value that the corporation uses as a reference is the book value of the assets or the value set by the Tax Administration for other taxes. In the second place, it again seems illogical to always use the real value when the taxpayer can be the holder of a limited real right or of simple possession and these different situations are not differentiated for purposes of taxation. In the third place, the use of annual turnover is an extremely rigid requirement by which a corporation’s right to the exemption can change from one tax period to the next.

The last exemption established by the law has to do with the purpose of the tax – to prevent evasion through corporations – as it grants exemptions to ‘those corporations that prove to the satisfaction of the Tax Administration, the origin of the investments made in Spain and the personality of the direct or indirect holders of the stock capital, and make a commitment to notify competent authorities of all alterations or modifications and their respective causes’.

The Regulations stipulate that this exemption is dependent upon the Resolution of the General Tax Office. The application presented by the corporation must include a list of the real estate that it owns in Spain, its most recent Real Estate Tax receipts, and proof that all requirements established by the Regulations have been met.

The requirements established by the Regulations are the following:

First, that the corresponding investment is made and formalized in accordance with the rules in effect as regards matters of foreign investments.22

Second, that the legal representative of the non-resident corporation communicate to the Tax Administration the identity of the individuals who are the direct or indirect owners of the assets and indicate their nationality, country of residence and permanent domicile. When the majority of the stock capital belongs to juridical persons comprising more than fifty shareholders or to corporations that are quoted on the stock market, the Regulations require that the final decision-making center be identified. The General Tax Office can grant or deny the exemption after making the pertinent enquiries. Royal Decree 803/1993 dated 28 May, which modifies certain tax procedures, establishes that the procedure for granting exemptions from the IEBI must be completed within a six month period of time. It is understood that if the procedure is not completed in this period, the exemption is denied. While an application is being processed and until a decision is issued, taxpayers are required to file tax returns to which they must attach the application for the exemption, although no payments are required. If the application for exemption is denied, the Tax Administration proceeds to collect the tax without any penalties or interest (Resolution dated 22 January 1993).

Finally, the Regulations stipulate a 'commitment' to communicate all alterations or modifications and their causes to the Administration within three months of their occurrence. We cannot help but think that this shows a great deal of naivety on the part of the Tax Administration. We do not understand why this was not established as a true tax responsibility carrying some sort of sanction or consequence in cases of non-compliance. Do not forget that we are talking about companies that are domiciled in tax havens. Therefore, this requirement is completely superfluous.

V. Tax Base and Tax Rates

The tax base for this tax is based on the assessed value of the real estate. The reference to assessed value facilitates the processing of the tax and at the same time requires the rules found in Articles 66 to 70 of the Ley Reguladora de las Haciendas Locales (Law regulating Local Treasuries) to be integrated into the IEBI. These articles deal with setting, revising and updating the assessed value of property for real estate tax purposes.

Carbajo Vasco24 feels that when the assessed value is not available, one of the following two options should be used:

1. the application of the rules found in Article 10 of Law 19/1991 of Property Tax, which therefore would mean using the higher of the following values: the purchase value or the value set by the Tax Administration; or
2. the application of book value.

Although it is highly unlikely that this type of situation would actually occur, I feel that one of the following two solutions should be chosen:

1. use the market value which is the reference value of the assessed value according to Article 66 of the Ley de Haciendas Locales, or
2. file a return without payments so that the Administration can fix the assessed value of the real estate.

22 The rules in effect in matters related to investments is found in Law 18/1992, 1 July, and in Royal Decree 671/1992, 2 July, on foreign investment in Spain.

23 As regards investment in real estate, Article 13 of the Royal Decree stipulates that:
1. Foreign investment in real estate can be carried out freely and is not subject to any prior administrative verification procedures, with the exception of those established by sections 2 and 3 below and independent of the provisions in the law that were established for strategic or national defense purposes.
2. Those investments that are made for the purpose of acquiring real estate and that have a real cost of over 500,000,000 pesetas are subject to prior administrative verification procedures.
3. Real estate investments in any amount that are made from tax havens—defined as those countries or territories listed in the single article of Royal Decree 1080/1991, 5 July—are also subject to prior administrative verification.
4. Earnings from the leasing of real estate will be considered real estate investment yields, and in accordance with the provisions of Article 5 of this Royal Decree, they can be freely transferred to foreign countries'.

24 Carbajo Vasco, D. 'El impuesto especial sobre bienes inmuebles de entidades no residentes' (Special Tax on Real Estate belonging to Non-Resident Corporations), op. cit. p. 27.
The tax rate is 5 per cent and can be revised by the Ley de Presupuestos (Budgetary Law) but this faculty has never been used.25

According to the law, the entire IEBI tax liability can be deducted from the tax base for Corporation Tax.

Article 74. Seven of the Regulations establishes that: 'The tax liability produced by the Impuesto Especial de Entidades No-Residentes is considered to be a deductible expense when determining the tax base on which taxes on the profits derived from the use of the real estate are assessed'.

In the first place, this precept corroborates the idea that assets that are taxed must be used for business activity, contrary to what some authors believe, as we have already shown. In fact, the tax is a deductible expense only when profits from the use of the real estate are included in the tax base when figuring Corporation Tax. This limitation attempts to prevent the existence of negative tax bases which could occur in cases in which corporations that are only tenants of the property are allowed to deduct this tax without having earned profits of any type.

In order to take this deduction, it is important to know if the non-resident corporation is operating with or without a permanent establishment.

If a non-resident corporation earns income in Spain through a permanent establishment, the tax liability can be deducted from the tax base provided that the economic use derived from this establishment includes the earnings from the real estate. The tax accrued will be deducted in the corresponding tax period, the same as it is for other resident corporations.

This deduction is more complicated for non-resident corporations that operate in Spain without a permanent establishment.

First of all, a non-resident corporation is only subject to Corporation Tax through real obligation if it earns income in Spanish territory. These cases are quite clear as the definition of these given in Article 7 of IS Law includes income obtained in Spanish territory such as earnings from real estate located in Spain or rights related to this real estate.

However, this type of obligation is characterized, first of all, by the fact that the tax accrues immediately (Art. 339 Regulations); in other words, the tax accrues as soon as the non-resident corporation in Spanish territory demands payment; and, in the second place, because the tax base consists of the entire amount of the earnings to which a lower tax rate is applied based on the type of earnings involved – except in cases of capital gains – in order to compensate for the absence or limitation of deductible expenses. Article 336 of the Regulations only allows for the deduction from total earnings of personnel-related expenses under certain conditions and the supply of materials for jobs related to services or technical assistance.

This tax regime plants a doubt about the temporary deductibility of the amount of IEBI tax due. Although Article 343 of the Regulations requires a separate tax return for each type of income, it does not prohibit the grouping together of the same type of operations throughout the tax period. Therefore, in this case, it is possible to deduct the new expense outlined in the Sixth Additional Disposition of the LIRPF along with the expenses established in Article 336 from total earnings.

Another question altogether is if it would be better to deduct IEBI taxes from the tax base or directly from the tax due in order to avoid double taxation. Moreno Fernandez26 thinks that deducting Corporation Tax from the tax base is justified in the case of Real Estate Taxes (which is also deductible from the tax base for Corporation Tax) to prevent the state from becoming involved in municipal taxation, but not when the state itself levies both taxes.

VI. Tax Procedures

The accrual of the IEBI takes place on 31 December of each year. Taxpayers are required to present all necessary paperwork during the month of January using the forms approved by the Order issued 28 December 1992.

A separate tax return must be filed with the competent organ of the Tax Administration for each piece of real estate that is located within its territory or for which a real right to use and enjoy the real estate is assigned. In our opinion, this multiplication of returns complicates compliance with the obligation to file tax returns. It would be easier to centralize returns with

25 The tax rate for this Special Tax might be considered high in our system considering that the tax on real estate is 0.4 per cent for urban properties and 0.3 per cent for rural properties.
26 Moreno Fernandez, J. I.: 'El impuesto especial sobre bienes inmuebles de entidades no residentes' (Special Tax on Real Estate belonging to Non-Resident Corporations), op. cit. p. 776.
the Tax Administration that corresponds to the domicile of the representative or of the permanent establishment.

In cases in which a corporation is waiting for a decision from the General Tax Office regarding the exemption found in section d of the Sixth Additional Disposition, the Resolution dated 22 January 1993, of the General Tax Office stipulates that a return must be filed with a photocopy of the application for the exemption attached to it, but no payments have to be made. Processing of the return will be suspended until a decision is issued. If the application for the exemption is denied, the Tax Administration would notify the taxpayer of its intent to collect the tax without any late penalties or interest.

As regards guarantees made by the Department of the Treasury, number three of the Sixth Additional Disposition establishes that: 'Failure to voluntarily pay the Special Tax within the time established for payment in section one of the Additional Disposition, will result in the initiation of an enforced collection action. Notification issued by the Tax Administration of the amount due and failure to meet the voluntary deadline for payment is sufficient cause for the initiation of such an action'.

In reality, this rule does not introduce anything new into our system since Article 128 of the Ley General Tributaria stipulates that collection proceedings can be initiated when payment has not been made before the deadline for voluntary payment of the tax. Article 129 of the same law states that these notifications of payment due have executionary force. In like manner, Article 73 of the Ley General Tributaria establishes a tacit legal mortgage on the assets or rights that are recorded in a public register and are subject to periodic taxation.

VII. Conclusions

In my opinion, the Special Tax on Real Estate belonging to Non-Resident Corporations merits a negative rating. In addition to the inadequacy of its legal regime, which has been thoroughly addressed in this article, there is the apparent purpose of the tax.

In fact, even though the tax is based on an economic capacity index, what is really sought is the avoidance of possible fraudulent behaviors and this converts the tax into a type of sanction or punishment. This attempt to punish taxpayers by creating new taxes does virtually the opposite: it penalizes those who fulfill their tax obligations without getting those who systematically defraud the system to rectify their situation.

The international dimension of tax fraud does not seem to be resolvable through unilateral measures taken by the state itself. International treaties or conventions between states which stipulate adequate measures for collaboration between tax administrations and the harmonization of tax procedures at least within the European Community would prove more effective. We should also bear in mind that this is the only tax in our country that taxes the mere possession of real estate and that it duplicates the tax levied on part of the capital of corporations. Therefore, we do not feel this new tax is able to prevent international tax fraud, and find it unfair if the only result it achieves is increasing fiscal pressure on non-resident corporations that invest in real estate in our country.

Advance Transfer Pricing Rulings: the Belgian Case


I. Introduction

In recent years, multinational companies have become increasingly concerned about the danger of international double taxation caused by the differing views of the Belgian and foreign authorities regarding correct transfer prices. In particular, it has often appeared impossible to solve these differences within the framework of the mutual agreement procedure provided by the Belgian tax treaties. The shortcomings of the mutual agreement