

NEW BINDING TAX RULINGS V2967-21 AND V2997-21: A CLARIFICATION OF THE TAX TREATMENT APPLICABLE TO DIRECT INVESTMENTS BY GERMAN INVESTMENT FUNDS

In these two binding tax rulings, dated 21 November 2021 and 2 December 2021, the Directorate of Taxes clarifies the tax treatment applicable to real estate investments carried out in Spain by German open-ended alternative investment funds.

In accordance with the German Capital Investment Code, these German funds do not have legal personality and their management is assigned to their respective management company, who formally acts and appears in the Land Registry as the legal owner of the asset in its own name, but on behalf of the German fund.

The applicable tax treatment has not been clear, in particular for VAT purposes. First, the Directorate of Taxes considered that the management company should act as the VAT payer (ruling no. 2333, of 13 December 2000). However, some years later, the Directorate of Taxes changed this position and considered that the fund itself (instead of its management company) should act as the VAT payer for the acquisition and subsequent lease of the Spanish real estate assets (binding tax rulings Vo641, dated 29 March 2007, and V1935, of 27 October 2008).

In practice, this last interpretation created some confusion with tenants and purchasers in asset deals, as they faced a situation where the VAT payer was an entity that was different from the legal owner of the properties shown in the Land Registry.

With these two new rulings published at the end of 2021, the Directorate of Taxes confirms the status of the management company as the VAT payer, to the extent that it is the entity engaged to purchase, lease and manage in its own name the assets located in the Spanish territory.

In connection with the VAT treatment of the lease, the Directorate of Taxes confirms the application of the “Titanium Ltd” case (C931/19, dated 3 June 2021) for the purposes of analysing and concluding when the management entity acts through a fixed place of business in Spain for VAT purposes.

Finally, binding tax ruling V2997-21 also considers the application of the Spanish Non-Resident Income Tax to the lease income ultimately received by the German funds. In this case, the Directorate of Taxes confirms that the German fund acts in Spain without a permanent establishment, as it does not have the organisational means necessary to carry on a business activity in Spain. The fact that these organisational means are provided by another management company does not change this conclusion.

This Legal Update was prepared by José Ramón Vizcaino and Paulino González-Fierro, Partner and Associate of the Tax practice area.

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