

NEWSFLASH AVANTIA ASESORAMIENTO FISCAL Y LEGAL

SPANISH SPECIAL VOLUNTARY DISCLOSURE PROCEDURE IMMEDIATE ACTION REQUIRED

On Friday 30 March 2012 the Spanish government announced the introduction of a Special Voluntary Disclosure Procedure by means of a Royal Decree (Real Decreto Ley 12/2012) which came into effect on Saturday 31 March 2012.

This is a Procedure which has been long awaited by advisors and investors alike and has finally been adopted in the context of mounting difficulties in managing the public finances and meeting the short-term deficit targets agreed with the European Union. Avantia has been closely involved in the consultative stages of the Procedure during these past months and as such, we are now able to share our outlook.

1. The Who: Persons who may apply

The Procedure may be applied by certain categories of taxpayers, mainly as follows:

- **Individual taxpayers resident in Spain subject to Spanish Income Tax** who, at 31 December 2010, owned assets or rights whose income and gains have not been reported for Spanish income tax purposes.
- **Corporate taxpayers resident in Spain subject to Spanish Corporation Tax** who, at 31 December 2010, owned assets or rights whose income and gains have not been reported for Spanish corporation tax purposes. Corporations with an accounting year end other than 31 December each year should check their position as to the cut-off point in terms of timing for the application of this Procedure.
- **Individual or corporate taxpayers non-resident in Spain subject to Spanish Non-Resident Tax on Spanish-source income and gains**, who own Spanish assets or rights whose income and gains have not been reported for Spanish Non-Resident Tax purposes. These taxpayers should check their position as to their exact cut-off point in terms of timing for the application of this Procedure.
- **Taxpayers currently under full tax audit or in appealing stages** will generally not be able to benefit from the Procedure, but we would strongly advise to **check the position on a case-by-case basis**, given the wide range of review procedures currently being adopted by the Spanish tax authorities.

2. The What: Costs and Benefits

Taxpayers who opt to apply this Procedure will have to submit a special return and pay a **one-off tax liability for an amount equal to 10% of the current value or acquisition cost of all undeclared assets and rights**. In general terms, partial disclosures will not be allowed.

This tax settlement will automatically exonerate taxpayers from:

- The application of all provisions in the relevant laws treating **undeclared assets discovered by the tax authorities as deemed taxable income** of the year, fully subject to tax as regular income.
- The application of any **penalties, surcharges and interest on overdue tax**.
- The **referral to the taxpayer to the criminal courts under tax fraud charges** for any periods not covered by the Spanish statute of limitations (currently four years for administrative reviews and five years for criminal tax fraud cases).

3. The How: Tax filings and Reviewing Process

As explained above, taxpayers who opt to apply this Procedure will have to submit a **special return, together with the payment** of the resulting liability. As well as the return, taxpayers will have to submit an **explanatory memorandum** identifying the assets and rights now brought to tax.

This special return will be of a **confidential nature** and will be subject to review by a **Special Unit** who will manage and coordinate the Voluntary Disclosure Procedure. Further details on the Unit remain to be provided, but it is generally expected that it will operate within the Spanish Tax Revenue structure (Agencia Tributaria or AEAT).

The law now passed states that all relevant forms, place of submission, as well as any other measures which may be necessary to roll out the Procedure will be subject to **further regulations which will be released in due course**.

4. The When: Deadline for Filings and Payments

The deadline for submission of special returns and payment of liabilities under the Procedure will be **30 November 2012**.

5. The Unknown: Pending Issues and other important matters

Having reviewed the legislation in detail, there are a number of important issues which have not been addressed and need to be highlighted:

- There are a great number of circumstances and situations which remain unsolved, given the complexities and the multijurisdictional nature of many structures. Further guidance may be given in the future through pending regulations. In any event, the **criteria and opinions which the Special Unit will adopt in practice when dealing with individual returns will be of critical importance.**
- The Procedure **does not cover all taxes**; among the taxes not covered are Wealth Tax (up to 2007), Inheritance and Donation Tax, VAT, Transfer Tax and all municipal taxes.
- The Procedure points to ownership of undeclared assets and rights a certain cut-off point in time, but does not contemplate situations of **changes in ownership** throughout the periods not covered by the Statute of Limitations (and IHT is not covered by the Procedure).
- It is unclear how best to manage **tax reportings for the year ended 31 December 2011**, whose returns must generally be submitted in June/July this year, prior to the deadline of the Procedure.
- The legislation does not address the situation of **assets and rights wrapped in undeclared offshore corporate structures**, how to report them going forward and the tax consequences of their liquidation once brought to tax under the Procedure.
- The legislation does not preclude taxpayers from implementing Regular Voluntary Disclosure Procedures under standard General Tax rules. However, these taxpayers will not be able to benefit from the provisions of this Special law, will not benefit from the special protection against criminal charges set out in this law and will not be able to access the Special Unit on their disclosure.

Our Firm, Avantia Asesoramiento Fiscal y Legal, has been actively involved in the **consultative phase of the Procedure**. As a Firm, we recommended the adoption of a Special Disclosure Procedure around a Special Unit to give taxpayers legal certainty as to their tax disclosures. We have also shared our extensive experience in advising taxpayers in administrative and criminal tax processes and cases and have provided detailed analysis on recent Voluntary Disclosure Schemes in other main jurisdictions, within the context of the OECD recommendations and reports.

We **strongly recommend clients** who own unreported assets and rights, or hold undeclared assets in Spain (including Spanish situs real estate) through onshore or offshore vehicles, **to examine this opportunity closely** within the provisions of the law now passed as a matter of urgency, **well prior to the deadline for the submission of 2011 income tax returns on 30 June 2012, as certain actions and preliminary consultations might be required**. In any event, we would strongly recommend that this is **channeled and coordinated through a specialist law firm**, who may provide technical advice and access to best practices, as well as provide protection under professional privilege rights.

We would also highlight that the Spanish government has expressly stated its intention to implement tougher legislation and actions against non-compliant taxpayers who choose not to make full disclosures going forward. **Tougher legislation is now being drafted and is formally in the government pipeline; this will be reinforced by making full use of current closer cooperation between States**, with unilateral, bilateral and multilateral exchanges of information, and **enhanced access to information and documentation** from jurisdictions which have been non-cooperative in the past.

We at **Avantia Asesoramiento Fiscal y Legal, as a specialist Private Client boutique law firm, will be delighted to assist you and your clients in the overall process**, including advice at the preliminary stages of weighing the pros and cons of individual situations, preliminary consultations and advice on tentative disclosures, preparation of special tax returns and back-up memoranda, overall management and coordination of the whole procedure with the Special Unit, which will be critical to the success of each individual disclosure, and assistance on assessing impact of the new scenario and tax planning opportunities going forward.

We hope that the above will be of help, but please do not hesitate to contact us if you have any queries or otherwise wish to discuss. Our contact details are as follows:

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