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## Tax Alert

# Approved the Regulation of the Spanish Digital Services Tax, and published an Interpretative Resolution Draft

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On June 9 was published in the Spanish Official Gazette the Royal Decree 400/2021 which develops the rules for the location of users and the formal obligations of the Spanish Digital Services Tax (DST). The Royal Decree also modifies the Spanish General Tax Regulation on census obligations accordingly.

Also, on June 10, the Ministry of Finance published the draft interpretative resolution of the Spanish DST. A text widely demanded by the business sector, which aims to establish interpretative and clarifying criteria for the application of the new tax, which is considered essential considering both its novelty and its immediate application.

Finally, on June 11, Order HAC/590/2021 of June 9, has been published approving the Form of the Spanish DST return and determining the methods and procedure for its electronic submission.

## I. Background

The entry into force of the DST occurred on January 16 of this year and, although it contemplates a quarterly settlement, the self-assessments corresponding to the first quarter were postponed for joint presentation with those of the second quarter from July 1 to 31, so the approval of the regulation and the publication of the draft resolution of the General Directorate of Taxes (hereinafter , DGT) occur at very short notice of the first practical application of the tax.

The Regulation finally approved maintains, in general lines, the content of the draft Royal Decree submitted to the public information process on December 3, 2020, although it contains a series of modifications that we will be pointed out.

The Spanish Tax authorities interpretative draft resolution sheds light on certain controversial aspects of the IDSD, which we will be commenting on, although there are numerous issues remaining.

Order HAC/590/2021 of June 9 published the Form of the Spanish DST return and determined the methods and procedure for its electronic submission.

## II. Royal Decree 400/2021

The approved Regulation finally develops only two aspects of the tax: (i) the mechanisms for locating users' devices and (ii) the formal obligations of taxpayers (bookkeeping obligations, the descriptive memorandum and the establishment of systems, mechanisms or agreements for the location of users).

### Location of users

Article 1 of the Regulation develops Article 7 of the Law, relating to the place of realization of the taxable event, establishing as such the place of location of the devices that will be determined by all the details of the address provided by the geolocation technology, including, where appropriate, latitude and longitude.

That location will be determined by the IP address or by the various geolocation tools based on network identification, satellite geolocation, wireless terrestrial communication or beacons.

However, as a novelty with respect to the project submitted to public information, a reference is made to the use of other means of proof, as provided for in the Law itself.

### Bookkeeping obligations and descriptive Memorandum

The Regulations develop the content of DST ledgers and formal obligations and clarify that such information will only be provided to the Spanish Tax Authorities (STA) upon request.

The content of the DST ledgers must be kept with regards to each transaction subject to the DST (i.e. online advertising services, online intermediation services and data transfer services), detailing the data of total revenue obtained, the of number of users in Spain and the number of worldwide users that intervene in each transaction.

Additionally, it will be necessary to identify the clients, gathering, among other data, their Tax Identification Number.

It is established that these formal obligations may be complied with by the taxpayer using books or registers elaborated in compliance with other accounting or tax obligations. Although this appears to be a relaxation to the rules in favor of the taxpayer, effectively, it may have limited practical implementation.

Article 4 of the Royal Decree specifies the content of the descriptive memorandum which shall include the process, methods, algorithms and technologies used by the taxpayer (and subsequently by the Spanish Tax Authorities in case of a tax audit) in order to:

- ▶ Analyze the subjection / non-subjection of the digital services to the DST.
- ▶ Locate the users of the different types of digital services.
- ▶ Calculate the revenues from each type of digital service.
- ▶ Identify the files, software, applications used in the processes with regards to each filing period.

As a new feature compared to the draft Royal Decree, the obligation established in article 13.1 Law 4/2020 is now also developed. Taxpayers must establish internal systems or mechanisms that allow to locate the devices in the Spanish territory, by capturing the IP address, except in those cases in which the location of the users will be done through other systems or mechanisms. Taxpayers may agree with third parties the provision of the location service of the devices of the users in Spanish territory.

### Census obligations

The Spanish General Tax Regulations are modified including the formal obligation to report the start, modification or close of business subject to the DST, that shall be complied through the corresponding census forms as any other taxpayer. Additionally, in order to identify DST taxpayers, a formal communication of this condition is required, as well as, any change of its circumstances.

## III. Spanish Tax Authorities DST's interpretative resolution

The enormous difficulty of the DST, due to its new regulation and the complexity of the transactions it taxes, has led the STA to have draft an interpretative resolution that clarifies some issues about the application of the DST, although others questions remain uncertain.

### Online advertising services

The taxable event of online advertising services requires such services to be deemed as a "targeted advertising". However, the concept of "targeted advertising" seems to be not sufficiently defined.

The DST's Law defines the concept of "targeted advertising" as any form of digital commercial communication, which purpose is to promote a product, service or brand, which is advertised to users of a digital interface based on the data collected from them.

The Spanish DST's resolution clarifies that the amount of information about users that is considered in order to display advertising may vary according to different levels of intensity or personalization. Some examples are given, such as geographical location (country, city,

IP, geolocation...), sociodemographic data (age, gender, etc.), individual preferences or interests, word or search words or the profile of the user when registering through surveys, phone calls or by any other means.

It is clarified that the data may have been collected previously or during the internet navigation, not being necessary to come from the use of digital interfaces, and that the mere use of a single user data will be sufficient to consider digital advertising as targeted.

The rule contains a presumption by means of which all online advertising will be considered as 'targeted advertising' unless there is evidence to the contrary. The resolution does not clarify any possible alternatives or means of proof for the destruction of this presumption *ius tantom*.

### Taxpayer of online advertising services

The Spanish Tax Authorities provided its interpretative criteria on who should be the taxpayer of DST on online advertising services.

The provider of the advertising service and, therefore, the taxpayer of DST will be that entity which, from the offer side, can include in the digital interface an advertising content to show to each user. This capacity can be exercised by the owner of the interface itself, or through a third party, which, under an agreement whereby, markets the inventory of advertising spaces of the owner, acquiring the right and/or the obligation to include advertising in it. These third parties are the so-called "affiliate networks", which add advertising space ("inventory") of one or more interfaces, allowing their owners their monetization and, in turn, empowering advertisers to have a wide catalog of interfaces in which display their advertising.

The DST resolution also specifies that, in the case of online advertising, there can only be one entity that performs the inclusion of advertising.

However, it should be noted that, as is being seen in practice, the different agents or entities involved in advertising services, both on the supply side and on the demand side, may incur in any of the other digital services subject to DST -i.e. online intermediation or data transmission-, if the requirements established in the Law are met.

## Online intermediation services

The DST resolution clarifies the concept of intermediation from DST purposes. Concretely, it requires the existence of, at least, two users and that the relationship of users is carried out through a digital interface that allows them to interact concurrently, not being necessary that all of them are using the device at the time of conclusion of the operation.

Special mention should be made of the delimitation of the concept of intermediary for DST purposes. The resolution addresses the issue and seems to take the position that it is limited only to those cases intermediation who act on the name and behalf of the principal when a remuneration or commission is received for the achievement of a result in the underlying operation. It seems that this definition will minimize the scope of online intermediation cases, although it is not clear whether prevents the application of DST to the intermediary who acts in its own name. In any case, a case-by-case analysis should be performed.

## Cases of non-subjection

It is noteworthy that STA clarifies the case of non-subjection provided for in Article 6(d), by establishing that it relates exclusively to online intermediation services. Therefore, where regulated financial institutions provide regulated financial intermediation services and advertising services through the same digital interface online -common situation in practice-, the aforementioned case of non-subjection will be limited to online intermediation services and not to online advertising services, an issue that will have to be taken into account by many business models of this type of financial institutions.

In addition, the resolution clarifies that the non-subjection extends to the provision of services that take place between entities of the group, although among them there is no participation if they are wholly owned by the group's parent company.

## Accrual and taxable amount

The DST shall be calculated transaction by transaction. This criterion will generate displeasure in many companies in the technology sector that opted for an aggregate calculation for all the transactions of a given

quarter, in line with the provisions of DST of other countries.

The resolution clarifies the meaning of transaction for these purposes, concluding that it is basically the contracts or agreements concluded by the taxable persons including examples for each type of taxable service.

The transaction may be considered to have been executed or carried out - accrued - on the issuance date of the invoice or any equivalent document. In case of transactions subject to DST, that give rise to advance payments prior to the realization of the taxable event, DST will accrue at the time of total or partial collect of the price for the amounts paid. In these cases, an invoice will also be issued as required by the invoicing regulations, in line with VAT rules.

Taxable persons - companies - will need to calculate the tax and configure their record books -ledgers- based on the information available in their systems. Although linking the accrual to billing will help, relevant issues could arise as we discuss later on.

If the operations are limited to Spanish territory, the taxable base will consist of all the income obtained in Spain, without calculating the proportion of the income obtained from users located in Spain in relation to the total of users located all around the world. However, it would be desirable in this case that the Spanish Tax Authorities could lift the formal obligations related to the location of users to the extent that they do not seem necessary and would greatly alleviate the burden of adaptation and management of companies.

The commissions received from both the buyer and the seller will be part of the taxable base of the online intermediation tax event, an aspect widely debated and that had different opinions.

Finally, it is clarified that in those cases in which the taxable base is calculated and declared provisionally because it is unknown in the settlement period, the adjustment may be made in the self-assessment (DST return) of the period in which it is definitively known, without arising late payment surcharges or delay interests.

However, when the DST returns were submitted declaring incorrect data, an amending DST return

should be submitted, in which the corresponding surcharges and associated interest for late payment would be applied, or, where appropriate, a request to the Spanish Tax Authorities should be filed for the rectification of the self-assessment previously filed.

#### IV. Approval of Form 490

Finally, on June 11, Order HAC/590/2021 of June 9, has been published, which approves the Form of the Spanish DST return and determines the methods and procedure for its electronic submission.

Apart from the modification of the Form number with respect to the draft previously published (moving from Form 420 to the definitive Form 490), the essential difference consist on the creation of the necessary boxes to declare the modifications of the tax base in such cases where it was provisionally calculated and declared.

This Ministerial Order confirms the deadlines for submitting the returns corresponding to the first and second quarters of 2021, which will be from July 1 to August 2, 2021.

Recently the STA have published the content of the catalogue of frequently asked questions from the Spanish Tax Authorities on operational issues and doubts in relation to the submission of the tax returns.

#### V. Impact and next steps

Once the regulation has been approved and, above all, once the draft of the interpretative resolution has been published, some controversial aspects of the practical application of the tax are beginning clarified.

However, significant issues remain uncertain on some aspects, such as the means of proof for rebutting the *iuris tantum* presumption on targeted online advertising, the concept of intermediary, the possibility of cascading taxation in cases of intermediation or those operative - quite often- in which several taxable events overlap at the same time and for which the Tax Authorities do not seem to recognize cases of non-subjection.

All these difficulties are becoming even more evident when implementing the necessary adaptations of the

systems in order to comply with the DST records and automatically calculate the tax.

Calculating the taxable base on a transaction by transaction basis instead of on aggregate revenues will also be a big issue, more over for those foreign companies which will use the aggregate methods in other DST jurisdictions. In addition, there are many companies which contracts mix digital and offline operating services where the quantification of the tax and the bookkeeping compliance will become even more difficult (e.g. those companies that transfer data obtained online and offline, those with advertising contracts in different media -some digital and others not-, or those that render intermediation services where physical and digital channels are mixed).

Although the tax was set up with the view to taxing the income generated by technology companies derived from the participation of users located in Spain, many traditional companies that have added digital channels - as new business windows parallel to physical channels- are being impacted in many sectors, such as tourism, retail or publishing sector among others.

The adaptations of systems for the location of users according to the different types of services taxed are also proving to be extremely complex due to their technical difficulty and the diversity of systems of the companies impacted.

On the other hand, the OECD negotiations on the well-known pillars 1 and 2 of BEPS Project are gaining considerable momentum. It should be taken into account that the DST was shown as an unilateral interim solution until the definitive solution agreed at the OECD level was adopted and implemented in Spain for the taxation of foreign technology companies whose users generate the value of digital services in the Spanish territory.

However, the Spanish Government is not considering either the suspension of the tax or a further postponement of its returns. As pointed out, the tax came into effect on January 16 and the returns for the first quarter and second quarter must be filed during the month of July.

The above is forcing companies to carry out an analysis of the impact of the Spanish DST on their operations

with limited information, being doubtful the criterion to be followed in certain business models and uncertain the adaptations to be implemented in their systems in order to comply with the obligations of self-assessment, formal compliance and tax registration that the Spanish DST requires to be done by July.

However, the application of the tax in July makes necessary to undertake and finalize the relevant analyses and the necessary adaptations of systems without further delay, in order to arrive in time to submit the census forms, the returns of the first and second quarter, where applicable, from 1 to 31 July, and comply with the formal obligations.

Should you require further information with regards to this tax alert, please, contact with:

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