

Spain

Taxation

HEDGE FUNDS 2009

Hedge fund managers/advisors

Taxation

Tax rates applying to hedge fund managers/advisors

In principle, hedge fund managers/advisors are subject to the general Spanish corporate income tax (CIT) regime.

In general, Spanish CIT taxable base is calculated on the basis of the tax payer's accounting result determined under Spanish GAAP, which must then be adjusted if applicable – upwards or downwards – in accordance with the provisions of Spanish tax legislation. In this regard, Spanish CIT legislation does not establish different income categories or CIT rates for each source of income.

The CIT rate applicable would be the general 30 percent CIT rate on fiscal periods commencing after 1 January 2008.

The effective tax rate usually suffered by hedge fund managers/advisors

The effective tax rate would in principle be the aforementioned 30 percent. However, certain Spanish CIT deductions could be applicable and, thus, the effective tax rate would be lowered.

Tax concessions, allowances, or exemptions specifically available to hedge fund managers/advisors

There are no specific tax concessions nor allowances or exemptions for fund managers/advisors. The tax credits available are the ones applicable for other Spanish CIT payers that are taxed under the general CIT regime.

Details of anti-avoidance tax rules that could bring the profits of an offshore hedge fund into tax

As a general rule, offshore hedge funds without a Spanish presence (that is, without conducting its activities through a permanent establishment) are not taxed in Spain except for the income obtained in Spain, such as dividends, interest, etc.

However, according to Corporate Income Tax Law entities satisfying any of the following requirements shall be deemed to be resident in Spain, hence, shall be taxed on all the income or gains obtained by them, regardless of the place where it arose and whatever the residence of the entity:

- if they have been formed under Spanish law
- if their registered office is in Spain
- if their place of effective management is in Spain

For these purposes, an entity shall be deemed to have its place of effective management in Spain if the management and control of its activities as a whole are located in Spain.

In practice, Spanish hedge-fund asset managers only manage Spanish hedge funds or funds of hedge-funds and, thus in practice, tax residence of the fund should not be an issue.

In addition, according to Spanish Corporate Income Tax Law, companies located in tax havens or in a zero taxation jurisdiction (as defined by in Spanish CIT regulations) may be deemed Spanish tax residents if most of their assets (direct and indirect ownership of assets) are located (or can be exercised) in Spain or most of their activity is undertaken in Spain.

In principle, this rule would not be applicable if the taxpayer can provide evidence that the effective place of management is in that tax haven and that there are sound business reasons for the incorporation of the company and operation of its activity in the tax haven.

Requirements to charge VAT (or equivalent sales tax) and the rate

As a general rule, VAT should not be charged on the services provided by regulated hedge fund managers to the funds consisting of management and deposit of such funds. These services are exempt under article 20 of Spanish VAT Law.

As a result of the above, as a general rule, the fund manager is not entitled to fully recover input VAT.

Hedge fund structures

Taxation

Tax rates applying to the fund

Domestic hedge funds should be able to benefit from the special tax treatment applicable to ordinary domestic funds. Under such regime, Spanish regulated Collective Investment Institutions are generally subject to a 1 percent corporate income tax rate.

Access to double tax treaties

Given that Spanish Funds are subject to taxation in Spain, the Spanish tax authorities usually issue tax residence certificates within the meaning of the corresponding tax treaty.

Value-added tax registration and charging requirements

The fund is not obliged to register with the Spanish tax authorities for VAT purposes unless if it is deemed to carry out a business activity in Spain for VAT purposes (such as, rental of real estate different from housing).

Withholding tax requirements for the fund on dividend or interest payments made by the fund or on realization of an interest in the fund

Distributions made by funds to Spanish investors are treated as dividends for the Spanish taxpayer and should be included in the corporate and personal income tax base such as the capital gains obtained in the redemption of the participation in funds.

In principle, capital gains obtained in the transfer of investment funds and dividends received by investors would be subject to withholding tax on the gross amount received:

- In case of Spanish investors, an 18 percent withholding tax is applicable as from 1 January 2007. This withholding tax would be considered as a payment on account of the final tax payable by the investor. Given the special regime applicable to Spanish funds (1 percent tax rate) the Spanish resident investor cannot apply for a tax credit in order to avoid domestic double taxation.

Please be informed that, for individuals, as from 1 January 2003, Spanish Personal Income Tax Law has established a tax deferral system for capital gains or losses obtained upon transfer or reimbursement of gains derived from qualifying undertakings, conditioned to the amount obtained from the transfer

or reimbursement of participations being reinvested in another qualifying undertaking. The reinvestment made will maintain the same fiscal value and purchase date of the former investment.

- In case of non-resident investors, an 18 percent withholding tax is applicable, subject to the potential application of reduced tax rates established in the tax treaties. This withholding tax would be considered as final tax payable in Spain by the investor.

The Spanish fund manager (in the event of capital gains) and the depositary or custodian company (in the event of dividends) are the ones that are obliged to declare and apply the corresponding withholdings tax on account.

Tax return requirements

Basically, it needs to file a corporate income tax return on a yearly basis. The final tax return will have to be filed before the 25-days period following the six months from the closing date of the tax year (such as, for tax years ending on 31 December, the return is due by the following 25 July).

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Investor tax resident in your country	Partnership (see through entity)	Corporate open ended (not see through)	Corporate closed ended (not see through)	Unit Trust open ended	Unit Trust closed ended
Individual		X	X		
Company		X	X		
Pension fund		X	X		
Life insurance company		X	X		
Mutual fund		X	X		
Fund of hedge funds		X	X		

*Look-through entities are not usually preferred by Spanish investors.

In this regard, it should be noted that as from 1 January 2003, Spanish tax legislation regulates the tax regime applicable to investments in certain foreign collective investment undertakings within the scope of UCITS Directive.

According to Spanish legislation, investors in foreign Collective Investment Institutions registered with the CNMV are taxed in the same way as investors in domestic Collective Investment Institutions. However, taxation of foreign undertakings not registered with the CNMV is not a clear-cut issue as opposed

to investments in resident undertakings or non-resident undertakings registered with the CNMV.

The only specific rule refers to those institutions, which are resident in territories classified as tax havens. In this regard, in case of undertakings set up in offshore locations deemed tax havens by the Spanish authorities, Spanish tax law expressly provides for the taxation of rolled-up profits of such undertakings. (Please see below.)

In other cases, in the absence of specific tax rules, the tax treatment applicable to investors is subject to discussion and to interpretation.

As a result of the above, general tax rules should be applied in order to determine the tax treatment of the fund and its investors. In this regard, it could be said that the tax treatment applicable to investors would require a case-by-case analysis and would depend, among other circumstances, on the type of fund (with or without legal status, UCITS or non-UCITS, registered or not registered with the Spanish regulator, CNMV), its country of residence, the accounting GAAP applicable to the investor, etc.).

In general, the following scenarios may be presented:

- Investments in shares or units of funds with a corporate structure that is, with legal status, not resident in tax havens would receive a similar tax treatment as the treatment applicable to Spanish funds, regardless the fact the fund is UCITS and is registered with the Spanish regulator (CNMV).
- Investments in non-UCITS shares or units of funds registered or not in Spain and without corporate structure. Although their taxation is not expressly included in the special tax regime for domestic funds and non-resident UCITS funds, investors could be potentially taxed under income attribution tax rules and, as a result, there will be a taxation of rolled-up profits obtained by the fund in the hands of the investor.

Anti-avoidance tax legislation applying to an investor resident in Spain, where the hedge fund is also resident in Spain

There is no specific anti-avoidance tax legislation applying to investors resident in Spain regarding domestic hedge funds.

Anti-avoidance tax legislation applying to an investor resident in Spain, where the hedge fund is resident offshore

Spanish investors in funds which are resident in a tax haven are penalized by the special tax regime contained in Spanish personal and corporate income tax laws.

In this regard, taxpayers having interests in funds formed in countries or territories classed as tax havens shall include annually in their tax base the positive difference between the net asset value of their interest on the date on which the tax period ends and its acquisition cost.

There shall be a presumption that the difference referred is 15 percent of the acquisition cost of the share or unit.

The amount included in the tax base shall be treated as an addition to acquisition cost for the purpose of future transactions. For its part, income distributed by the fund shall not be included in the tax base and shall reduce the acquisition cost of the interest.

Tax information required from an offshore fund by an investor resident in Spain

In general, information such as acquisition price, sales price, and other costs related to the sale and annual revaluation of the participation would be required.

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act upon such information without appropriate professional advice after a thorough examination of the particular situation.