José Suárez, Alejandra Flores

The Government presents the amendments introducing the temporary Solidarity High Net Worth Tax and certain changes to the Wealth Tax

On 29 September 2022, the Government presented its Fiscal Measures plan with the aim of ensuring "social justice and economic efficiency". The plan presented by the Minister of Finance and Public Administration sought to move towards a "*fairer*" tax system with an increase in contributions from wealthy individuals and large companies.

This plan has been achieved through the inclusion of a series of amendments (the "**Amendment**") to the Draft Law establishing temporary energy levies and levies on credit institutions and financial credit establishments (the "**Draft Law**"). Regarding this briefing on wealth taxation, the Government proposes the introduction of a new tax to supplement the Wealth Tax ("**WT**"). This new tax, which exists at state level and is not subject to transfer to the Autonomous Communities, is called the Solidarity High Net Worth Tax ("**SHNWT**"). The Government has also proposed the amendment of the Wealth Tax regulations concerning non-residents who hold shares in companies with a real estate element (land-rich companies).

Under the proposed addition to the explanatory memorandum of the Draft Law, the SHNWT would have two aims: (i) revenue-raising, in order to require a greater effort from those with greater economic capacity in times of energy crisis and inflation, and (ii) harmonisation, to avoid differences in WT taxation in the different Autonomous Communities, especially between those that have opted to substantially reduce or eliminate WT taxation and those that have not. As we shall see later, and disregarding political assessments, it is possible that in relation to this objective the text contained in the Amendment has exceeded what is strictly desired or desirable.

This Legal Briefing will deal both with the main features of the SHNWT and the proposed amendment to the Wealth Tax Law 19/1991 of 6 June 1991 ("**WT Law**"), due to the close relationship between the WT and the SHNWT, as will be seen.

Although it will be necessary to wait for the finalisation of the parliamentary processing of the Amendment and the Draft Law, we consider that it is quite likely that the SHNWT and the amendment of the WT will be approved in the terms contained in the respective amendments that have been presented.

I. SHNWT

1. Description of the tax

Although the details of the tax are provided in greater detail below, it is important to note that the SHNWT is a wealth tax that supplements the WT and that it only effectively comes into play when the WT paid to the Autonomous Community or the State is below the amount established by the SHNWT quantification rules. Therefore, the SHNWT has an equalising effect on the taxation of wealth.

In the vast majority of its aspects, the SHNWT regulation refers totally or partially to the state regulation of the WT or incorporates the literal wording of the WT Law, a fact that we consider relevant for the purposes of the interpretation and application of the SHNWT.

- Scope of application, taxable persons and obligation to appoint a representative

The subjective and objective scope of the SHNWT is identical to that of the WT. This means that residents are subject to it by virtue of their personal obligation for their worldwide assets, and non-residents by virtue of their real obligation, namely, for assets and rights located, exercisable or enforceable in Spain.

It should be noted that, given the configuration of the SHNWT, in which the existence of effective tax liability depends on the amount paid for the WT, it will also affect non-residents who are taxed under the WT by real obligation but in accordance with one of the regional regulations by virtue of the fourth additional provision of the WT Law (provided that they were taxed under the WT for an amount lower than that which would be determined by the SHNWT).

Among the taxpayers who are liable to pay the SHNWT by real obligation are taxpayers who are covered by the special Personal Income Tax (“**PIT**”) regime for workers who have been seconded to Spanish territory (popularly known as the “Beckham Regime”). These taxpayers, under the interpretation of the Directorate General of Taxes (consultation V0339-16), can apply the regional WT regulations of the Autonomous Community where they reside and, consequently, they may pay less tax than they would under the SHNWT.

As in the case of the WT, taxable persons liable to pay SHNWT who are not residents of another EU Member State or the European Economic Area will be obliged to appoint a representative resident in Spain.

Regarding the application of the network of double taxation treaties signed by Spain, when their scope includes the WT, given the configuration of the SHNWT, the WT will fall within the definition of a tax covered by the Double Taxation Convention (“**DTC**”), with the effect that this may have in relation to the taxation or non-taxation of wealth in Spain by the SHNWT.

Concerning the territorial scope of application, the SHNWT will apply to the whole Spanish territory. In relation to the application of the SHNWT in the foral territories, the Amendment establishes that the adaptation of the Economic Agreement of the Basque Country and the Economic Agreement between the State and the Foral Community of Navarre will be agreed, respectively, in the Joint Commission of the Economic Agreement of the Basque Country and in the Commission of the Agreement with Navarre.

Therefore, it is worth mentioning that the Joint Committee of the Economic Agreement of the Basque Country is made up, on one hand, of one representative of each Provincial Council and as many representatives of the Basque Government and, on the other hand, of an equal number of representatives of the State Administration and that the agreements of the Joint Committee of the Economic Agreement must be adopted unanimously by all its members. Therefore, it is possible that the unanimity required for approval will not be reached in the Commission or that implementation will not be possible as early as the end of the financial year 2022.

As far as Navarre is concerned, although the Agreement establishes that, in the event of a substantial reform of the State’s tax law, both Administrations will proceed, by mutual agreement, to adapt the Agreement to the modifications made, we consider that similar conclusions can be reached.

- Ownership of the SHNWT and powers for the implementation of the SHNWT

The ownership of the SHNWT rests with the State, and it cannot be ceded to the Autonomous Communities.

The State Administration is also responsible for "*management, assessment, collection, inspection and review*". This means that the interpretation criteria applicable for the determination and review of the tax debt will be those issued by the Directorate General for Taxation and other bodies of the State Tax Administration.

- Taxable event and minimum exemption

The SHNWT is configured as a supplement to the WT which is levied on the net wealth of individuals above EUR 3,000,000 at the date of accrual of the tax.

Notwithstanding the above, as with the WT, the taxable base will be reduced, as a minimum exemption, by EUR 700,000 for taxpayers who pay personal liability tax. If we add to this the exemption of up to EUR 300,000 on the main residence (Article 4(9) of the WT Law), this means that, for residents, in general, the tax will be levied on individual net wealths in excess of EUR 3,700,000 or EUR 4,000,000.

The EUR 700,000 exemption threshold does not apply to real obligation taxpayers (including those taxed under the "Beckham Regime").

- Ownership of assets and tax base

Both for the purposes of determining the assets and rights attributed to each of the taxable persons, and for determining the value of each of them and the taxable base of the SHNWT, the proposed regulation refers to the rules contained in the WT Law.

- Accrual

The accrual, as in the case of the WT, will take place on 31 December of each financial year. The first accrual, as noted below, is expected to occur on 31 December 2022.

- Tax rates

Although the definition of the taxable event refers to a net worth of more than EUR 3,000,000, the fact is that the SHNWT scale applies from the first euro of the net base, albeit at a 0% rate up to EUR 3,000,000 (therefore, there is a "progressive exemption" on the first three million euros).

Above EUR 3,000,000 and up to EUR 5,347,998.03 of net taxable base, the tax rate is set at 1.7%; between EUR 5,347,998.04 and EUR 10,695,996.06 of net taxable base, 2.1% will be applied; and above EUR 10,695,996.07, 3.5% will be applied.

In other words, from a payable base of EUR 3,000,000, the tax rate is identical to that provided in the WT Law (Article 30 of said law).

- Exemptions and allowances

Concerning exemptions, the Amendment provides that the same exemptions apply as in the WT Law (Article 4 of the WT Law).

These exemptions include, among others, assets belonging to the Historical Heritage of Spain and the Autonomous Communities, certain objects of art and antiques, pension plans, certain intellectual and industrial property rights, and the taxpayer's main residence (up to EUR 300,000).

Also exempt under the same terms as in the WT Law are assets that constitute an individual company (Article 4(8)(1) of the WT Law) and shares in entities that qualify as a family business (Article 4(8)(2) of the same text).

However, given that in some Autonomous Communities there are certain more flexible interpretations of certain family business requirements (for example, the criterion expressed by the Tax Agency of Catalonia in its consultation V63/15, of 7 April 2015, regarding compliance with the requirement of full-time labour employee for leasing activities in a group of companies, which contains a more lax criterion than that established by the Directorate General of Taxes; consultation V0984-16, of 14 March 2016, for example), and that the verification of SHNWT, as we have pointed out, is a state power, it could be the case that a tax liability for this tax could be demanded on shares considered exempt by an Autonomous Community.

The only tax relief provided for in the SHNWT regulations is that which corresponds to assets and rights located in Ceuta and Melilla under the same terms as in the WT.

In view of the above, the "equalising effect" of the SHNWT will mean that, in certain situations, the rebates on the tax established by the Autonomous Communities will be totally or partially cancelled. This consideration affects not only the allowances that are applicable to all taxpayers, as would be the case in Madrid (100%), Andalusia (100%) and Galicia (25%), but also those which, for non-tax purposes, have decided to favour certain groups or activities, as could be the case of the allowance for protected estates of disabled persons applicable in Aragon, Asturias and Catalonia, the 95% rebate for forestry properties in Catalonia, the 90% rebate for ownership of cultural assets in the Balearic Islands and certain rebates on the tax for the creation of companies and certain activities in Galicia. It should be noted that all of them have been established under Article 47(1) of the aforementioned Law 22/2009, of 18 December, which regulates the financing system of the Autonomous Communities, currently in force.

- Deductions from tax liability and taxes paid abroad

From the SHNWT payable, the WT paid, if any, by the taxpayer shall be deducted until it is cancelled.

Similarly, the deduction for international double taxation will be applicable under the terms provided in the WT Law for taxpayers under personal liability.

- Limit to the tax payable

A joint limitation rule is established for PIT, WT and SHNWT similar to that contained in Article 31 of the WT Law.

As is well known, in application of this rule, the WT -and now also the SHNWT- may be reduced up to a minimum of 20% of its original amount in order to ensure that the joint taxation for personal income tax, WT and SHNWT does not exceed 60% of the sum of certain income of the taxpayer. In this regard, although the first paragraph of number 1 of section 12 of the article whose addition is proposed refers to "60% of the sum of the taxable bases" of personal income tax, given the reference contained in the second paragraph of the same number to the WT regulations, and in view of the purpose of the tax, it seems illogical to consider that the 60% limit operates differently from the way it does in the WT.

Concerning the WT rules, in particular, it should be remembered that long-term capital gains are not included in this sum of income (they are "good income"), that the tax corresponding to unproductive assets cannot be subject to reduction, and that for the application of this rule it is necessary to refer to the whole calendar year, as it refers to income subject to personal income tax obtained throughout the tax period (calendar year).

- Management of the SHNWT and sanctioning regime

As noted above, "*management, assessment, collection and inspection shall be state powers*".

Taxpayers shall be obliged to submit a self-assessment tax return and pay the tax debt, where applicable, within the deadlines established in the regulations. Only taxpayers whose tax liability, under the rules of this tax, and after applying any applicable deductions and allowances, is a payable position are obliged to file a tax return. As in the case of the WT, the payment of the debt may be made through the delivery of assets that are part of the Spanish Historical Heritage.

However, those taxpayers who pay tax directly to the State, as the WT is not assigned to any Autonomous Community, are not obliged to file a tax return, unless the tax payable generates a tax liability.

Infringements relating to this tax shall be classified and sanctioned under the general rules of Law 58/2003, of 17 December, General Tax Law.

- Duration of the SHNWT and entry into force

The SHNWT will be applicable for the first two financial years in which it becomes due from the date of its entry into force. At the end of the tax's term of validity, the Government will carry out an evaluation to assess the results and, if necessary, propose its continuation or abolition.

Insofar as the accrual occurs on 31 December, if the Draft Law is passed before that date -which is likely to be the case-, the SHNWT will take effect in 2022.

2. Assessment of the SHNWT

Leaving aside political assessments, as well as the possibility that the Autonomous Communities that feel aggrieved by the measure may file appeals of unconstitutionality, the fact is that the application of the SHNWT raises certain questions and situations that are difficult to reconcile with other constitutional and legal principles.

Firstly, the vehicle and procedure used for the incorporation of the SHNWT into the legal system are surprising. It will be necessary to follow the doctrine of the Constitutional Court to determine whether this procedure is admissible.

Secondly, although the tax becomes due on 31 December, the accrual for 2022 will apply WT rules that refer to the whole calendar year 2022 and therefore to situations that may already be consolidated.

Thus, in the case of the family business exemption in Article 4(8)(2), the WT regulations "allow" certain requirements not to be met during the calendar year for a maximum of 90 days. Given that the SHNWT regulation has been published and is expected to be approved at a time when well over 90 days of the year 2022 have elapsed, there will be cases in which the taxpayer will not be able to meet the requirements at the end of the year. This situation may constitute a case of retroactive application and may seriously affect the legal certainty and legitimate expectations of the taxpayer concerned.

The same could happen in relation to the application of the joint limitation rule for PIT, WT and SHNWT, where the 60% threshold of Article 31(2) of the WT Law will be calculated on income mostly already generated even before the Government's announcement of 29 September, although not accrued for tax purposes. Consider, for example, dividend distribution agreements or the receipt of interest by the natural person. In cases where the taxpayer has the legitimate power to adjust

his “bad income”, the application of the SHNWT may also result in a retroactive application and an undermining of legal certainty.

Thirdly, it is clear that the regulation of the SHNWT and, in particular, its equalising effect on the tax involves a greater or lesser, effective or merely potential impact on the regulatory powers of the Autonomous Communities. In this regard, Article 47(1) of Law 22/2009 provides that the Autonomous Communities may assume powers in relation to (i) the minimum exemption, (ii) the rate of taxation, and (iii) deductions and rebates on the tax liability.

By virtue of the application of a 0% rate on the first EUR 3,000,000 of net taxable income, it is unlikely that there will be an effect on the minimum exemptions approved by the different Autonomous Communities (to date, no Autonomous Community has approved a minimum exemption of more than EUR 3,000,000). However, this will be the case where the Autonomous Communities have approved tax scales lower than the national scale (for example, the case of Galicia) or have approved deductions or reductions in the tax liability, whether general (Madrid, Andalusia and Galicia) or for specific purposes (Aragon, Catalonia, Galicia, the Balearic Islands and the Principality of Asturias). This effect could be contrary to the organising principles of Law 22/2009, the system of financing of the Autonomous Communities and their scope of autonomy, as well as the political independence of each region.

Fourthly, we consider that the joint limitation rule for PIT, WT and SHNWT is not sufficiently clear. In particular, no procedure or order is provided for making the comparisons and the proposed wording could lead to interpretations under which the 20% of the SHNWT could always be considered to be payable. In view of the purpose of the tax announced by the Government and the supplementary nature of the SHNWT, it seems that the most coherent approach would be to proceed as follows: (i) determine the result of the reduction considering only PIT and WT; (ii) determine, separately from the above, the result of the reduction considering only PIT and SHNWT; and (iii) compare both results and, based on them, determine what the tax payable for each wealth tax should be.

Finally, as stated above, non-residents will not be able to benefit from the EUR 700,000 exemption, which could have an impact of EUR 24,500 per year in the worst-case scenario. We consider that, once again, this provision probably involves the unlawfulness that the Court of Justice of the European Union and the Supreme Court criticised in relation to the WT and which led to the incorporation of the fourth additional provision in the WT Law.

In view of the above, we consider that it is very likely that a large number of taxpayers affected by the SHNWT will consider it appropriate to challenge their self-assessments, especially those for the year 2022, with the ultimate aim of having the tax considered unlawful.

II. WT

The Amendment also proposes the amendment of the WT Law to establish that securities representing the equity of any entity - whether resident or not - not traded on organised markets, more than 50% of whose assets are directly or indirectly made up of real estate located in Spanish territory, shall be considered to be located in Spanish territory.

For the purpose of calculating assets, it is established that the net values of all assets entered into the accounts will be replaced by the market values determined at the date of accrual of the tax (similar to the rules of Article 314 of the Consolidated Text of the Securities Market Law), with the exception of real estate, whose net book values will be replaced by the values that are to be used as the taxable base

for the WT.

Due to the referral of the SHNWT to the WT rules for the determination of taxable assets and their valuation, this criterion will be equally applicable to the SHNWT.

The effect of the rule, however, will depend on the wording of the double taxation treaties themselves and whether they contain such a clause in the article regulating wealth and what its terms are.

CONTACTS

José Suárez
Partner, Tax
jsuarez@perezllorca.com
T. +34 91 423 67 41

www.perezllorca.com | Madrid | Barcelona | London | New York | Brussels

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