

# Summary - International Tax Agreement

## 5 March 2019

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### **PREAMBLE**

The UK recognised as the State responsible for Gibraltar's external relations.

The application of Agreement does not prejudice position on sovereignty and control of Gibraltar by the UK.

### **ARTICLE 1**

Static alignment of EU standards and legislation on the following:

- Tax transparency
- Administrative cooperation on taxation
- Harmful tax practices
- Anti-money laundering

**Static alignment** refers to the application of standards and legislation up to date of EU exit and then maintaining those same standards and legislation thereon.

### **ARTICLE 2.1 (INDIVIDUALS)**

Rules for dealing with residency.

The residency tests and rules in this Article proceed in the following manner:

1. Application of domestic law in either Gibraltar or Spain
2. Identification of residency conflict (individual taxable in both Gibraltar and Spain and not categorised clearly as resident of either one). The use of 4 tests to establish if individual is **only** resident in Spain
3. If none of the tests are conclusively met, presumption that individual is tax resident in Spain unless they spend over 183 days in Gibraltar **and** have a permanent home in Gibraltar. If these latter conditions are met, the individual is tax resident in Gibraltar.
4. If there is still a difficulty or doubt in resolving the tax residency conflict, the case referred to the Joint Coordination Committee.

In the first instance, individuals are classified as tax resident in Gibraltar or Spain according to the applicable domestic legislation.

Specific rules are introduced in cases of tax residency conflicts.

A tax residency conflict arises when an individual is tax resident in both Gibraltar and Spain and cannot be clearly categorised clearly as a tax resident of either one.

In a tax residency conflict, an individual will be considered **only** tax resident in Spain when meeting any of the following conditions:

- 1) The individual's **only** permanent home is located in Spain.
- 2) The individual spends over 183 overnight stays in Spain, attributing any sporadic absences from either Spain or Gibraltar to the place where that individual spends most of their time.

#### Example A

Individual A spends 170 overnight stays in Spain and 145 overnight stays in Gibraltar. They also spend 50 overnight stays in UK. The 50 overnight stays not spent in either Gibraltar or Spain would be added to the time spent in Spain. The individual would then be tax resident in Spain with a total of 220 overnight stays.

#### Example B

Individual B spends 180 overnight stays in Gibraltar and 156 overnight stays in Spain. They also spend 29 overnight stays in UK. The 29 overnight stays not spent in either Gibraltar or Spain would be added to the time spent in Gibraltar. The individual would then be tax resident in Gibraltar with a total of 209 overnight stays.

- 3) The individual's centre of vital interests is located in Spain. Centre of vital interest is determined by habitual residence of family members (spouse or equivalent and dependent ascendants or descendants) in Spain. Habitual residence would mean whether you live there regularly, normally or customarily.
- 4) The individual's centre of economic interests is in Spain. Centre of financial interest is determined if at least two thirds of net assets are held (directly or indirectly) in Spain.

If, within a tax residency conflict, none of these conditions conclusively apply, then the individual is considered tax resident in Spain unless they spend over 183 days in Gibraltar **and** have a permanent home there. If these latter conditions are met, the individual is tax resident in Gibraltar.

A Joint Coordination Committee will assist in resolving tax residency conflicts involving difficulties or doubts.

There are special rules for certain classes of individuals which override provisions in domestic law on both sides.

### Rules on migration of residency

On moving their residence to Gibraltar:

- 1) Spanish nationals retain tax residence only in Spain.
- 2) Non-Spanish nationals that have spent at least one complete tax year in Spain, retain tax residence in Spain for the year of change in residence and during the four subsequent years.
- 3) Registered Gibraltarians (as per section 4 of the Gibraltarian Status Act or British citizens residing in Gibraltar for over 10 years) that have spent at least 4 years in Spain, retain tax residence in Spain for the year of change in residence and during the four subsequent years.

Participation in a tax regime under which assessable income is capped in Gibraltar does not prove tax residency in Gibraltar for the purposes of the Agreement.

## **ARTICLE 2.2 (ENTITIES)**

### Rules for dealing with residency.

This article concerns “legal persons”, including companies, trusts, foundations and similar entities and specific rules for determining when such entities would be considered tax resident in Spain.

Entities established and managed in Gibraltar (which would normally meet the residency criteria in Gibraltar), shall be resident in Spain rather than in Gibraltar when meeting any of the following conditions:

- 1) The majority of assets directly or indirectly owned by the entity are in Spain, or consist of rights that can only be exercised in Spain.
- 2) The majority of the entity’s accrued income in a calendar year derives from sources in Spain as defined by Spanish legislation on non-residents<sup>1</sup>.
- 3) The majority of the individuals in charge of effective management (i.e. executive directors) are tax resident in Spain.

- 4) The majority of the capital or equity, voting or profit-sharing rights (i.e. ordinary shareholders) are directly or indirectly controlled by individuals that are tax resident in Spain or by entities linked to tax residents in Spain.

The agreement by Gibraltar to these rules demonstrates the jurisdiction's commitment to full transparency and the alignment of its approach to the OECD's BEPS economic substance requirements.

The residency rules in this Article apply in the following manner:

- 1) All 4 conditions apply to all companies incorporated in Gibraltar after 16 November 2018.
- 2) In the event that the last 2 conditions apply to companies incorporated before 16 November, those affected companies can avail themselves of an exclusionary clause by meeting 5 conditions as at 31 December 2018, which establishes them as entities with a genuine tax presence and economic substance in Gibraltar.
- 3) Gibraltar is required to provide a list of those entities that **are** tax resident in Spain by virtue of the rules on effective management and control **and** that have satisfied the tests of genuine tax presence and economic substance.

A provision in the Agreement, excludes entities in Gibraltar that existed before a particular date from tax residency in Spain, in the event that the entity inadvertently 'trips' either one of the last 2 conditions referred to above (i.e. tax residency in Spain by virtue of directors and/or ordinary shareholders being classified as tax resident in Spain).

This exclusion allows entities incorporated on or before 16 November 2018 to remain tax resident in Gibraltar, provided they meet all the following criteria as at 31 December 2018. Entities incorporated after 16 November 2018 are not eligible to rely on this exclusion.

Therefore, Gibraltar entities meeting the five criteria set out below, provide reliable evidence regarding a genuine tax presence and sufficient economic substance in Gibraltar.

The criteria, all of which must be satisfied, are:

- 1) The entity must have a fixed place of business in Gibraltar through which the business is wholly or partly carried out with adequate staff (number and qualifications) and expenditure to support its core income-generating activities;
- 2) It is liable to and has paid corporation tax in Gibraltar;
- 3) It has operated in Gibraltar from its incorporation to 31 December 2018 and there has been no interruption or change in its trade since 1 January 2011;

- 4) More than 75% of its income for the last financial year before 31 December 2018 accrued in and derived from sources in Gibraltar;
- 5) It has, for the last financial year before 31 December 2018, an amount **below** a defined percentage of its income that accrues from sources in Spain. The percentage varies according to the entity's annual turnover and are:
  - 15% in Spain for entities with an annual turnover not more than €3m.
  - 10% in Spain for entities with an annual turnover between €3m and €6m.
  - 5% in Spain for entities with an annual turnover over €6m.

Where there are other Gibraltar entities forming part of the same group for financial reporting purposes, the turnover of all related entities is considered. Related entities defined within International Accounting Standard 24 on Related Party Disclosures issued by the International Accounting Standards Board.

In order to be able to avail themselves of this exclusionary clause in the Agreement, in the event that they are caught by the residency rules regarding effective management and control in Spain, entities incorporated in Gibraltar before 16 November 2018 will need to provide this information to the Income Tax Office.

Submission of this information will ensure exclusion is available going forward in the event the entity is inadvertently caught by the residency rules on effective management and control by tax residents in Spain.

In order to ensure that every entity in Gibraltar, incorporated before 16 November 2018 is safeguarded against this potential eventuality, the Income Tax Office will be legislating the requirement to submit an information return to this effect.

Under the Agreement Gibraltar has agreed to supply Spain with a list of all those entities that would be deemed resident in Spain, on the basis of the rules on effective management and control by tax residents in Spain **and** meet all the tests set out in the exclusionary clause. The list supplied to Spain by 31 March 2020, shall include beneficial ownership and governance details.

#### Rules on migration of residency

There is a further rule retaining tax residency in Spain for those entities that move their residency to Gibraltar after the date of the Agreement.

### **ARTICLE 2.3 (DOUBLE TAXATION RELIEF)**

Where a tax resident of one jurisdiction suffers double taxation in the other's territory, the jurisdiction in which the taxpayer is resident shall relieve the taxation suffered in accordance with their domestic law.

### **ARTICLE 3 (EXCHANGE OF INFORMATION)**

This commits both Gibraltar and Spain to share tax data. It also provides for further forms of administrative assistance, including joint audits, assistance in collection of tax debts, and the serving or transfer of documents.

**Dynamic alignment** on exchange of information, whereby measures equivalent to the various EU directives currently supporting the sharing of information for tax and anti-money laundering purposes are maintained beyond the date of EU exit.

Gibraltar and Spain have agreed to exchange the following information with each other automatically:

- Annual information on workers who are tax resident in one jurisdiction but who are employed or carry on a trade in the other, including information relating to their employment or trade; and
- Information on vessels, aircraft, and motor vehicles registered in one jurisdiction but connected to tax residents in the other. Information to be supplied on a six-monthly basis.

The term “workers” refers to those individuals residing in municipalities in Spain within 80km from Gibraltar.

Gibraltar has also agreed to provide Spain with the following additional information:

- Direct and free access to the records of the Registry of Companies in Gibraltar and to the Land Registry in Gibraltar.
- Direct access to any public information regarding beneficial ownership.
- Direct and on request access to the Commissioner of Income Tax in Gibraltar regarding any beneficial ownership information.
- Direct access to any public information regarding trusts where a trustee, settlor, protector, or beneficiary is tax resident in Spain or an asset held by the trust is located in Spain.
- Direct and on request to the Commissioner of Income Tax in Gibraltar regarding information on trusts where a trustee, settlor, protector, or beneficiary is a tax resident in Spain or an asset held by the trust is located in Spain.

The article contains the timing of the first and successive exchanges of information as well as defining the taxable periods and periods of time such exchanges relate to.

## **ARTICLES 4 and 5**

Set out institutional arrangements relating to the Agreement. Requirement for both Parties to identify competent authorities and establish a Joint Co-ordination Committee to supervise and co-ordinate the operation of the Agreement.

## **ARTICLE 6**

Applies OECD standards on confidentiality, data safeguards and exchange of information.

## **ARTICLE 7**

Sets out the termination provisions of the Agreement. Either Party may terminate the Agreement by giving six months' notice before the beginning of the calendar year in which they wish it to cease to apply. In the event of such a discontinuance, this will apply to taxes chargeable for any tax year commencing on or after 1 January in the calendar year after the year in which the notice is given.

## **ARTICLE 8**

Sets out the entry into force of the Agreement, subject to either Party notifying that their internal procedures are complete. These procedures relate to any internal legislation and procedures in place for the necessary and effective implementation of the Agreement.

It also sets out commencement provisions for both Article 2 (residency rules for individuals and entities) and Article 3 (exchange of information).

## **ARTICLE 9**

This states that the Agreement although signed by the United Kingdom only applies to Gibraltar.