FREQUENTLY ASKED QUESTIONS (FAQs)

INTERNATIONAL TAX AGREEMENT: GIBRALTAR - SPAIN

November 2021

Contents

Topic	Page
DISCLAIMER	1
FOREWORD	2
SCOPE	7
How do these FAQs work?	7
When & how does it come into operation?	7
OTHER GENERAL MATTERS	12
ARTICLE 2	13
Tax residency of natural and legal persons, entities and other legal structures or arrangements	13
Introduction – Natural persons	13
Article 2(1)(a)	15
How will I be considered tax resident in either Gibraltar or Spain?	15
What is the law in Gibraltar regarding tax residency and how am I tax resident there?	15
What is a year of assessment in Gibraltar?	16
Do the Gibraltar tax authorities issue a certificate confirming residency?	16
Article 2(1)(b)	17
What happens if I am tax resident in both Gibraltar and Spain?	17
How is single tax residence determined?	17
What happens if none of the tie-breakers determine single tax residence?	18
Why is there a rebuttable presumption of tax residence only in Spain?	18
If this presumption is rebutted, is your tax residence established only in Gibraltar?	19
How is this presumption rebutted?	19
What is actually meant by “remain in Gibraltar”?	19
What would constitute reliable evidence?	19
What is meant by “permanent home”?	20
When will the tie-breakers become applicable?	21

Do the tie-breakers reproduce Spanish law on tax residency and if so how can they be used to resolve dual residency? 21

Are there any differences in tie-breaker (A)? 22

Why are “overnight stays” used? 22

Should I count ‘days’ or ‘overnight stays’ for tax residency purposes in Spain? 22

What is meant by “sporadic absences”? 23

How does the Treaty help with “sporadic absences”? 24

How would “sporadic absences” actually be dealt with under the Treaty? 25

Does the calculation of the day count for the purposes of the rebuttable presumption include or exclude any sporadic absences? 28

Are there any differences in tie-breaker (B)? 28

Does the term “ascendants” in tie-breaker (B) include only parents or also grandparents and great grandparents, etc. 28

Does the term “dependent” in tie-breaker (B) mean a legal obligation to maintain or does it mean actual maintenance with no legal obligation? 29

What does “habitually reside” in tie-breaker (B) mean? 29

What does “similar relationship” in tie-breaker (B) mean? 29

Are there any differences in tie-breaker (D)? 29

Is this two thirds ratio based on my worldwide asset base or my asset base located only in Gibraltar and Spain? 30

On what asset value is this two thirds ratio based? 30

If my single residence is established in Spain would I continue to be tax resident in Gibraltar? 31

Does this affect how much tax I pay in Gibraltar and Spain? 31

Would double taxation relief be available if, as a resident in Spain, I receive dividends from a Gibraltar company and the income received has paid tax in Gibraltar? 32

Would double taxation relief be available if, as a resident in Spain, I receive foreign income from outside Gibraltar? 32

What is the Joint Coordination Committee? 33

Who are the designated authorities under the Treaty? 33

What is the purpose of the Joint Coordination Committee and how does it work? 33

How do I refer my case to the Joint Coordination Committee if I am dual resident? 35

If a residency dispute is not ultimately resolved by the Joint Coordination Committee, does that mean I will be taxed twice on the same income in Gibraltar and Spain? 35

Who appoints the members of the Joint Coordination Committee? 36

Article 2(1)(c) 36

Are there any special rules regarding tax residency? 36

What is a Registered Gibraltarian? 37

How has the Treaty affected me as a Spanish national? 38

How are these rules applied and how do they affect me as a non-Spanish national or a Registered Gibraltarian? 39

If I am a Spanish national moving to Gibraltar from any location other than Spain am I affected? 39

Being a Spanish national, if my child is born in Gibraltar will he or she be considered tax resident in Spain if they hold Spanish nationality? 40

I am a Spanish national who was resident in Gibraltar before the 4 March 2019. Will I now be considered tax resident in Spain? 40

I am a non-Spanish national who moved to Gibraltar from Spain before the 4 March 2019. Will I now be considered tax resident in Spain? 40

I am a registered Gibraltarian who moved to Gibraltar from Spain before 4 March 2019. Will I now be considered tax resident in Spain? 41

Introduction – Legal persons, entities & other legal structures or arrangements 42

Article 2(2)(a) 43

What are the rules on effective management and ownership contained in Article 2(2)(a)(iii) and (iv) for determining residency only in Spain and when and how do these apply? 43

How do these rules affect structures including other legal arrangements such as trusts? 44

What is meant by “effective management”? 44

If I am the natural person charged with the effective management of a company will my tax residence in Spain be determined and established by the individual residency rules within the International Agreement with Spain? 45

Can you clarify what is meant by “majority of interests in capital, equity, voting or profit-sharing rights”? 45

How would this majority of control apply? 45

If I am the natural person with the majority of control in the ordinary share capital of a company will my tax residence in Spain be determined and established by the Treaty? 46

What is meant by “linked to tax residents in Spain”? 46

How does this affect me as a Gibraltar-based entity? 47

Why the date of 16 November 2018? 48

What is the safeguard? 48

Can I rely on the safeguard if my company or arrangement was incorporated or established before 16 November 2018 and the majority of the assets are located in Spain and/or the majority of the income derives from sources in Spain? 48

What are the conditions that I need to have met as at 31 December 2018? 49

What type of evidence to corroborate the conditions is required? 50

What is meant by 75% of income accrued in and derived from sources in Gibraltar? 52

If my company has an accounting date at 31 December, does the financial year immediately preceding the 31 December 2018 mean the accounting period ended 31 December 2017? 52

What does the safeguard achieve? 52

Why do the conditions for the safeguard have to apply as at 31 December 2018? 53

What if I had no actual liability to tax? Can I still use the safeguard? 53

How do I apply to use this safeguard? 53

Will a newly formed subsidiary/arrangement be able to benefit from the safeguard by extension if its parent is eligible? 54

What will Gibraltar do with both the supporting information submitted and my declaration? 54

When does Gibraltar need to submit this information and what is to be sent? 55

Why does Gibraltar need to give this information to Spain? 55

Is my partnership within the scope of these residency rules? 56

Can I benefit from the safeguard as a partner in a partnership if I don't pay corporation tax? 56

Are there any special rules on companies changing their residence to Gibraltar? 57

If I liquidate my Gibraltar company, will the liquidation need to be carried out in Spain if the company is resident there given that this is where the majority of its assets are located? 57

ARTICLE 3 58

Administrative co-operation in tax matters 58

Introduction 58

Is there any difference to the current position? 65

Why is Gibraltar dynamically aligning to such measures in respect of information exchange after the UK's expected exit from the EU? 65

Is the information exchanged with Spain fully reciprocal? 66

Who is information exchanged between? 66

How are tax residents in Spain identified for the purposes of the automatic exchange of information? 66

What type of information is to be automatically exchanged on a reciprocal basis with Spain in relation to individuals? 67

Can I ask what information you hold on me that you will be sharing with Spain? 68

If incorrect information is sent to Spain about me how and when is this rectified? 68

What taxable periods are within the scope of the automatic exchange of information on workers? 69

Will the Gibraltar tax authorities be obliged to assist Spain with the collection in Gibraltar of tax owed in Spain and due by a Gibraltar resident? 70

Disclaimer

These FAQs have been issued to assist the reader and to help inform understanding of this International Agreement (the “Treaty”). They do not constitute legal advice and may not reflect the most current legal developments, verdicts or settlements. They are not, and are not intended to be, a substitute for independent specialist advice or analysis of the legislation.

The examples contained in this document are hypothetical and are included entirely for illustrative purposes only.

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Foreword

An overwhelming majority of Gibraltarians voted to remain within the European Union. Our voice as a people was resolute and clear. The democratic decision resulting from the referendum held on Thursday 23 June 2016 will forever be remembered as an historic event as well as an unprecedented one in shaping Gibraltar’s future.

This is a future of uncertainty, change and new opportunities. One in which we have had to rely on foresight and the strength of our convictions in order to identify and pursue those long-term objectives to ensure our success and allow Gibraltar to endure and prosper.

A time for all to reflect on what the future holds, what we want and how best to get there.

Our exit from the EU with the UK has allowed us to build stronger and improved meaningful relationships with the UK. This is our silver lining, one we have embraced with open arms and one that has allowed us to consider and develop opportunities that were previously thought to be impractical, impossible or even unrealistic.

It is this attitude and forward-thinking that provided the unprecedented opportunity for the UK, Gibraltar and Spain to negotiate and ultimately agree on an International Agreement on Taxation and the Protection of Financial Interests.

This Treaty was signed on 4 March 2019 by the UK as the state responsible for Gibraltar's external relations under the Gibraltar Constitution and has now entered into force on 4 March 2021.

This is a milestone in our relationship with our neighbours and a significant step forward in pursuing our transparency agenda in the area of taxation.

The Treaty does not prejudice our position on sovereignty, jurisdiction or control of Gibraltar. It does not change Spain's domestic tax legislation. Its purpose is to improve and enhance administrative co-operation in tax matters between Gibraltar and Spain in a progressive and modern way; one which is commonplace among neighbouring territories and under which we are able to nurture international business links, attract international trade and reach out and expand our treaty network with prospective partners.

This is vital in a post EU exit world. The need to forge new relationships and expand horizons can only be achieved through strategies such as this, by taking bold steps and never losing sight of the long-term benefits and objectives.

Benefits have already materialised and I am confident that more will come our way.

The negotiation of this Treaty paved the way for the successful negotiation and ratification of a Double Taxation Agreement with the UK. This agreement is an essential tool enabling a more streamlined flow of investment and business with what is essentially our major trading partner and the principal market in which the majority of our financial service providers operate in.

In contributing significantly to our international tax transparency initiative, it demonstrates our commitment in this field following our EU exit and is in line with our strategy, attitude and approach towards the OECD and G20 summit.

We acknowledge the important outcomes achieved from active participation in and adoption of measures from such international forums. In today's modern tax landscape, membership in international bodies, such as the OECD's Global Forum on Transparency and Exchange of Information and the Base Erosion Profit Shifting Inclusive Framework (BEPS for short) are more critical than ever. Staying behind or being excluded is simply not an option in today's global tax environment.

Spain has, for the better part of the last 2 decades, challenged our tax system on grounds of regional selectivity; insisting that Gibraltar should not be allowed to have a different tax system to the UK. The Treaty is a recognition not only of our independent tax system but also of our distinct tax authorities and their ability to autonomously implement and administer Gibraltar's tax system.

This was a significant achievement for Gibraltar, a major step in the right direction in cementing our international tax reputation and an immediate benefit from having concluded the Treaty.

It is important also to note public statements made by the former Spanish Foreign Minister, Sra Arancha González Laya[1] praising the Treaty and making the commitment by way of Parliamentary declaration to delist and no longer classify Gibraltar as a tax haven once the Treaty is operational.

This in itself is a tremendous achievement, more so when it becomes a reality.

This will undoubtedly have a positive impact on our international reputation and open up gateways with countries not previously willing to establish business and trade with Gibraltar as a direct result of Spain's challenge to our tax system.

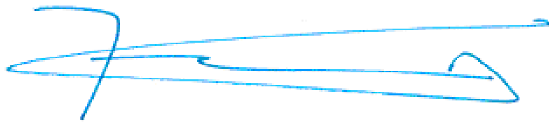
It ensures that Gibraltar's tax system is not abused in a manner that causes unnecessary irritation to Spain; something not conducive to our wish to collaborate for better future relations with our neighbour.

Our position is clear. Gibraltar will combat aggressive tax planning and will not allow itself to be used to exploit opportunities of not paying tax anywhere - *the right person must pay the right tax in the right place*.

[1] 20th January 2021 Congreso de los Diputados, the Spanish Parliament: "So I think, frankly, in terms of taxation, I think we can see clear progress, which is the reason why, when this Tax Treaty is signed, Spain will remove Gibraltar from its list, which is a Spanish list that is not European, which Gibraltar was never on, … but when this Treaty is signed, Spain will be ready to remove Gibraltar from the list of tax havens because a problem will have been answered. Look, we can continue to have Gibraltar on the list of paradises and Gibraltar can continue to behave as a tax haven. It seems to me that this does not help us. It does not help our citizens or help our companies. What does help them is that we agree on rules of fair play, fair competition in tax matters, which is modestly what this Government has done with the Tax Treaty and what it will continue to do with the negotiation between the European Union and the United Kingdom regarding Gibraltar." (Translated from Núm. 42, Pág. 1, Sesión núm. 10 (extraordinaria) celebrada el miércoles 20 de enero de 2021, en el Palacio del Congreso de los Diputados, Diario de Sesiones de las Cortes Generales Comisiones Mixtas)

These are unpredictable but exciting times. I am a proud Gibraltarian, one that stands tall, steadfast as ever and with the absolute determination and drive that together we can succeed in building a better Gibraltar, a stronger Gibraltar and one that safeguards our identity and lifestyle for future generations to enjoy.

Thank you for reading this Q&A which is designed to be informative and helpful to practitioners and taxpayers.



Hon Fabian Picardo QC MP
Chief Minister
HM Government of Gibraltar

Scope

How do these FAQs work?

These FAQs are designed to help in understanding how the Treaty works and how it may affect you. They are largely based on both the questions that have been posed as well as those that may be asked in the future. The Income Tax Office may need to amend or add to these FAQ's based on actual examples and experiences.

The background, purpose and other general matters regarding the Treaty are set out in the technical paper issued by H.M. Government on 26 February 2021 and can be accessed here.

When & how does it come into operation?

Following approval of the Gibraltar Parliament, the Treaty was transposed into Gibraltar law on 26 February 2021 and came into operation on 4 March 2021.

The Treaty's operable dates are as follows:

General provisions for natural and legal persons

The residency rules for natural and legal persons, entities and other legal structures and arrangements apply to taxable periods commencing on or

after the date of entry into force of the Treaty. Taxable periods under Spanish law extend from 1 January to 31 December, whilst in Gibraltar these extend from 1 July to 30 June.

Regarding natural persons, the Treaty will commence to apply in Spain for taxable periods commencing on 1 January 2022 and in Gibraltar for taxable periods commencing 1 July 2021.

Regarding legal persons and entities, the Treaty will commence to apply in both Gibraltar and Spain for accounting periods commencing on or after 4 March 2021.

Special rules on residency of natural persons: Spanish nationals

The provisions regarding Spanish nationals is already in effect since the determining date here is the date of signature of the Treaty, namely the 4 March 2019, and not the date of entry into force. Those that have relocated from Spain to Gibraltar since that date, 4 March 2019, retain tax residency in Spain. There is no scope in the Treaty for retrospection and therefore there is no ‘look back’ to a period before the date the Treaty was signed.

Special rules on residency of natural persons: non-Spanish nationals and Registered Gibraltarians

These are prospective in application. They only apply now to future taxable periods starting after the Treaty has entered into force. They have not applied from the date the Treaty was signed.

This is clear from the future tense contained in the language of the Treaty. The use of the term “spends”[2] means that you are ‘looking forward’ and therefore confirms the prospective application of these rules.

As a result, the rules will apply to any non-Spanish national or registered Gibraltarian with effect from 1 January 2022. This is explained below with the use of hypothetical illustrative examples:

Example: non-Spanish national

Any non-Spanish national that as from 1 January 2022 is resident in Spain and remains there until at least 31 December 2022, will retain tax residency in Spain upon moving to Gibraltar, immediately after this date, for the taxable period commencing on 1 January 2023 and up to and including 31 December 2027.

As from 1 January 2028, that non-Spanish national will be resident in Gibraltar for tax purposes, provided that they meet the conditions of the domestic law for tax residence purposes.

During the period 1 January 2023 to 31 December 2027, relief from double taxation is available under Article 2(3) of the Treaty and in accordance with the domestic laws of Gibraltar and Spain.

These rules will not apply on any non-Spanish national that relocates and changes their residency from Spain to Gibraltar prior to 31 December 2021.

[2] This is consistent with the principle of legitimate expectation and the provision of certainty.

Example: Registered Gibraltarian

Any Registered Gibraltarian that as from 1 January 2022 is resident in Spain and remains there until at least 31 December 2025, will retain tax residency in Spain upon moving to Gibraltar, immediately after this date, for the taxable period commencing on 1 January 2026 and up to and including 31 December 2029.

As from 1 January 2030, that Registered Gibraltarian will be resident in Gibraltar for tax purposes, provided that they meet the conditions of the domestic law for tax residence purposes.

During the period 1 January 2026 to 31 December 2029, relief from double taxation is available under Article 2(3) of the Treaty and in accordance with the domestic laws of Gibraltar and Spain.

These rules will not apply on any Registered Gibraltarian that relocates and changes their residency from Spain to Gibraltar prior 31 December 2025.

Exchange of Information

The exchange of information provisions of the Treaty are set by reference to the application of two distinct dates –

(i) taxable periods commencing on or after 1 January 2014 for the automatic exchange of information in the Treaty; and

(ii) taxable periods commencing on or after 1 January 2011 for all other forms of exchange of information set out in Article 3 of the Treaty.

What is the relevance of these specific dates?

These dates are aligned with the effective implementation and introduction of the EU Directive on Administrative Co-operation.

Council Directive 2011/16/EU of 15 February 2011 on administrative co-operation in the field of taxation imposed the mandatory automatic exchange of information for taxable periods as from 1 January 2014. This directive was transposed into Gibraltar tax legislation with effect from 1 January 2013. The tax authorities in Gibraltar have been automatically exchanging information with other EU Member States, including Spain, in relation to taxable periods since 1 July 2014.

The other types of information exchange, including that sought on request applies in relation to taxable periods commencing on or after 1 January 2011, which is the commencement date of the Income Tax Act 2010 in Gibraltar.

Other general matters

The terms used in international tax treaties can be complex and unique. A particular term may not have the same meaning as it does in the everyday language.

It is for this reason that, in the same way that a dictionary may be relied upon to provide the necessary understanding and meaning in everyday use, the OECD Model Tax Convention fulfils a similar function for those terms contained in international tax treaties.

It is the most reliable and relevant source of information that is available and for that reason the OECD's Commentary is a sensible and appropriate resource that can be used to define and interpret any common terms contained in the Treaty. This is the approach the Income Tax Office in Gibraltar proposes to take.

Article 2

Tax residency of natural and legal persons, entities and other legal structures or arrangements

Introduction – Natural persons

The first part of this Article deals with natural persons.

It does not specify rules for taxation. Its purpose is to establish single residence in either Gibraltar or Spain through a series of sequential tests that are applied in turn. Each subsequent test is only applied if the previous one has failed to determine single tax residence. The rules proceed in the following manner.

The first is the application of domestic law, including the issuance of tax residency certificates as proof of residency. If an individual is found to be tax resident in both Gibraltar and Spain, the tie-breakers then determine single residence.

The provisions of this Article of the Treaty are designed to determine and establish a single tax residence. The tie-breakers referred to above only apply in those cases where an individual is found to be tax resident in both Gibraltar and Spain. Therefore, single tax residence can only be in either of these places given the scope and extent of the Treaty. Therefore, if the

Treaty is unable to determine and establish single tax residency in Spain, the only remaining option available is that single tax residency is by default established and determined in Gibraltar.

These tie-breakers are based on Spanish domestic law and provide greater analysis and focus on the triggers that determine when an individual would be resident only in Spain.

If any of the tie-breakers are met, an individual is resident only in Spain.

Spain has a residency-based tax system requiring the tax authorities to establish residency there in order to tax an individual. The system in Gibraltar is mainly source-based and taxes the income where this arises (i.e. the location of the activity).

These differences are very noticeable in the above rules, where the Treaty allocates taxing rights to the contracting state with the emphasis on residency-based taxation and therefore the greater need to determine residency.

There are also specific rules to establish tax residency when residency is moved from Spain to Gibraltar.

These FAQs do not constitute legal advice. This document is a guide to interpretation only.

Article 2(1)(a)

How will I be considered tax resident in either Gibraltar or Spain?

Gibraltar and Spain each have tax residency rules within their domestic laws. It is these rules as applied to the facts in any given situation, including the issue of tax certificates as proof of residence, that determines where you are tax resident.

What is the law in Gibraltar regarding tax residency and how am I tax resident there?

The residency requirements for Gibraltar tax purposes are set out in the definition of "ordinarily resident" in section 74 of the Income Tax Act 2010.

Spending at least 183 days or at least 300 days in three consecutive years of assessment in in Gibraltar establishes tax residence in Gibraltar.

A full day of presence is counted in Gibraltar for any part of a 24-hour period. This test applies in isolation and there are no additional tests based on personal and/or economic relations. This test demonstrates that the simple act of crossing the border into Gibraltar triggers a complete day of tax residence in Gibraltar.

What is a year of assessment in Gibraltar?

A year of assessment is the basis period under which an individual is taxed. All years of assessment run from 1 July to 30 June.

Do the Gibraltar tax authorities issue a certificate confirming residency?

An application can be made to the Income Tax Office for a tax residency certificate.

As part of the application a residency declaration will need to be completed together with copies of any documentary evidence requested. Once all conditions under Gibraltar’s tax laws are satisfied the certificate will be issued.

This certificate confirms tax residence in Gibraltar in accordance with the tax law in Gibraltar. It does not prevent a determination of Spanish tax residency under Spanish tax law if their tests are also met, including spending 183 days in Spain and the additional tests in relation to the centre of vital and economic interests.

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Article 2(1)(b)

What happens if I am tax resident in both Gibraltar and Spain?

Dual tax residence occurs if the domestic residency laws of both Gibraltar and Spain are satisfied. This can easily happen given the different rules applied by each side and the movement across the border. Double taxation (i.e. being taxed by Gibraltar and Spain on the same income) is a risk of being dual tax resident.

The Treaty resolves dual residency and eliminates instances of double taxation.

How is single tax residence determined?

Single tax residence is established by applying a set of rules known as 'tie-breakers'. These **only** apply if you are dual resident (i.e. tax resident in both Gibraltar and Spain).

Each tie-breaker is considered in turn and would only apply if the previous one has not established single residence.

What happens if none of the tie-breakers determine single tax residence?

If none of the tie-breakers establish single residence, then tax residence is presumed only in Spain. This presumption can be rebutted by proving tax residence in Gibraltar.

There is a mutual agreement procedure available as a last recourse for disputes not resolved by the tie-breakers.

Why is there a rebuttable presumption of tax residence only in Spain?

The Treaty does not favour or give an advantage to Spain. It allocates taxing rights to the contracting state with the emphasis on residency-based taxation and therefore the greater need to determine residency.

This presumption clearly demonstrates the difference in the tax basis between Gibraltar and Spain. Spain needs to establish tax residency in order to tax an individual, whilst Gibraltar does not require tax residency to tax an individual's income. This is the reason why there is less focus on proving residency in Gibraltar and a greater focus and emphasis the other way around.

It is the rebuttal of this presumption that establishes tax residence in Gibraltar.

If this presumption is rebutted, is your tax residence established only in Gibraltar?

Yes. Once this presumption is rebutted tax residence **only** in Gibraltar is established.

How is this presumption rebutted?

By proving the availability and usage of a permanent home in Gibraltar for more than 183 days in the calendar year.

What is actually meant by “remain in Gibraltar”?

That your home is in Gibraltar and that it is the place lived in for more than 183 days in a calendar year and the place where the closest personal, social and economic relations are located.

The time spent in Gibraltar counts towards proving time not spent in Spain.

What would constitute reliable evidence?

Anything that demonstrates a habitual lifestyle and/or a continued presence or a ‘footprint’ in Gibraltar. An indicative but not exhaustive list of examples includes any or all of the following:

- Utility bills

- ATM withdrawals & spending patterns via bank and credit cards
- Employment records
- Attendance and membership of gyms/clubs

What is meant by "permanent home"?

This is one of the examples where the OECD definition contained within the Commentary is used. This definition is used each time this phrase is used in the Treaty.

The home must actually be permanent[3]. This means that it must have been arranged and retained for constant use as opposed to being a place which conditions clearly show that the stay is intended to be of short duration, such as a hotel.

Any form of home may be taken into account, including an owned or rented house or apartment or a rented furnished room (e.g. a lodging).

The permanence of the home is nevertheless essential. The home must be continuously available at all times, and not occasionally for the purpose of a short stay, such as a hotel.

[3] Paragraph 13 of the Commentary on Article 4
OECD (2019), Model Tax Convention on Income and on Capital 2017 (Full Version), OECD Publishing.
http://dx.doi.org/10.1787/g2g972ee-en

When will the tie-breakers become applicable?

The tie-breakers come into effect for the taxable periods commencing on or after the Treaty become operable.

The earliest this can happen is the tax year in Spain commencing on 1 January 2022.

Do the tie-breakers reproduce Spanish law on tax residency and if so how can they be used to resolve dual residency?

The tie-breakers are broadly based on Spanish tax residency law.

Tie-breaker (C) is unique to the Treaty and is an absolute measure in determining tax residency in Spain.

If an individual's **only** permanent home at their disposal is located in Spain, then there can be no question whether that individual can be resident in Gibraltar. This is the reason why it is absolute in its determination of tax residency.

The differences between the other tie breakers and Spanish law provide a greater analysis and focus on each of the triggers that determine when tax residency only in Spain would apply. This makes the process clearer and fairer.

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Are there any differences in tie-breaker (A)?

Yes. There are subtle differences such as the reference to ‘overnight stays’ instead of ‘days’ and to the treatment of sporadic absences.

Why are “overnight stays” used?

Spanish tax law determines residence in Spain if presence in Spain exceeds 183 days in the tax year. Permanence of stay in Spain is established by considering the place returned to after being away (i.e. return from holiday, business travel or educational leave), demonstrating the characteristics of a regular or typical abode.

Tie-breaker (A) reflects the actual reality of how the residency criteria is applied in practice with particular emphasis on the above.

Should I count ‘days’ or ‘overnight stays’ for tax residency purposes in Spain?

The Treaty has not changed the application of Spanish tax residency law. Overnight stays would still be considered when establishing the permanence of the stay in Spain.

If a considerable amount of time is spent in Spain, a day-count may need to be maintained so that the residency rules based on day count are not inadvertently triggered.

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There must be awareness and responsibility as to how lifestyle choices may determine and establish tax residency in Spain.

The Treaty has not changed the residency rules in Spain. These remain as they were previously. What has changed is that it the signing of the Treaty has brought the possibility of tax residency in Spain into sharper focus than before.

What is meant by “sporadic absences”?

Sporadic absences are used to establish the permanence of the stay in Spain. They include periods of occasional time away from Spain within any tax period. It considers both the duration and/or the nature and extent of the stay outside Spain and excludes prolonged and long-term absences.

There is a limited legal framework for the practical consideration or verification of such absences by the Spanish tax authorities.

When sporadic absences relate to time spent in a jurisdiction listed as a tax haven under Spanish law, proof of stay in that place for more than 183 days is required. This is the only way tax residency in Spain can be avoided.

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How does the Treaty help with "sporadic absences"?

It allows a fairer allocation of time spent in the event that dual tax residency applies. Tie-breaker (A) identifies sporadic absences away from both Gibraltar and Spain and allocates this time to the place where most of your remaining time is spent.

Without the Treaty, absences from Spain that were spent in Gibraltar may be added to the actual time in Spain, increasing the number of days deemed as presence in Spain thereby helping to establish tax residency there. This is a reality given that Spain presently classifies Gibraltar as a tax haven, although they have committed to removing Gibraltar from that list. Proving tax residence in Gibraltar against such odds, without a formal procedure or mechanism represents a tremendous burden requiring an almost impossible burden of proof.

The Treaty mitigates this through a formal process including tie-breakers, a rebuttable presumption and ultimately a mutual agreement procedure, where recourse is available to refer the matter to a tax authority in the event of a dispute.

It is important to remember that the Treaty is not designed to allow one system to be played against the other, but to ensure that the *right tax is paid in the right place by the right person*.

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How would "sporadic absences" actually be dealt with under the Treaty?

Consider the following examples. In these, the time is split between Gibraltar, Spain and the UK.

The first two examples demonstrate the current position in the absence of the Treaty. These clearly indicate how the sporadic absence rule is currently applied to countries listed as tax havens by Spain.

Example 1 - Dual resident in the absence of the Treaty

135 overnight stays are spent in Spain and 145 overnight stays are spent in Gibraltar. 85 overnight stays are also spent in the UK. The 145 overnight stays spent in Gibraltar may be added to the time spent in Spain, since Gibraltar is considered to be a tax haven and no proof has been provided in relation to having resided there for more than 183 days. Tax residency is established in Spain with a total of 280 overnight stays.

Consider this other example. Here time is split between Gibraltar, Spain and a third country. This third country is listed by Spain as a tax haven (e.g. BVI). Also, for the purposes of this example although there is no Treaty assume that Gibraltar were not listed by Spain as a tax haven.

Example 2 - Dual resident in the absence of the Treaty and Gibraltar not listed by Spain as a tax haven

135 overnight stays are spent in Spain and 145 overnight stays are spent in Gibraltar. 85 overnight stays are also spent in the BVI. For the purposes of this example, the BVI is classified under Spanish law as a tax haven. The 85 overnight stays spent in the BVI may be added to the time spent in Spain, since BVI is considered to be a tax haven under Spanish law and insufficient proof of stay there for more than 183 days has been provided. The 145 overnight stays in Gibraltar are likely not to be in scope since, in this example, it is not a jurisdiction listed by Spain as a tax haven and 145 days is likely to represent a prolonged absence. Tax residence is established in Spain with a total of 230 overnight stays.

The above examples demonstrate how sporadic absences in the context of a jurisdiction listed by Spain as a tax haven currently apply. If an individual is unable to prove that they spend over 183 days outside Spain, their sporadic absences in the country classified by Spain as a tax haven is added to the time they actually spend in Spain.

Residents of Gibraltar are presently faced with this since Gibraltar is listed a tax haven by Spain, although they have committed to removing Gibraltar from that list.

The following examples demonstrate how the position materially changes after having concluded the Treaty.

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Example 3 - Dual resident under the Treaty

135 overnight stays are spent in Spain and 145 overnight stays are spent in Gibraltar. 85 overnight stays are also spent in the UK. The 85 overnight stays not spent in either Gibraltar or Spain would be added to the time spent in Gibraltar as this is where this individual spends the majority of their overnight stays. Under the Treaty, tax residency is established in Gibraltar with a total of 230 overnight stays.

In this final example, time is split between Gibraltar, Spain and a third country. This third country is listed by Spain as a tax haven.

Example 4 - Dual resident under the Treaty

135 overnight stays are spent in Spain and 145 overnight stays are spent in Gibraltar. 85 overnight stays are also spent in the BVI. For the purposes of this example, the BVI is classified under Spanish law as a tax haven. The 85 overnight stays not spent in either Gibraltar or Spain would be added to the time spent in Gibraltar. Under the Treaty, tax residency is established in Gibraltar with a total of 230 overnight stays.

This last example demonstrates the protection afforded by the Treaty against Spain’s stance towards jurisdictions listed by them as tax havens.

Does the calculation of the day count for the purposes of the rebuttable presumption include or exclude any sporadic absences?

The presumption can be rebutted by demonstrating a stay in Gibraltar for more than 183 days in the calendar year. It is likely that proof is provided to demonstrate that sporadic absences from the permanent home located in Gibraltar are temporary.

Are there any differences in tie-breaker (B)?

Spanish tax law presumes that the habitual place of residence is Spain, when the spouse (not legally separated) and underage dependent children permanently reside in Spain.

Tie-breaker (B) more closely defines where these personal relations are closer by including legally dependent ascendants and descendants (not just dependent children).

Does the term "ascendants" in tie-breaker (B) include only parents or also grandparents and great grandparents, etc.

The term "ascendants" is used conjunctively with the term "dependent" and therefore extends to any dependent living ascendant to the remotest degree.

Does the term “dependent” in tie-breaker (B) mean a legal obligation to maintain or does it mean actual maintenance with no legal obligation?

Under Spanish tax law, the term “dependent” is used in conjunction with underage children implying that there is a legal obligation for a parent or guardian to maintain their child.

Under the tie-breaker, there must also be a legal obligation to maintain the ascendant or descendant.

What does “habitually reside” in tie-breaker (B) mean?

This is another term where the OECD Commentary can be relied on for guidance. Article 4 of the OECD Model Tax Convention on Income and on Capital defines this as meaning the place of regular, normal or customary abode.

What does “similar relationship” in tie-breaker (B) mean?

A similar relationship would extend to include any spousal equivalent relationship with another natural person.

Are there any differences in tie-breaker (D)?

This tie-breaker sets a higher threshold to trigger tax residency in Spain.

Contrary to current Spanish tax law, this tie-breaker requires two thirds of your net assets to be in Spain instead of a simple majority (i.e. 50%).

Is this two thirds ratio based on my worldwide asset base or my asset base located only in Gibraltar and Spain?

Currently, the law in Spain applies a 'one to one' basis. This therefore means net assets in Spain as a proportion of total assets in both Spain and the country in which tax residency is being claimed are the only ones that are considered (i.e. for the purposes of the Treaty a Gibraltar – Spain centric asset base only).

On what asset value is this two thirds ratio based?

Currently, for the purposes of wealth tax, the Spanish tax authorities value property assets at the higher of either – (i) the cadastral value (i.e. rateable value), (ii) the value assessed by the tax authorities from another tax filing or (iii) the price paid as per the title deed (i.e. cost).

Similarly, bank balances are valued at the higher of either the closing balance as at 31 December (i.e. end of the taxable period) or the average balance during the 4th quarter of the taxable period (i.e. period 1 October to 31 December).

If my single residence is established in Spain would I continue to be tax resident in Gibraltar?

Residency is mutually exclusive under the Treaty. If an individual is found to be tax resident in Spain under the Treaty, this individual cannot also be tax resident in Gibraltar. This is why the reference to "*only resident in*" exists. It is not a reflection of where tax may be paid or payable.

If the tie-breakers are not met and the presumption is rebutted, then an individual's tax residency is established in Gibraltar.

Starting from the premise of dual residency, if one of the options is no longer viable, the other must apply. The Treaty cannot make an individual a tax residency nomad; it is designed to establish their tax residence in either Gibraltar or Spain and nowhere else.

Does this affect how much tax I pay in Gibraltar and Spain?

Gibraltar does not require an individual to be tax resident in order to tax them on their income. The system in Gibraltar enables tax to be charged on the basis of where the income is earned. If income is currently earned in Gibraltar, tax on that income will need to continue to be paid in Gibraltar.

If tax residency is determined and established in Spain, an individual will be taxed in Spain on their worldwide income. The Treaty ensures that such

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individuals will be legally entitled to tax relief in Spain for the tax paid on the income from Gibraltar (i.e. double taxation relief).

Would double taxation relief be available if, as a resident in Spain, I receive dividends from a Gibraltar company and the income received has paid tax in Gibraltar?

Under the Treaty, an individual is either resident in Gibraltar or Spain.

Gibraltar-sourced dividends are not taxed on an individual if that individual is not resident in Gibraltar. Therefore, an individual that is tax resident in Spain will be taxed in Spain on Gibraltar-sourced dividends as part of their worldwide income. No double tax relief would be available for this individual since no tax would have been paid in Gibraltar.

Would double taxation relief be available if, as a resident in Spain, I receive foreign income from outside Gibraltar?

Individuals that are tax resident in Spain need to pay tax on their worldwide income in Spain. Double taxation relief would be available in relation to that foreign income if it has already been subject to tax in its country of origin. If the country of origin is not Gibraltar, then tax on this foreign income will be charged in Spain in accordance with its domestic law and any other relevant double taxation agreement. It will not be governed by this Treaty since this only deals with Gibraltar-Spain centric issues.

What is the Joint Coordination Committee?

The Joint Coordination Committee is the mutual agreement procedure contained within the Treaty to assist in resolving disputes regarding dual tax residency.

It is similar in context to the procedure found in the OECD Model Tax Convention on Income and on Capital.

It will comprise officials appointed by the parties.

Who are the designated authorities under the Treaty?

The designated authorities are the Income Tax Office in Gibraltar and the Agencia Estatal de Administración Tributaria or any relevant regional subdivision or local authority in Spain.

What is the purpose of the Joint Coordination Committee and how does it work?

The Committee's purpose is to enable interaction and co-operation on governance and dispute resolution.

It is likely that the most common cases referred to the Joint Coordination Committee will relate to dual residency (i.e. where an individual is considered

a tax resident in both Gibraltar and Spain) and the individual's circumstances are complex.

Although the Treaty works through a series of tie-breakers and a rebuttable presumption to establish single tax residence, different views may be taken (e.g. where the location of a permanent home or centre of vital interests is located).

The Committee will aim to establish single residence in either Gibraltar or Spain by mutual agreement. It needs to consider all relevant facts and circumstances in order to fairly determine the greater connecting nexus with either Gibraltar or Spain.

This may be required even if both sides agree how the tie-breakers and rebuttable presumption work, since these may not always give a clear-cut result that resolves a dispute.

The Committee allows a forum for discussion, interpretation and a fair outcome to be determined. The decisions taken by the Committee will create binding precedents to be used and relied upon.

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How do I refer my case to the Joint Coordination Committee if I am dual resident?

A case may be referred to the Joint Coordination Committee by making contact with one of the designated authorities and submitting a referral in writing.

The tax authorities in Gibraltar will actively participate in the Committee hearings to assist in resolving a dual residency dispute and establishing single residence through mutual agreement and on the basis of the facts and circumstances available.

If a residency dispute is not ultimately resolved by the Joint Coordination Committee, does that mean I will be taxed twice on the same income in Gibraltar and Spain?

There may be instances when the Committee is unable to resolve a dual residency dispute. A number of factors can cause this including the imposition of legal requirements affecting either side's ability to compromise or a deadlock position held for key economic reasons.

If this occurs, an individual may be subject to tax in both Gibraltar and Spain. Gibraltar would retain its taxing rights in relation to income earned in and from Gibraltar and Spain would tax that individual as a resident on their worldwide income.

Given that Gibraltar is the place with the lower tax rate, such an individual is likely to seek a double tax claim in Spain. Relief would be available in relation to the tax paid in Gibraltar on the income now subject to tax in Spain.

Who appoints the members of the Joint Coordination Committee?

The Joint Coordination Committee will comprise officials from Gibraltar, Spain and the UK.

The Gibraltar members shall be appointed by the Chief Minister, in his capacity as Minister with responsibility for Public Finance and Taxation, by notice in the Gibraltar Gazette.

Article 2(1)(c)

Are there any special rules regarding tax residency?

Yes. There are 3 special rules that establish tax residency in Spain. These apply following a change in residence from Spain to Gibraltar. They do not take into consideration personal circumstances or the reason for moving.

These rules apply in different ways.

Spanish nationals moving their residence from Spain to Gibraltar will retain Spanish tax residency whilst they live in Gibraltar. This has applied since the Treaty was signed on 4 March 2019.

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Spanish nationals referred to above would still need to pay tax in Gibraltar in respect of income earned in Gibraltar. Gibraltar's taxing rights under its source-based system of taxation remain unaffected by the Treaty. Tax would need to be paid in Gibraltar, on the income earned in Gibraltar, irrespective if the Spanish national remains in Spain or relocates their residence to Gibraltar. The determining factor in relation to the taxing rights in Gibraltar is the location of the income earned.

Non-Spanish nationals that *spend* at least 1 complete tax year in Spain after the date of entry into force of the Treaty and then change residence from Spain to Gibraltar will retain Spanish tax residency for the year in which the change is made and the 4 subsequent years after. This applies prospectively to taxable periods in Spain commencing on 1 January 2022.

The impact is similar for registered Gibraltarians. The only difference being that this rule would apply ONLY to registered Gibraltarians that *spend* at least 4 complete tax years in Spain after the date of entry into force of the Treaty in order to retain the tail of Spanish residency. The duration of this tail is also applied as from the year the change is made and the 4 subsequent years. This also applies prospectively only to taxable periods in Spain commencing on 1 January 2022.

What is a Registered Gibraltarian?

A person who is registered on the Register of Gibraltarians as per section 4 of the Gibraltarian Status Act 1962.

The following list includes examples of what a registered Gibraltarian is. It includes a British national who:

(a) is born in Gibraltar on or before 30 June 1925;
(b) is the child of the person under (a);
(c) is the descendant of the person under (a) or (b) and whose parent or grandparent was born in Gibraltar;
(d) is the spouse, widow or widower or surviving civil partner of the person under (a) to (c);
(e) is the child of a person registered by order of the Minister;
(f) is the descendant of the person under (e) and whose parent or grandparent was born in Gibraltar;
(g) is the spouse, widow or widower or surviving civil partner of the person under (e) or (f) above;
(h) is born in Gibraltar and is a child of a person registered in the register;
(i) is the spouse, or civil partner, widow or widower or surviving civil partner of the person under (h) above.

How has the Treaty affected me as a Spanish national?

Spanish nationals that moved to Gibraltar from Spain after 4 March 2019, retain tax residency only in Spain whilst they live in Gibraltar.

They will continue to be taxed on their worldwide income in Spain but will be eligible for double taxation relief in Spain in relation to tax paid in Gibraltar on income from Gibraltar.

How are these rules applied and how do they affect me as a non-Spanish national or a Registered Gibraltarian?

If an individual has already moved to Gibraltar, having previously lived in Spain, these rules do not affect them. The number of years already spent in Spain will not affect residency in Spain for the purposes of these rules.

The minimum number of years spent in Spain only counts prospectively for the purposes of these rules. After spending these years in Spain, the tail of Spanish tax residency applies following a change of residence from Spain to Gibraltar.

If I am a Spanish national moving to Gibraltar from any location other than Spain am I affected?

It would go against the spirit and context of the Treaty if these rules are applied to Spanish nationals relocating to Gibraltar from elsewhere having already lost their Spanish tax residency.

A risk of tax base erosion to Spain can only exist as a result of a change in residence from an individual that was previously resident in Spain. Tax is not charged in Spain on the basis of nationality.

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Being a Spanish national, if my child is born in Gibraltar will he or she be considered tax resident in Spain if they hold Spanish nationality?

Any child born in Gibraltar to a Spanish national is not caught within these rules since there has been no change in residency after the 4 March 2019.

Such a child would not fall within the scope and reach of this rule even if that child's father, being a Spanish national, changed their residence to Gibraltar after this date and as a result now retains tax residency in Spain. The application of these rules cannot be inherited.

I am a Spanish national who was resident in Gibraltar before the 4 March 2019. Will I now be considered tax resident in Spain?

Any Spanish national that moved their residence to Gibraltar before 4 March 2019 is outside the scope and reach of this rule.

I am a non-Spanish national who moved to Gibraltar from Spain before the 4 March 2019. Will I now be considered tax resident in Spain?

Any non-Spanish national will not be within the scope and reach of this rule if they moved to Gibraltar before 4 March 2019.

These rules are prospective and require that the non-Spanish national *spends* more than 1 complete tax year in Spain.

I am a registered Gibraltarian who moved to Gibraltar from Spain before 4 March 2019. Will I now be considered tax resident in Spain?

A registered Gibraltarian will not be within the scope and reach of this rule if they moved to Gibraltar before 4 March 2019.

These rules are prospective and require that the registered Gibraltarian *spends* more than 4 complete tax years in Spain in taxable periods commencing on or after the date of entry into force of the Treaty.

Introduction – Legal persons, entities & other legal structures or arrangements

This part of Article 2 establishes rules for legal persons, entities and other legal structures or arrangements prescribing the conditions for residence to be solely in Spain.

Once again, these rules drive a greater emphasis and focus in allocating the taxing rights to Spain given their greater need to determine residency.

In addition, this mitigates Spain's primary perceived concern relating to tax-motivated opportunities being exploited. The proximity of the international border in addition to the difference between the source-based and residency-based tax systems of Gibraltar and Spain respectively, may lead cross-border operators to avail themselves of complex structures conferring tax advantages contrary to recognised and accepted international standards on taxation and enabling base erosion and profit shifting.

The Treaty provides a safeguard for long-established businesses in Gibraltar provided that these maintain a physical presence and an operating base in Gibraltar under genuine economic and business purposes. It is designed to shield from any inadvertent change in circumstances resulting from the Treaty.

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Therefore, if presently unaffected by current Spanish tax law this safeguard ensures that these businesses will continue not to be within the scope and reach of any taxation in Spain. For such companies, the Treaty is not making any material changes and mirrors the law and current position in Spain.

The rules will, however, apply automatically to new market entrants seeking to set up operation in and from Gibraltar. Given the prospective application of these rules, it allows such new entrants to properly plan and structure their affairs in-line with these requirements and in a fully transparent manner.

Article 2(2)(a)

What are the rules on effective management and ownership contained in Article 2(2)(a)(iii) and (iv) for determining residency only in Spain and when and how do these apply?

Residency only in Spain is also established if any of these conditions are met:

(iii) The majority of the individuals in charge of the effective management of the company are tax resident in Spain.

(iv) The majority of the company's capital, equity, voting or profit-sharing rights, are directly or indirectly controlled by individuals that are tax resident in Spain or by entities linked to tax residents in Spain.

These rules will apply to taxable periods commencing on or after 4 March 2021.

How do these rules affect structures including other legal arrangements such as trusts?

Spain applies a purposive approach to unincorporated entities.

Their civil law system does not recognise the protection afforded by such legal structures or arrangements that are available under a common law legal system. If a structure contains such legal arrangements, then the impact of these rules will likely need to be considered on the highest corporate or individual layer available, where Spain considers the 'true' purpose, effect, control and ownership to be.

The tax residence of any natural persons at this highest layer would need to be established in accordance with the provisions of the Treaty.

What is meant by "effective management"?

This means the actual location where the key management and commercial decisions necessary for the conduct of the business are carried out.

It is the true centre of operations and is within the function and role of the board members charged with the executive responsibility of running the day-to-day operational business.

If I am the natural person charged with the effective management of a company will my tax residence in Spain be determined and established by the individual residency rules within the International Agreement with Spain?

Yes. Tax residence will be determined in accordance with the rules for natural persons.

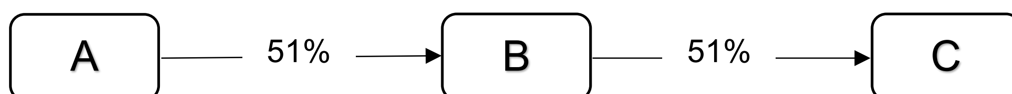
Can you clarify what is meant by “majority of interests in capital, equity, voting or profit-sharing rights”?

This means a majority (51%) control of the entity’s ordinary shares that carry voting rights for the shareholders.

How would this majority of control apply?

The rule applies when the majority of the ordinary shares is controlled either directly or indirectly.

Example:



A directly owns 51% of the ordinary share capital of B. In turn, B directly owns 51% of the ordinary share capital of C.

For the purposes of the Treaty and under this type of structure, the indirect control exercised by A over the majority of the ordinary share capital of C through its 51% shareholding in B would render A within scope of Article 2(2)(a)(iv).

The rule would apply throughout the whole structure including between A and C on the basis of the indirect control of the majority of the ordinary share capital.

If I am the natural person with the majority of control in the ordinary share capital of a company will my tax residence in Spain be determined and established by the Treaty?

Yes. Tax residence will be determined in accordance with the rules for natural persons.

What is meant by "linked to tax residents in Spain"?

This refers to companies and/or other legal structures or arrangements that hold the majority of the controlling interests and are themselves managed and/or controlled by other natural persons that are tax resident in Spain.

The purpose of this is to prevent the circumventing of the effective management and control residency rule by divesting control of the company to others. This ensures that the scope and reach of the rule allows it to be extended in such cases to achieve its intended purpose.

This anti-avoidance measure is in-line with the purposive approach understood to be taken by Spain regarding ownership and control structures including the use of other legal arrangements. Here consideration would need to be given to the natural person or company ultimately behind the legal arrangement and determine and establish their residency in accordance with the applicable provisions of the Treaty.

This rule is intended to allocate tax residency on the basis of the reality on the ground regarding ultimate ownership and control for the purposes of mitigating the opportunistic exploitation of cross-border double non-taxation.

How does this affect me as a Gibraltar-based entity?

The residency rules set out in Article 2(2)(a) apply to all companies incorporated and other arrangements established in Gibraltar after 16 November 2018.

Companies and other arrangements incorporated before 16 November can avail themselves of a safeguard that allows them to retain tax residence in Gibraltar. This is subject to satisfying a series of conditions.

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Why the date of 16 November 2018?

This is the material date the substance of these residency rules were negotiated and principally agreed.

What is the safeguard?

If the company or arrangement is incorporated or established in Gibraltar before 16 November 2018 and it meets the residency rules regarding the majority of effective management or ultimate control/ownership in Spain, the safeguard shields the company or arrangement from tax residency in Spain.

By demonstrating that the company or arrangement is incorporated or established in Gibraltar and that it operates here for valid economic and business reasons it can remain tax resident only in Gibraltar.

There are 5 conditions that must have met as at 31 December 2018. All these demonstrate that the company has substance in Gibraltar.

Can I rely on the safeguard if my company or arrangement was incorporated or established before 16 November 2018 and the majority of the assets are located in Spain and/or the majority of the income derives from sources in Spain?

The safeguard is only available if the company or arrangement triggers the residency rules regarding effective management and control/ownership.

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The Treaty does not change the application of Spanish law in any form or manner. If the majority of the assets are located in Spain and the majority of the income is derived from sources in Spain, you are most likely to already be tax resident in Spain and you will not have the necessary substance in Gibraltar to satisfy the necessary conditions of the safeguard.

What are the conditions that I need to have met as at 31 December 2018?

All the conditions that must be satisfied to be eligible for the safeguard are set out below.

1. You must have had a fixed place of business in Gibraltar through which the business was wholly or partly carried out with adequate staff and expenditure to support its core income-generating activities.

2. You must have been effectively subject to and paid corporation tax in Gibraltar. This condition shall be accepted as having been met if you have not paid corporation tax either because you have not generated a profit or if your profit is offset by available losses.

3. You must have operated in Gibraltar from incorporation to 31 December 2018 and have had no interruption or change in trade since 1 January 2011. If incorporated or established after 1 January 2011 you must have had no interruption or change in trade since either the later of this date or 1 January 2011.

4. More than 75% of the income for the last financial year before 31 December 2018 accrued in and derived from sources in Gibraltar.

5. You have had, for the last financial year before 31 December 2018, an amount below a defined percentage of the income that accrued from sources in Spain. The percentage rates are:

   - 15% in Spain for entities with an annual turnover for that last financial year of not more than €3m.
   - 10% in Spain for entities with an annual turnover for that last financial year of between €3m and €6m.
   - 5% in Spain for entities with an annual turnover for that last financial year of over €6m.

For the purposes of this condition, a consolidated turnover must be considered where there are other Gibraltar companies forming part of the same group for financial reporting purposes. Related companies are to be taken to mean those defined within International Accounting Standard 24 on Related Party Disclosures as issued by the International Accounting Standards Board.

What type of evidence to corroborate the conditions is required?

1. In order to demonstrate the conditions a fixed place of business you can supply copies of documents including:

- lease agreements or ownership deeds
- utility bills
- bank statements
- supplier invoices

2. You do not need to provide anything to demonstrate that you have been effectively subject to and paid tax in Gibraltar. The Income Tax Office can check this based on the declaration made. It is necessary however that your name and taxpayer reference are correctly included since otherwise this may result in the condition not being met due to the Income Tax Office being unable to confirm your payment of tax.

3. In proving continued operation since the earlier of the date of incorporation/establishment or 1 January 2011, you can supply any of the following:

   - trade and business licenses
   - employee registrations and employment contracts
   - financial statements
   - supplier invoices

4. You should be able to demonstrate the geographical source of the income you have generated for the last financial year by supplying any of the documents included below:

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- financial statements showing geographical sales analysis
- sales receipts
- customer lists or portfolios

What is meant by 75% of income accrued in and derived from sources in Gibraltar?

This directly applies the territorial scope and basis of tax in accordance with the Income Tax Act 2010.

The location of the activities that give rise to the profits in addition to licensed activities under which the income is deemed to accrue and derive need to be considered.

If my company has an accounting date at 31 December, does the financial year immediately preceding the 31 December 2018 mean the accounting period ended 31 December 2017?

Yes. The threshold of 75% must be based on the immediately preceding financial year.

What does the safeguard achieve?

This protects a long established Gibraltar-based company from being taxed in Spain just because either the person effectively controlling that business or its owner is tax resident in Spain. It therefore shields a company or

arrangement from the residency rules regarding effective management and control/ownership. Only Gibraltar-based businesses with genuine economic business purpose and physical presence in Gibraltar can rely on this safeguard.

Why do the conditions for the safeguard have to apply as at 31 December 2018?

The date was selected to fix a particular point in time when the conditions for eligibility to the safeguard could be measured.

It was set at the material date the substance of these residency rules were negotiated and principally agreed.

What if I had no actual liability to tax? Can I still use the safeguard?

If you did not generate profits or had profits on which there was no corresponding tax liability due to availability of accumulated tax losses, as computed in accordance with the Income Tax Act 2010, you will not be excluded. You can use the safeguard.

How do I apply to use this safeguard?

If your company was incorporated in Gibraltar before 16 November 2018 a declaration will need to have been made to the Income Tax Office whether you satisfied all 5 conditions as at 31 December 2018.

If all conditions as at 31 December 2018 are met, the safeguard will be available.

This safeguard may not need to be used, but once the declaration and return has been processed it can be relied on should the need arise.

Will a newly formed subsidiary/arrangement be able to benefit from the safeguard by extension if its parent is eligible?

The safeguard evaluates the conditions for each company or arrangement individually and applies only to those incorporated or established before 16 November 2018.

What will Gibraltar do with both the supporting information submitted and my declaration?

Gibraltar will provide Spain with a list of companies and arrangements that are outside the scope and reach of the Article 2(2)(a)(iii) or (iv) residency rules regarding effective management and control by tax residents in Spain.

This list is compiled from the return you submit demonstrating sufficient evidence that the 5 necessary conditions as at 31 December 2018 are met.

When does Gibraltar need to submit this information and what is to be sent?

Under the Treaty, Gibraltar needs to send details of beneficial owners and those natural persons responsible for the governance and effective management of the companies and arrangements that will be benefitting from the safeguard.

In this context, it is important to recognise that Gibraltar committed to introducing a public register of beneficial ownership well before the referendum on the UK's exit from the European Union and before the negotiations for the Treaty commenced.

Why does Gibraltar need to give this information to Spain?

This information is provided to ensure the company or arrangement is immediately identified and excluded from any tax enquiry or examination in Spain.

This would ensure that there would be no foreseeable relevance for any enquiry or examination to be carried out given that there would be no evidence supporting tax residency in Spain providing a connecting nexus for the tax authorities in Spain to pursue.

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Is my partnership within the scope of these residency rules?

Partnerships are not separate legal entities and are therefore not within the scope of the corporate residency rules.

Limited partnerships and limited liability partnerships are separate legal entities that are within the scope of the residency rules.

Can I benefit from the safeguard as a partner in a partnership if I don't pay corporation tax?

All partnerships are fiscally transparent under tax law in Gibraltar.

The conditions in the safeguard mechanism regarding the liability and payment of corporation tax will need to be analysed at the level of the underlying partners.

In the event that the underlying partners are companies subject to corporation tax the condition would be met and the safeguard available.

The purpose of the safeguard is to demonstrate substance in Gibraltar through the payment of tax. Therefore, in the spirit and context of what the Treaty seeks to achieve, the payment of income tax may also be considered.

Are there any special rules on companies changing their residence to Gibraltar?

Yes. Any Spanish company that moves its residence to Gibraltar once the Treaty is operable will retain tax residency only in Spain.

If I liquidate my Gibraltar company, will the liquidation need to be carried out in Spain if the company is resident there given that this is where the majority of its assets are located?

A company’s liquidation is governed by the legislation of the place where it is incorporated. The place of corporate tax residence has no impact on this.

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Article 3

Administrative co-operation in tax matters

Introduction

As the world becomes increasingly globalised and cross-border activities become more commonplace, tax administrations must co-operate in order to ensure a level playing field is maintained under which taxpayers pay the right amount of tax to the right jurisdiction.

This is achieved by ensuring that tax authorities are ready for the challenges of tomorrow by equipping them with the necessary compliance infrastructure including legal, administrative and IT tools. A crucial element of this compliance strategy is the enhanced co-operation between tax authorities through the various exchange instruments designed and implemented by international organisations such as the OECD.

Gibraltar continues to be an active participant in information exchange for tax purposes globally through the adoption and implementation of international standards and conventions into our law.

Gibraltar's continued adherence to best practices and commitment to align to newer transparency measures demonstrates our forward-thinking approach to tax compliance and good governance. This cements Gibraltar's reputation further as a sound financial centre.

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In addition to rules for establishing and determining residency, a key aspect of any tax treaty is the exchange of information and the corresponding measures associated with this. It is these that are highlighted and explained below within the context of the Treaty.

Three distinct types of information exchange are provided for in the Treaty. These are: automatically, on request and spontaneously.

Automatic exchange

Information exchanged automatically is carried out systematically at agreed dates with an exchange partner without that partner having to request it.

Under the Treaty, the tax authorities in Gibraltar will automatically exchange data on an annual basis regarding residents of Spain that are in employment or carrying out a trade, business, profession or vocation in or from Gibraltar.

Information exchanges regarding vessels, aircraft and motor vehicles registered in Gibraltar to Spanish residents will also be made periodically on a six-monthly basis.

Why was there a need to extend the scope and reach of the automatic exchange retrospectively to taxable periods since 1 January 2014?

There was no specific need but both Gibraltar and Spain decided to align these exchanges with the effective implementation of the EU Directive on Administrative Co-operation under which exchanges have already been

made by Gibraltar up to and including the 2018/2019 tax year and reciprocated by Spain in relation to their 2019 taxable period.

It is common in bilateral agreements on the exchange of information, to tailor the exchanges between the respective parties to information that is both relevant and required. This is the reason why the automatic exchange of information under the Treaty has been extended to include the exchange of information on moveable assets.

These gateways are reciprocal. This means that information flows both ways. This is the case with the Treaty, under which Spain is required to provide the tax authorities in Gibraltar with similar information on residents of Gibraltar that are in employment or carrying out a trade or business in Spain and on vessels, aircraft and motor vehicles registered in Spain to Gibraltar residents. Although there is no taxation levied in Gibraltar on the ownership of assets, this information will provide intelligence value to our local tax authorities.

Although comprehensive information falls within the extent of automatic information under the Treaty it nevertheless does not extend to include the systematic exchange of financial account information or Country-by-Country Reports.

Exchanges between Gibraltar and Spain regarding the above will continue through OECD equivalent gateways, such as the Common Reporting Standard (CRS) and BEPS Action 13, under the multilateral competent authority agreements under the OECD and Council of Europe’s Multilateral

Convention on Mutual Administrative Assistance in Tax Matters (the "MAAC").

Spontaneous exchange

Spontaneous exchange of information occurs where one jurisdiction provides information that is foreseeably relevant to another jurisdiction that has not requested that information.

Spontaneous exchanges are a means of notifying an exchange partner country when a tax authority suspects or discovers that there may be a loss of tax in that country.

The Treaty requires this method of exchange is reciprocally available between Gibraltar and Spain. This is to be achieved through the use of the MAAC.

Exchange on request

The other form of information exchange included in the Treaty is that exchanged on request. This is when one jurisdiction specifically requests information from another state as part of their ongoing enquiry into the affairs of a taxpayer.

The information must be **foreseeably relevant** to the enquiry being made and the requesting jurisdiction must have **exhausted all possible sources of information domestically** to obtain the information requested. These

measures are in place to prevent tax authorities from conducting "fishing expeditions" which is where information is requested when there is no actual enquiry being undertaken and is essentially obtained in order to commence an enquiry. This is expressly forbidden under internationally accepted principles of information exchange since it is at odds with the principle of foreseeable relevance.

The Treaty requires this method of exchange is available between Gibraltar and Spain. This is to be achieved through the use of the MAAC.

The Treaty confers direct and free access to the Spanish tax authorities to the Land and Company Registrar in Gibraltar. The Spanish tax authorities will not be granted any access beyond what is already available to present users.

There is no reciprocity on this given the regional scope and extent of comparative authorities in Spain. Nevertheless, Gibraltar can seek required information through the Spanish tax authorities on request.

Exchanges on request are reciprocal under the Treaty. Information can therefore be requested both ways. Gibraltar is able to request information from Spain in relation to a current tax enquiry, where the information needed is understood to be available in Spain.

The only limitation on reciprocity arises with in relation to information sought by Gibraltar on legal structures and arrangements in Spain.

Spain is a civil law jurisdiction and consequently is understood to apply a purposive approach in relation to structures such as trusts and foundations. Under this approach the trust or foundation is not recognised in law. These structures are not common in Spain since they are 'looked-through' to establish and determine their true purpose, effect, control and ownership.

Gibraltar, on the other hand is a common law jurisdiction, under which the protection afforded by a legal arrangement such as a trust or foundation is maintained.

This distinction in legal systems does not preclude the effective and reciprocal exchange of information on request to the extent that the information is available. The Treaty recognises this difference and highlights why Spain is unable to make this information readily available to the tax authorities in Gibraltar.

Another important feature, particularly in the ambit of exchange of information and co-operation is the ability to conduct joint examinations and controls and participate in such examinations within that treaty partner's country.

The inclusion of this in the Treaty does not represent, in any way, shape or form that Gibraltar is relinquishing its tax autonomy or sovereignty to Spain.

It is a compliance tool where resources and expertise can be pooled to achieve the desired results and outcomes and is an approach that is increasingly utilised and recommended by the OECD. Gibraltar has already

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previously actively participated in the exchange of information with numerous partners, including Spain where the exchanges have contributed positively towards compliance activities targeting tax avoidance, evasion, profit shifting and double non-taxation.

The Treaty requires this method of co-operation to continue to be available between Gibraltar and Spain through the use of the MAAC.

Assistance in the recovery of tax debts

Provisions enabling contracting jurisdictions to assist each other with the collection and recovery of tax debts is another common feature of international agreements. This ensures that taxpayers cannot avoid paying the taxes that are due by moving to another jurisdiction and/or by dissipating their assets.

Claims which are enforceable in the country in which the debt is to be recovered are legally pursued by the means permitted by the laws of that jurisdiction. Other measures also within that legal framework can also be applied when the claim is not yet enforceable. These are aimed at preventing the debtor from disposing of his assets, such as freezing orders or the placing of a lien on property.

These are typically called measures of conservancy, interim measures or precautionary measures and are only applicable in accordance with respective domestic laws. This represents a recognition and acceptance of local jurisprudence.

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Other processes associated with mutual recovery assistance include the service and notification of documents. This is particularly relevant after the debtor has relocated to another country and is a means of the pursuing tax authority to notify the debtor of the amount owed to them.

Gibraltar has retained the relevant EU legislation for this in addition to transitioning to OECD equivalent measures as the broader approach following its EU exit.

Is there any difference to the current position?

No. The measures and processes contained in the Treaty in relation to information exchange and assistance in the recovery and collection of tax debts are not materially different to those which Gibraltar complies with.

Why is Gibraltar dynamically aligning to such measures in respect of information exchange after the UK's expected exit from the EU?

HM Government of Gibraltar considers this is best practice and in-line with international commitments to ensure the highest standards of tax transparency, good governance and information exchange.

HM Government of Gibraltar feels that this will benefit our economic success and progressive development in the long-term.

These principles are enshrined in any modern tax treaty.

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Is the information exchanged with Spain fully reciprocal?

All automatic information exchanges under the Treaty are reciprocal. This means that the information flows both ways.

Gibraltar has not sought a reciprocal arrangement in relation to information regarding legal structures or arrangements which are likely not to be readily available in Spain. The reason for this is the nature and application of their legal system. Information needed can be readily obtained through a specific request for information.

Who is information exchanged between?

The Treaty allows for a more dynamic and fluid channel of communication and cooperation.

All information exchanged is carried out directly between the tax authorities of Gibraltar and Spain. These are the Income Tax Office in Gibraltar and the relevant regional subdivision or local authority of the Agencia Estatal de Administración Tributaria in Spain.

How are tax residents in Spain identified for the purposes of the automatic exchange of information?

The tax authorities in Gibraltar will identify information to be exchanged by reference to the source data held in their records.

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Individuals will be within the scope of these exchanges if they are registered in Gibraltar under an address in Spain.

The tax authorities in Gibraltar will identify and include individuals on the basis of their personal circumstances applicable to the taxable periods being automatically exchanged. The tax authorities in Gibraltar will not use current personal circumstances to include individuals in any automatic exchange of information for an earlier taxable period.

What type of information is to be automatically exchanged on a reciprocal basis with Spain in relation to individuals?

Information will be exchanged on two categories of workers registered in Gibraltar as residents of Spain. The categories and the relevant information to be exchanged on each type includes:

1. Natural persons employed in Gibraltar

    - Period of employment.
    - Amount and type of remuneration.
    - Source of the income (i.e. the employer).

2. Natural persons carrying on or exercising a trade, business, profession or vocation in Gibraltar

    - Period of trade, business, profession or vocation.

- Amount of income earned.
- Source of the income (i.e. the business).

Can I ask what information you hold on me that you will be sharing with Spain?

Under General Data Protection Regulations (GDPR) individuals can make a Data Access Subject Request (DSAR) to the tax authorities in Gibraltar in order to check what information is held which is within the scope of the automatic exchange.

Individuals will be within scope of these exchanges if they live in Spain, are registered with the tax authorities in Gibraltar under their Spanish address and are either employed in Gibraltar, carry on a trade, business, profession or vocation in Gibraltar or have moveable assets as prescribed within the Treaty registered in Gibraltar.

If incorrect information is sent to Spain about me how and when is this rectified?

The tax authorities in Gibraltar will submit a rectification in the form and manner required by the data transmission method used for the exchange of data. This rectification will invalidate the earlier data exchange. The tax authorities will also engage with our counterparts in Spain to ensure that they are notified of the rectification.

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The tax authorities will assist in correcting any wrong information that is submitted.

The Gibraltar authorities are unable to stop Spain from proceeding with any enquiry, especially if other evidence supports an individual's residence in Spain.

What taxable periods are within the scope of the automatic exchange of information on workers?

Individuals will be caught by the automatic exchange provisions of the Treaty if they fall within the definition of a "worker".

Under the Treaty, a "worker" means a natural person that is employed and/or carries on a trade, business, profession or vocation in Gibraltar and resides in Spain within a radius of 80km from Gibraltar.

Gibraltar needs to exchange information in relation to taxable periods commencing on or after 1 July 2014. The timing of the exchanges is set out below:

1. Information in relation to the following taxable periods in Gibraltar are envisaged to be exchanged by 30 June 2021:

    (i) 1 July 2014 to 30 June 2015
    (ii) 1 July 2015 to 30 June 2016
    (iii) 1 July 2016 to 30 June 2017

(iv) 1 July 2017 to 30 June 2018
(v) 1 July 2018 to 30 June 2019
(vi) 1 July 2019 to 30 June 2020

2. Information in relation to the taxable period extending from 1 July 2020 to 30 June 2021 will be exchanged by no later than 30 April 2022.

Will the Gibraltar tax authorities be obliged to assist Spain with the collection in Gibraltar of tax owed in Spain and due by a Gibraltar resident?

Yes. Assistance in collecting tax debts is a form of co-operation within the scope of any treaty. This Treaty is no exception and is in-line with existing tax cooperation agreements Gibraltar participates in. This applies on a reciprocal basis.

[End]

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