Executive summary

On 30 October 2015, the Spanish 2016 Budget Law was published in the Spanish Official Gazette. Among many other measures, it introduces amendments to the Patent Box regime and the Deferred Tax Assets’ (DTA) Monetization regime established under the Spanish Corporate Income Tax (CIT) Law.

This Alert only addresses the above-mentioned tax amendments and does not cover all measures introduced by the Budget Law.

Detailed discussion

Patent Box regime

The amended regulation, which will enter into force on 1 July 2016, introduces the “modified nexus approach” included in the Organisation for Economic Co-operation and Development (OECD) under Action 5 (counteracting harmful tax practices) of the Base Erosion and Profit Shifting (BEPS) Project and supported by the European Union (EU).

The Spanish Patent Box regime currently in force provides for a 60% exemption on net income derived from the licensing of qualifying intellectual property (IP) subject to the compliance with certain requirements which essentially remain unchanged.
However, under the new provision the current condition which requires the Spanish taxpayer to have incurred in at least 25% of the cost of the IP asset is replaced by a new limitation whereby the exemption will only apply in relation to the proportion of the income resulting from the following ratio:

a. The expenses (excluding any financial expenses and the depreciation of buildings) incurred by the licensing entity directly related to the creation or development of the IP assets, including those derived from the outsourcing to third parties. These expenses will be increased by 30% with the limit of the amount included in the denominator; divided by

b. The expenses (excluding any financial expenses and the depreciation of buildings) incurred by the licensing entity related to the creation of the IP, including those derived from the outsourcing, and if applicable, from the acquisition of such IP.

This exemption also will apply to the income derived from the transfer of the qualifying IP to a non-related party.

As noted, the above amendment will generally enter into force on 1 July 2016. However, the Budget Law provides for two transitory regimes depending on the date of the licensing agreement.

• For licensing agreements entered into prior to 29 September 2013, licensing entities may opt to continue to apply the original Spanish Patent Box Regime (in force since 1 January 2008).

• For licensing agreements entered into from 30 September 2013 to 30 June 2016, licensing entities may opt to apply the Spanish Patent Box Regime as amended effective 1 January 2015.

The election between the regimes must be made by the taxpayer in the fiscal year 2016 corporate income tax (CIT) return and will only apply until 30 June 2021. After this date, the new rules will apply regardless of when the licensing agreement was entered into.

Additionally, gains derived from the sale of qualifying IP assets made between 1 July 2016 and 30 June 2021 may also benefit from the regime currently in force. The option for this regime must be made in the CIT return corresponding to the fiscal year during which the assets are sold.

Deferred Assets’ Monetization regime

The Spanish CIT Law allows the conversion of certain DTAs into tax credits directly enforceable against the Spanish Treasury provided that several circumstances are met. The Budget Law introduces a new quantitative limitation to this regime whereby the DTA to be converted cannot exceed the tax due corresponding to the fiscal year in which it was generated. If the tax due corresponding to that year is higher than the convertible DTA, the entity will be entitled to the DTA conversion in an amount equal to the excess derived by similar assets in prior fiscal years or in the following two years.

For fiscal years commencing on or after 1 January 2016, a new tax duty is introduced for taxpayers who have qualifying DTAs recorded and intend to request the monetization. The tax duty will generally amount to 1.5% of the total amount of DTAs at fiscal year-end and will be due on the same date as the company’s CIT.

Impact

Companies should analyze the advantages of the amended Spanish Patent Box. Also, Spanish corporate taxpayers currently applying the Spanish Patent Box regime should determine the impact of the amendments on their Spanish tax liability, as well as of the elective transitory regimes.

Spanish corporate taxpayers should review their position in relation to the DTAs which may be re-characterized as a direct tax credit in order to determine the impact of the amendments, including the new tax duty.

Endnote

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