

José Suárez and Alejandra Flores

Analysis of the Special Tax Regime applicable to workers, professionals, entrepreneurs and investors posted to Spanish territory following the reform introduced by Law 28/2022

Law 28/2022, of 21 December 2022, on the promotion of the startup ecosystem (the “**Startups Law**”) aims to establish a regulatory framework to support and encourage the creation and growth of startups in Spain. The Startups Law also seeks to attract foreign talent and investment by creating ecosystems that are favourable to the establishment of entrepreneurs or remote workers and to attracting investors that are specialised in the creation and growth of startups.

In order to attract this foreign talent, the Startups Law amends Article 93 of Law 35/2006, of 28 November, on Personal Income Tax (the “**PIT Law**”) to improve access to the special tax regime applicable to workers posted to Spanish territory (the “**Beckham Regime**” or the “**Special Regime**”).

This Legal Briefing analyses the main features of the Beckham Regime following the amendment introduced by the Startups Law.

1. Characteristics of the Special Regime

The Beckham Regime gives individuals who acquire their residence in Spain as a consequence of moving to Spanish territory the option of paying Non-Resident Income Tax (“**NRIT**”), with some particularities, instead of Personal Income Tax (“**PIT**”), without prejudice to their status as taxpayers in relation to PIT.

This Special Regime may be applied during the tax period in which the change of residence takes place and the following five tax periods (i.e. a total of six tax years).

The application of the Beckham Regime will mean that the PIT tax liability will be calculated in accordance with the rules established for the NRIT for income obtained without the intermediation of a permanent establishment, with the following particularities:

- Certain provisions of the NRIT Law (i.e. taxpayer status, tax residence, need to appoint a representative, etc.) do not apply. Nor does the exemption for income provided for in Article 14 of the NRIT Law (i.e. severance payments, interest, dividends, etc.). However, certain income provided for in Article 14.1.a) of the NRIT Law will be exempt, including, for example, income corresponding to the delivery of shares in a company to its employees, which, following the entry into force of the Startups Law, has a more favourable tax treatment for employees of these companies.
- This means that only income and capital gains obtained exclusively in Spanish territory will be taxed in Spain under the NRIT. However, the whole worldwide employment income as well as all income from economic activities classified as an entrepreneurial activity will be subject to taxation in Spain.
- Those covered by this regime will be taxed on employment income and income from economic activities that are classified as entrepreneurial at a rate of 24% on the first €600,000 and 47% from €600,000.01 and above. Compared to the ordinary personal income tax regime, the Beckham Regime is very beneficial for those with such incomes that are below €600,000.

- In addition, the savings tax base will be taxed at 19-26% (in relation to dividends, capital gains, etc.). However, the maximum rate is scheduled to increase to 28% as of January 2023 as provided for in the State Budget Bill for 2023.

2. Requirements for the application of the Special Regime

- Not having been a tax resident in Spain for the five tax periods prior to moving to Spain (until the Startups Law was passed, the relevant period was 10 tax years).
- The posting to Spanish territory takes place, either in the first year of application of the Special Regime or in the previous year, as a result of any of the following circumstances:

- a) An **employment contract** (with the exception of the special employment relationship of professional sportsmen and women).

This condition will be deemed to be fulfilled when an ordinary, special or statutory employment relationship with an employer in Spain is initiated. This condition will also be deemed to be fulfilled when the posting is ordered by the employer and there is a letter of posting.

- b) Workers who move to Spain to work remotely, even if their employers do not order such a move (workers known as “**Digital Nomads**”).

For these purposes a Digital Nomad is a person that works entirely remotely, using computer, telematic and telecommunications means and systems.

This condition will be deemed to be fulfilled in the case of employees who have the visa for international teleworking, introduced by the Startups Law in Law 14/2013 of 27 September, on support for entrepreneurs and their internationalisation (“**Law 14/2013**”).

The visa for international teleworking may be applied for by foreigners who are not resident in Spain who intend to reside in Spanish territory in order to work remotely for a company located outside Spain.

This visa is valid for a maximum period of one year, unless the period of work is shorter, in which case the visa is valid for the same period as the period of work. No later than sixty calendar days before the expiry of the visa, international teleworkers who are interested in continuing to reside in Spain can apply for the residence permit for international remote workers, provided that the conditions that generated the right remain.

- c) As a consequence of **becoming a director of** an entity, irrespective of their stake in the capital of the entity.

Prior to the adoption of the Startups Law, the entity and the director could not be considered as related parties, i.e. the director could not hold more than a 25% stake in the entity. This limitation now only exists if the entity is considered as a holding entity (*entidad patrimonial*). Otherwise any level of stake is acceptable.

In relation to the consideration as a holding entity, Article 5.2 of the Corporate Income Tax Law establishes a presumption: a holding entity, which is therefore not engaged in an economic activity, is one in which more than half of its assets consist of securities or are not assigned to an economic activity.

- d) As a consequence of carrying out in Spain an economic activity classified as an “**entrepreneurial activity**”.

According to Article 70 of Law 14/2013, as amended by the Startups Law, “entrepreneurial activity” should be understood as that which is innovative and/or of special economic interest to Spain. In order to obtain this classification, a favourable report issued by Empresa Nacional de Innovación, S.A. (“**ENISA**”) must be requested.

- e) As a consequence of the performance in Spain of an economic activity by **highly qualified professionals** who provide services to startups or who carry out training, research, development and innovation activities, provided that the income received from these activities exceeds 40% of their total income from employment, business or professional activities.

In order for a company to be considered a startup under the terms of the Startups Law, the entrepreneur must ask ENISA to assess whether its economic activity meets the characteristics to be considered entrepreneurial and, in particular, the innovative and scalable nature of its business model.

Articles 3 and 6 of the Startups Law set out the characteristics that ENISA will assess in order to classify the activity as a startup (new or recently created, the company not being listed, not having arisen from a merger or similar operation, the annual turnover of the company not exceeding the value of €10 million, etc.). In addition, the Startups Law provides certain criteria for considering a business model to be an innovative and scalable venture, including the degree of innovation, degree of market attractiveness, competition, volume of clients, as well as the reputational, regulatory, ethical or speculative risks, etc.

The status of startup must be proven by registration in the Commercial Register (or Register of Cooperatives) in order for the company to be eligible for the benefits of the Startups Law. It would therefore be sufficient for the highly qualified professional to verify that this requirement is met.

On the other hand, the way of accrediting the status of highly qualified professional is still pending regulatory development, as are the requirements for classifying activities as training, research, development and innovation.

- As a final requirement for applying the Beckham Regime: the taxpayer must not obtain income that would be classified as obtained through a permanent establishment located in Spanish territory, except in the event of highly qualified professionals carrying out an entrepreneurial or economic activity in Spain in the terms indicated above.

3. Extension of the Special Regime

Children under 25 years of age (or of any age in the event of disability) and the spouse of the taxpayer (or the parent of the children in the absence of a marriage) may also apply this regime, provided that the following requirements are met:

- a) They move to Spanish territory with the taxpayer or before the end of the first year of application of the regime.
- b) They acquire tax residence in Spain.

- c) They do not obtain income classified as being obtained through a permanent establishment and have not been tax residents in Spain in the last five tax periods.
- d) The sum of the taxable income of the children under 25 years of age and the spouse must be less than that of the taxpayer in each of the tax years.

4. Option, waiver and exclusion from the Special Regime

- In the case of workers, the option to apply the Special Regime must be **exercised** by means of a communication addressed to the Tax Authorities (form 149), within a maximum period of six months from the date on which the activity commenced according to the registration with Social Security in Spain.

In the rest of the cases, the regulatory development that determines the communication of the option to apply the Special Regime is still pending.

- Taxpayers to whom the Special Regime applies will be obliged to file and submit their PIT return calculated using the NRIT rules by means of form 151. The period for filing the return will be the same as that generally approved on a yearly basis for the PIT return (from April to June).
- Taxpayers who have opted for the Special Regime **can waive** its application during the months of November and December prior to the start of the calendar year in which the waiver is to take effect (by means of form 149). Taxpayers who waive the Special Regime will not be able to opt for its application again.
- Taxpayers who have opted for the application of the Special Regime and who, after exercising the option, **fail to comply with any of the conditions** for it to apply, **will be excluded from the regime**. The exclusion will take effect in the tax period in which the non-compliance occurs. Taxpayers excluded from the Special Regime will not be able to opt for its application again.

5. Other considerations

Application of the Wealth Tax

Those covered by the Beckham Regime will be subject to the Wealth Tax by real obligation. This means that only assets and rights located or exercisable in Spain are subject to taxation, less the value of the charges and taxes affecting them, as well as debts due to capital invested in the aforementioned assets (e.g. mortgage loan to acquire a property).

For these purposes, following a recent amendment to the Wealth Tax, holding stakes in entities (resident or non-resident) where more than 50% of the assets are made up, directly or indirectly, of real estate located in Spain, will be considered as assets or rights located or exercisable in Spain.

Those covered by the Beckham Regime have an exemption of €700,000. A progressive tax rate (scale) will be applied to the excess, ranging from 0.2% to 3.5% (net taxable income above €10.6 million).

Those covered by the Beckham Regime can apply the regional Wealth Tax regulations of the Autonomous Community where they reside, which may establish different scales than the national scale, as well as de facto allowances or exemptions (as is the case in Madrid and Andalusia).

Application of the Temporary Solidarity High Net Worth Tax (“SHNWT”)

With the main objective of removing the differences in the level of wealth tax burden that the tax benefits granted by certain autonomous communities had generated, the Government has approved a temporary tax (in principle applicable for only two years) which is similar in nature but supplementary to the Wealth Tax.

Its regulation transcribes practically in its entirety the regulation contained in the Wealth Tax Law, except for two differences: (i) for taxpayers taxed by means of real obligation (i.e. non-residents and “Beckham residents”) the €700,000 exemption under the Wealth Tax Law is not applicable (which could violate EU law), and (ii) the taxable income bracket between €0 and €3,000,000, both for residents and non-residents and those under the Beckham Regime, is taxed at 0% (i.e. in practice the first €3 million are exempt, although they are included in calculations for the purposes of maintaining the progressivity of the tax on the remaining assets). The excess of €3,000,000 is taxed on the same scale as in the Wealth Tax Law, up to 3.5% (net taxable income above €10.6 million).

According to its regulation, the SHNWT is only payable when the amount of SHNWT exceeds the amount derived from the application of the Wealth Tax. Hence the classification as “supplementary” above.

In practice, this will occur when the applicable regional regulations establish a substantially more beneficial regime than the national one, mainly when the Wealth Tax scale approved by the autonomous community is lower than the national one, and/or when the regional regulations provide for percentage reductions in the amount (Madrid and Andalusia -100%- and Galicia -25%-).

Insofar as those covered by the Beckham Regime can apply the regional Wealth Tax rules of the autonomous community where they reside, they could be taxed a lower amount than would correspond under the SHNWT and, therefore, be subject to the SHNWT.

Obtaining tax residence certificates

Those covered by the Special Regime may apply for a certificate of tax residence in Spain, but this will not have the effect of applying the double taxation avoidance treaties signed by Spain since, according to the interpretation of the Directorate General for Taxation, these taxpayers do not fall within the definition of residents for the purposes of the treaties as they are not taxed on worldwide income.

Declaration of assets and rights located abroad (form 720)

Those covered by the Special Regime are not obliged to submit the declaration on assets and rights located abroad as they are not obliged to pay personal income tax on all of their income.

Regulatory development

As noted throughout this Briefing, the regulation that will develop different technical aspects of the Beckham Regime is still pending approval. Some of the above considerations may therefore be subject to change.

CONTACT



José Suárez
Partner, Tax

jsuarez@perezllorca.com
T. +34 91 423 67 41

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

The information contained in this Legal Briefing is of a general nature and does not constitute legal advice.

This document was prepared on 23 December 2022 and Pérez-Llorca does not assume any commitment to update or revise its contents.

AVAILABLE NOW | **New Pérez-Llorca App**

