The Offshore & International Taxation Review

SPANISH INHERITANCES AND GIFTS TAX

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Background

It is calculated that Britons own more real property assets in Spain than in any other single jurisdiction outside the United Kingdom. Many also have business interests and investments in Spanish territory. And Britons are not alone in this - the mix of nationalities with significant assets in Spain is considerable. For all of them, the potential effects of Spanish Inheritance and Gifts Tax (ISD)[2] thereon are well worth examining whether at the planning (pre acquisition) stage or thereafter.

Spain has taxed inheritances for a good many years.[3] A revised and modernised approach was introduced by the enactment in 1987 of ISD. This law took effect from 1st January 1988, and contained within it a provision for the annual updating (neo-indexation) of such figures as band-thresholds and allowances. ISD is rather better drafted than the average Spanish statute and contains a number of interesting anti-evasion provisions. It has been amended several times since its original enactment, notably by Law 66/97 which introduced some additional reliefs of interest to all taxpayers.

All rates, percentages, band threshholds, and so forth given in this article are those which apply to taxable events falling in the year 2000 (note that Spain's tax year runs concurrently with the calendar year).

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2 ISD: Impuesto sobre Sucesiones y Donaciones, Law 29/1987 18th December, published in the Boletin Oficial del Estado [BOE] (the official legal gazette) on 19th December 1987 and successively thereafter amended.

3 Most recently, and until the introduction of ISD, under the terms of Decree 1018/1967 6th April which approved the Revised Text (Texto Refundido) of still earlier laws on the taxation of inheritances and other related matters.

Aim of this Article

This article rehearses the details of ISD, and considers its effect for the foreigner (that is to say, the non-Spaniard), with an especial eye on the Briton who, by virtue of his - generally - UK domicile[4], is also subject to UK Inheritance Tax (IHT) on substantially similar taxable events and assets.

What may be good planning for IHT may produce unexpected and sometimes damaging results for ISD. These are not always obvious to the UK-based planner. This article therefore attempts also to signpost some of the more commonly encountered pitfalls.

Liability to ISD[5]

An event triggering consideration of whether tax is due occurs when a gratuitous transfer of relevant assets is made to a chargeable person. Both lifetime (inter vivos) and death (mortis causa) transfers are caught. Also caught are transfers with a donative element (e.g. sale at an over or under value).

The Taxable Person

In line with the norm in continental Europe, ISD is an acquisitions tax, and not a transfer tax. The taxable person is therefore the recipient, not the donor. This simple fact alone can cause much confusion in the mind of the IHT-orientated planner (and in the mind of the British client who, perhaps unsurprisingly, cleaves limpet-like to the notion of his own tax liability upon death, and for whom it is helpful time and again to be walked around to the other side of the mirror in order firmly to grasp the concept of the Spanish tax and comprehend its impact).

The tax is applicable only to individuals (*personas fisicas*) and therefore not to any

4 I should stress, for the lay reader, that domicile and residence are two quite separate concepts. Most Britons, wherever in the world they may be resident, remain of UK domicile. It is not necessarily a simple matter to shed a UK domicile of origin and replace it with an overseas domicile of choice.

5 Note that ISD applies throughout Spanish territory *except* Pais Vasco (Basque territory) and Navarra, where different autonomous regional laws apply. Note also that the right to apply administer and collect ISD is devolved by national law to the governments of the Autonomous Communities. In Malaga, for example, the taxing authority for ISD is therefore the Junta de Andalucía, and in Mallorca it is the government of the Balearic Islands.

other type of person at law, such as a company[6]. Indeed, Art 3 (2) says that "juridical" (i.e., not physical) persons are not liable to this tax, but will be assessable instead to the Spanish equivalent of corporation tax (IS[7]).

Although the earlier law took account of the nationality of the taxpayer, the present law does not. The sole criterion of the scope of an individual's liability is his fiscal residence or otherwise in Spain. Art 6 (2) of ISD takes in the statutory definition of "habitual residence" of an individual contained in the law of Personal Income Tax (IRPF[8]).

An individual resident in Spain is liable (by way of *obligación personal*) to ISD on receipts by him of assets (etc) wherever those assets may be situated.

An individual not resident in Spain is liable (by way of *obligación real*) on receipts of assets (etc) sited in Spain. Although the IHT notion of excluded property does not

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6 ...but what of a trust? Although a signatory to the Hague Convention on Trusts, there is, in Spain's law, no concept of beneficial title distinct from legal title to the same asset; and unless and until Spain ratifies that Convention, no domestic basis for regarding trust assets as a fund distinct from that of the trustee's personal assets. Does Spain therefore regard trustees simply as principals? For example, will a non-corporate trustee in receipt of a gratuitous transfer of chargeable assets be considered simply a *persona fisica* and therefore in principle chargeable to ISD? Inevitably, the law (and the regulations, which have the force of law) are silent on the matter. This general issue is addressed later in the body of this article.

7 IS: Impuesto Sobre Sociedades; Law 43/1995 (effective from 1st Jan 96).

8 IRPF: Impuesto sobre la Renta de las Personas Fisicas. The IRPF law (LIRPF) L 40/1998, as amended by L 55/1999, provides at Art 9:

One An individual shall be habitually resident in Spanish territory in either of the following circumstances:

(a) when he remains more than 183 days in the calendar year in Spanish territory

(b) when the principal nucleus or base of his activities or his economic interests lies, directly or indirectly, in Spain

Two Save proof to the contrary, an individual shall be presumed to be habitually resident in Spanish territory when his spouse from whom he is not legally separated and minor dependent children are habitually resident in Spain.

Three In computing the number of days spent in Spanish territory absences therefrom shall be included (*as days spent within Spain*) unless the taxpayer can demonstrate fiscal residence in another country. Where that other country is classified by Spain as a tax haven (*paraiso fiscal*) the Spanish tax authority may require that the taxpayer prove his physical presence there for a period of not less than 183 days of the calendar year.

exist in ISD, the effect is pretty much the same.

In ISD there is no concept of an exempt beneficiary. Significantly, this means that a spouse is not an exempt beneficiary. This latter piece of information generally has, upon communication to British clients resident in Spain, a stunning effect. Pragmatically, that effect can be quite valuable since it commonly motivates them into thinking about planning for ISD.

Assets affected by ISD

The rule on situs of assets is analogous to that in IHT. Only two geographical "classes" of asset are described:

Worldwide: Art 6 describes the charge to tax "...irrespective of the situs of the assets or rights".

Sited in Spain: Art 7 refers to "...assets or rights of whatever nature which are sited or could be exercised or accomplished in Spanish territory".

In principle, there is no parallel to the IHT Exempt Gift. This is so partly because it is, of course, the receipt and not the gift which is taxable, but largely because the recipients of gifts for, say, national purposes, the Holy See, public benefit and so forth, would have to look for exemption to the codes, laws, decrees, or regulations governing the taxation of their own income and other receipts. Since such recipients will generally be juridical and not physical persons, such exemptions are normally to be found in IS (to which reference in made in ISD Final Disposition Four). Certain receipts, however, are excluded from charge to ISD.

First, the Spanish Treasury from time to time has authorised the issue of certain bonds (usually with a penally low coupon). ISD Transitional Disposition Three confirmed the continuing exclusion from ISD of those bonds when acquired by the transferor before 19th January 1987 and owned by him for not less than two years before the (otherwise taxable) transfer.

Secondly, the Regulations[9] (*Reglamentos*) exclude from charge to ISD the following receipts (prudent advisors will also check the list of exempt receipts for Personal Income Tax [IRPF] and/or IS, however):

9 *Reglamentos del Impuesto sobre Sucesiones y Donaciones* (RISD) enacted in Royal Decree RD 1629/1991 as amended.

- prizes received from authorised games (National Lottery and so forth)

- other prizes and compensatory payments which are exempt from IRPF

- grants, scholarships, prizes, and other aid of a similar nature awarded by public or private organisations with objectives of a charitable, educational, cultural, sporting, or social welfare nature

- loans, "utilities", or other amounts provided by corporations, societies, associations and businesses to their workers arising directly from a contract for service ("work contract"), even where paid via an insurance scheme.

- sums received from pension plans and schemes by the beneficiaries thereof

- amounts received by a creditor from a life assurance policy written to guarantee the payment of a debt.

4 Gifts Inter Vivos and Mortis Causa - Any Difference?

With some exceptions, none of which are beneficial to the taxpayer, there is no difference in the taxation of net gifts inter vivos and those made mortis causa. Perhaps the most obvious exception is that, inter vivos, no personal allowance is available. In short, lifetime gifting is not encouraged by ISD[10].

Valuation

Spain's is a self-assessment regime. It is therefore incumbent on the taxpayer to report the value of a gratuitous receipt together with calculation and payment of the tax due.[11]

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10 Further discouragement is to be found in the taxation of realised gains (*ganancias patrimoniales*). LIRPF releases from charge to "capital gains tax" gifts made on death (formerly charged at a flat rate of 8%). Gains realised on gifts inter vivos remain chargeable to IRPF; there is no provision for holdover relief.

11 Compliance and administration are dealt with more fully later in this article.

The law characterises the value to be used for ISD as the "net value" of the assets received. Significantly it goes on to say that the starting point for valuation shall be the "real"[12] value. The especial significance of this point is twofold:

(a) Different laws can take different prices or valuation bases for different purposes, including taxation. Popular imagination can take this to imply that one can select the valuation basis most favourable to one's purpose for the time being. Where real property is concerned, for example, the range of values can include full market value, a value attributed by a lender when assessing the property as security for a loan, catastral value[13], or even the price of acquisition (often unlawfully understated[14]) given in the title deed. Popular imagination is fevered and wrong; "real" value is the only starting point for ISD valuations.

(b) Value, like beauty, is in the eye of the beholder. ISD Art 18 (as well as the overarching provision in Art 52 of the General Tax law - LGT) limits the possibly endless and furious debate on the matter by giving to the tax administration the right of verification of reported values (same general principle as the UK, although there is no direct equivalent of the Inland Revenue's District Valuer). The verified value prevails over the reported value, unless the reported value is higher... in which case, the latter prevails! Until 15th July 1998, Art 19 took this a degree further by giving the administration the right of compulsory acquisition at the reported value

12 Sometimes translated as "tax value", *valor real* (real value) is a concept much used in Spanish tax law. Probably its primary characteristic is that it is entirely hypothetical and not real at all. It is not specifically defined anywhere in the whole canon of Spanish law. It may perhaps best be described as a full arm's length market value, between an unencumbered buyer and and an unencumbered seller in open and fully liquid market conditions which are stable, trading neither up nor down, and in which all technical influences have been taken account of, but which remain unaffected by sentiment.

13 Catastral value - *valor catastral*. Broadly equivalent to a sort of "rateable value". Each piece of land or property has such a value which can be ascertained from the local town-hall, and is used as the basis for a number of taxes on property. Historically, catastral values have seemed not to exceed 60%-70% of market value but, for example in the early 1990s, increases in catastral values combined with the then soggy market prices generally eroded the differential.

14 Both buyers and sellers will frequently encounter pressure from the other party to agree to this practice. Disgracefully, many professional advisors support it - off the record. Such pressure, and the associated siren songs, should always be resisted. Apart from being unlawful, the practice inevitably puts at least one of the parties at risk of discovery, and established mechanisms exist for both discovery and sanction. Doubters should bear in mind that Spain is now getting more and more concerned about such frauds on the fisc.

where the verified value was more than 100%[15] greater than the reported value, such right to be exercised within six months of the date of finalisation of the tax due. This right was however repealed by L 25/1998. LGT provides for a process of appeal against the tax administration's re-valuations, and is much used.

In the case of acquisitions mortis causa, Arts 12 - 14 describe the encumbrances, debts, and costs which may be deducted from the gross value of the asset. There are no surprises here, and the words of these Articles are designed to ensure that only items which genuinely reduce the value of the inheritance are deductible. National and local taxes, and also Social Security contributions due from the deceased are deductible from the general estate (*caudal hereditario*).

Gifts inter vivos are treated somewhat differently. Deductible encumbrances are precisely as for acquisitions mortis causa. Debts are deductible only if they attach directly to the asset transferred and the recipient formally assumes and guarantees payment of the debt; this is inevitably a somewhat narrower definition than that for transfers on death. There is no provision for the deduction of costs.

Personal Allowances

Personal allowances are not available on lifetime gifts. For acquisitions mortis causa, an allowance may be deducted from the net value. This allowance is, of course, that of the recipient; the more recipients there are, the more allowances there are. The quantum of the allowance depends on the degree of kinship[16] (*parentesco*) between transferee and transferor, and the Group into which that kinship falls for ISD

15 Before 1st Jan 92, this figure was 50%. This degree of valuation discrepancy is perhaps more common than one might imagine. Patently, in the relatively volatile fields of, say, fine art and jewellery the risk of such a discrepancy is always present. Moral: choose your valuer with care; if he happens also to do Hacienda's valuations, so much the better.

16 A simple matter to the Spanish eye, and one defined in careful detail in the Civil Code (*Codigo Civil*) at Arts 915 - 920. To the British eye, it appears initially opaque, later baroque, and finally susceptible to mathematical calculation whilst continuing to elude emotional comprehension. A simple example may help: one draws a family tree, showing names and lines of direct descent. Each line represents a degree (*grado*) of kinship. Thus a son (son 1) has a kinship of first degree with his father; with his grandfather the kinship is of second degree; with his brother (son 2), however, the relationship is of collateral second degree since the line passes first from son 1 up to father, and then collaterally from him down to son 2. If that brother (son 2) in turn had a son (grandson), son 1's relationship with his nephew would be of the collateral third degree (son 1 direct to father; thence collaterally to son 2; and finally to grandson). Spouses are treated as if they were the same person for this purpose.

purposes. Prior to the enactment of ISD there were seven Groups; happily, ISD reduced the number to four.

Group 1 consists of children,[17] grandchildren and so forth in direct (i.e. not collateral) line of descent who are under the age of 21.[18]

Group 2 consists of the same descendants listed above in Group 1 but of the age of 21(+), together with ascendants in direct line, and spouses. One may therefrom deduce, correctly, that spouses are not favoured beneficiaries and are treated in no way differently from adult children or, indeed, parents and grandparents.

Group 3 consists of those in the next degrees of kinship out to, but not including, first cousins. (For the technically inclined, that is to say including the collateral third grade).

Group 4 consists of the rest of the family (collateral fourth grade and beyond) and unrelated persons. This latter category (unrelated persons) would include not only unadopted stepchildren, but also the so-called common-law spouse[19]. This latter is a common condition amongst, say, joint property owners. As will later become apparent, marriage can be a vastly successful tax-planning manoeuver (I say nothing of other consequences).

The allowances[20] for 2000 are:

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17 This includes natural and legally adopted children, but not step-children (unless legally adopted which can only be done during the child's minority).

18 As in the UK, the legal age of majority is 18. ISD is specific about age 21 for the purpose of the kinship Groups.

19 By which I mean a man and a woman living together as if married. Patently, this journalist's expression is wrong; it is especially nonsensical in a civil code jurisdiction. Equally clearly, a couple married under the common law are spouses for all the purposes of the law (including ISD). There are no "mistress's rights" - nor, I hasten to add, the male equivalent, whatever that may be - in ISD.

20 The personal allowances given here are the State (i.e. national) allowances. The Law permits the Governments of the Autonomous Communities to enact and apply different levels of allowance (including these personal allowances), failing which the State allowances apply. Six of the Autonomous Communities have to date taken advantage of those powers, including the Comunidad Valenciana, Cataluña, Madrid, and the Balearic Islands. Evidently the remainder, including Andalucía, have not, though they may elect to do so in the future.

Group 1: 2.655.000 pesetas (pts)[21] plus 664.000 pts for each year of the taxpayer's age under 21. The maximum allowance is capped at 7.963.000 pts

Group 2: 2.655.000 pts[22]

Group 3: 1.330.000 pts

Group 4: Nil

Note: Handicapped persons (with a physical, mental or sensory handicap[23] greater than 33% as defined in the Social Security Law) receive a special allowance of 7.963.000 pts or pts 25,000,000 depending on the degree of handicap, in addition to that derived from the relevant kinship Group.

Mortis Causa Reliefs for Family Home and Business

Introduced by Law 66/1997, these reliefs did not previously figure in ISD. Essentially, and subject to certain conditions both precedent and consequent, 95% of the value of the family home and of the family business may be deducted[24] in the case of receipts mortis causa. These reliefs are available in addition to other allowances provided by ISD.

The relief is available principally to those recipients who are spouses, or offspring (including adopted children) in direct line of descent, of the deceased. With effect from 1 Jan 2000 (introduced by L54/1999) the deduction in respect of the family home is capped at pts 20,400,000[25] per recipient (e.g. to spouse and two natural children in equal shares, a total allowance of pts 61,200,00 supposing that the family home has a value in round terms of at least pts 64,500,000).

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21 A good rule-of-thumb exchange rate at the date of writing (June 2000) is 265pts : £1 sterling. Note, however, that the relative strength of sterling against the Euro (of which the peseta is a member currency) appears to be declining somewhat.

22 This Group 2 allowance is the pivotal one, the others all being functions of this amount. The fiddly numbers result from indexation of a figure which, in 1988, started as 2.000.000 pts.

23 As defined in IRPF.

24 Note that this is the State allowance (see footnote 20). Autonomous Communities are again entitled to do their own thing. Baleares, for example, permits a 100% deduction, up to a limit of pts 20,000,000 per taxpayer, for residents of the Balearic Islands.

25 ... though see footnote 24, as an example of different treatment in different Autonomous Communities.

Inevitably, there is a significant clutch of rules designed to ensure that this allowance is available only in those circumstances intended by the legislator. One of those is that, in both cases, the recipient must remain the owner for a period of ten years following the acquisition mortis causa, failing which tax on the relieved portion falls due.

The Initial Calculation of the Tax

The net value of the receipt, less any allowance due, is calculated against the rate-bands to produce an initial, "raw", tax figure. There is no 0% band. The marginal rates start at 7.65% on the first 1.330.000 pts and proceed across a total of 16 bands to a top marginal rate of 34% on amounts over 132.702.000 pts. The tax due on an amount of precisely 132.702.000 pts is 33.159.299 pts, being an average rate at that point of almost exactly 25%.

That does not sound too horrendous, especially with a top marginal rate of 34%. It is not, however, the end of the story, since...

The Co-efficient

...to the raw figure is then applied a co-efficient ranging between 1 and 2×4[26]. The amount of the co-efficient in a particular case is determined by reference to a table. The indices of the table are, firstly and more importantly, the relevant ISD kinship Group referred to above, and secondly the net wealth[27] owned by the recipient, before receipt of the gift currently being taxed ("pre-existing net wealth"). For non-resident recipients, it is their Spanish sited wealth that is relevant; for residents their worldwide wealth is taken into account.

26 ....that's "two point four" (in case typescript may make it look like vastly more!)

27 Valued according to rules for Wealth Tax (Impuesto sobre el Patrimonio - [IP]). This is an annual tax on an individual's wealth (world-wide for residents; Spanish-sited for non-residents) which tax is, in general, monetarily insignificant but which acts as a remarkably effective control for capital and income taxes.

The table of co-efficients is as follows:

Pre-existing net wealth of recipient (taxpayer) (millions of pesetas)	**Groups I and II**	**Group III**	**Group IV**
0 to 67	1.0000	1.5882	2.0000
67 to 334	1.0500	1.6676	2.1000
334 to 669	1.1000	1.7471	2.2000
over 669	1.2000	1.9059	2.4000

A swift glance at the table above will reveal that degree of kinship has a far greater influence on the co-efficient than does pre-existing net wealth. It can be seen that the unmarried "common-law spouse" with not a bean of wealth will have to apply a co-efficient of 2, resulting in an effective top marginal rate of 68%. The same is true of, say, the unadopted step-child. Their greatly wealthier counterparts could be facing a top marginal rate of 81·6% (34%x 2·4) which produces an average rate at the top-rate threshold of 60%.

An Intermediate Summary

It may be helpful to summarise the bare bones so far:

(a) Value the asset received

(b) Deduct any allowable deductions or reliefs

(c) Determine the degree of kinship between donor and donee (the taxpayer)

(d) Establish into which kinship Group the taxpayer falls

(e) Deduct any available personal allowance

(f) Tax the resultant figure through the bands

(g) Calculate the taxpayer's pre-existing net wealth

(h) Determine which co-efficient is applicable

(i) Apply the co-efficient to the tax figure obtained earlier.

Compliance and Administration

ISD Art 24 defines the moment of accrual of the liability to tax as follows:

(a) Death: The date of death of the transferor; or when this is not known, the date on which declaration of death is duly signed in accordance with the Civil Code Art 196.

(b) Lifetime: The date on which the gift is conveyed (in whatever form is appropriate to the asset in question.

(c) General - gifts with conditions: The date on which any condition, limitation, term or other form of suspension attaching to the gift is satisfied or discharged.

ISD Art 31 leaves to the Regulations the matter of timing of presentation of documents. RISD Art 67 says of that matter:

(a) Death: within six months of the date of death of the transferor. (RISD Art 68 gives the tax office the ability to extend this period by a further six months, provided the request is made to them within the first five months following death. If that request is denied, the original six months will be extended by the number of days from presentation of the request to its refusal).

(b) All other cases: within 30 calendar days of the day following the conveyance of the gift.

In the case of receipts mortis causa, deferred payment (lump sum and schedular) of the tax due is possible in certain defined circumstances, but always subject to the payment of interest at the official rate and provision of adequate guarantees for both principal and interest. In general, it is necessary to demonstrate that the taxpayer has insufficient liquidity to meet the tax in cash. Deferred payment of the whole may be agreed for one year, or in up to five equal annual payments. In the case of the latter, the guarantee must be for 125% of the total of principal and interest.

Deferred payment is also possible in the transmission mortis causa or inter vivos of a trading or professional business. The same is true, but only mortis causa, of an habitual residence. In the latter case, only a Group I or II relative (spouse, children or parents) or a sibling over the age of 65 who has lived with the transferor during the two years preceding his death may request deferment of payment. In these cases, tax may initially be deferred for a period of up to three years (subject to the provision of a 125% guarantee); at the end of the three years, and subject to the same conditions, the Collector of Taxes may agree to further deferment by seven equal six-monthly payments.

The tax administration is proscribed[28] from seeking payment, or applying sanctions for non-payment of tax once a period of four years has passed counting from, in the one case the date for final presentation by the taxpayer of all the required documents, or in the other case the date of the infraction[29]. This four-year (formerly five years) proscription period is a general one in Spanish tax law.

Anti -Evasion/Avoidance

This is an interesting area of the legislation and regulations, which clearly demonstrates the reliance placed in the Spanish legal system upon bureaucratic control. The emphasis is upon anti-evasion. Avoidance - in the British tax sense of the word - is little contemplated. The general intention of the various Articles in ISD and RISD is to weave a web of reports around the taxable event, such that the taxpayer is effectively enmeshed by the system. That which follows is an illustrative sample of the various provisions, rather than what might become a rather tedious rehearsal of the whole.

The Law dives straight into the heart of the matter at ISD Art 4 with some presumptions of chargeable transfers within the family. At Art 4 (1) a transfer is presumed to have been made when from the records available from the Fiscal Registries or other sources an individual's wealth[30] is seen to have diminished simultaneously with or before (though always within the 4-year period of proscription mentioned above) an increase in wealth of his/her spouse, descendants, heirs or legatees. ISD Art 4 (2) presumes a chargeable transfer when parents or grandparents, acting as representatives for their minor children (under 18 years) purchase assets on their behalf unless there is proof that the minors owned sufficient means in their own right, and that those means were applied to the purchase in question. Art 4 (3) says, rather comfortingly, that these presumptions will be brought to the attention of the taxpayers concerned in order that they may formulate such rebuttal or proofs as they deem appropriate, before any assessment is made.

28 By ISD Art 25, and RISD Art 48.

29 This is not a charter for evaders with stamina; patently the playing field is more than somewhat levelled in favour of Hacienda, by providing many opportunities for them to re-start the clock. The provision seems designed to alleviate the potentially otiose burden on a taxpayer of an historical unnoticed/unreported liability.

30 Here, as throughout the whole canon of Spanish personal tax law, one can perceive the control provided by Wealth Tax (*Impuesto sobre el Patrimonio* - IP).

ISD Art 8 introduces the neat concept of subsidiary responsibility. Financial intermediaries, bankers, insurance companies, stockbrokers and other such persons and also official functionaries, concerned in the transmission and the registration thereof of cash, bank accounts, stocks, proceeds of life assurance policies, or any similar matter without first assuring themselves that the transfer has been duly reported to the taxing authority, become subsidiarily liable for the payment of tax (ISD) which may be due.

ISD Art 32 requires at clause (1) the courts to inform the tax administration monthly of any judgments which may give rise to an increase in a person's wealth. At clause (2), those in charge of the Civil Registry must, within the first 15 days of each month inform the tax administration of all deaths during the previous month, and the addresses of the deceased. At clause (3) Notaries are required, upon request by the tax administration, to send, without charge and within 15 days copies of any deed or document concerning which they have acted professionally and must also furnish such other detail as may be requested. They are also required to send within the first 15 days of each quarter a comprehensive list of all documents authorised by them in the preceding quarter which may have a bearing upon deeds or contracts which may give rise to an increase in wealth chargeable to ISD. Clause 4 sweeps up most of the rest of the population by prohibiting the transmission of assets by judicial organs, financial intermediaries, associations, foundations, companies, any other entity public or private, functionaries and private individuals, without first checking that ISD has been paid, unless authorised to do so by the tax administration. Insurance companies are similarly caught by clause 5.

The Regulations underscore these provisions from the law. But at RISD Arts 99 and 100 they tighten the web still further by prohibiting public offices and registries, and specifically the Property, Mercantile, and Industrial Property Registries from registering any document unless appropriate reference has been made to the tax administration.

As I observed earlier, most of this is aimed at evasion. Such small neo-anti-avoidance measures as there are tend to aim at intra family manoeuvres, such as renunciation of rights under the forced heirship rules. They are, in general, designed to ensure that a lower co-efficient is not thereby achieved. The Deed of Family Arrangement[31] has no place, and could give rise to a double charge to ISD; practitioners considering such variations where there is Spanish sited property involved would be well to check the effect for ISD.

31 A procedure sometimes adopted in the UK in which the terms of a will may be varied (subject to safeguards) within two years of the death of the testator without a double charge to IHT.

Other Matters

Business Property Relief Prior to L66/1997, there was none (other than the ability to request deferral of payment of the tax). As rehearsed earlier in this article, a limited relief is now available for the family business within certain defined circumstances and conditions.

Quick Succession Relief Until introduced by L14/1996, there was no form of quick succession relief. In the light of that, it seems strange that commorientes clauses are rarely seen in Spanish wills. Perhaps the very limited degree of testamentary freedom available under the Civil Code is responsible. However, since L14/1996, "consecutive hereditary transmissions" - which by definition excludes transfers inter vivos - benefit from such a relief. The succession period is untypically generous at ten years, as is the quantum at 100% of the tax formerly paid. It is however, restricted to successive transmissions of "the same assets" (though limited substitution is permitted) and is available only to direct descendants.

Life Assurance Spanish life assurance is nearly always written on an own-life, own-benefit, basis. Naturally there is no opportunity to write policies in trust for a beneficiary. It is always possible to nominate a beneficiary, but this is a purely administrative annotation, and has no effect upon title. The proceeds of a life assurance policy are therefore assessable to ISD when the recipient is anyone other than the policyholder (usually the life assured), and are treated as any other asset passing to that recipient. A life assurance policy written in trust (say, a UK policy) for a spouse stands the risk of attracting twice the rate of tax: trustees will be unrelated to the recipient, and hence Group IV transferors, where the spouse would have been Group II. It is probably good planning therefore for a policy to be held on a life-of-another basis, since the recipient of the proceeds will also be the policyholder hence there is no transfer to be taxed.[32]

Cumulation Lifetime gifts from the same donor to the same donee are cumulated over a rolling three year period. Upon death, lifetime gifts made by the deceased within five years of his death are accumulated with transfers at death to the same recipient.

Double Taxation Relief There is no treaty with the UK concerning inheritances and gifts tax. ISD Art 23 provides a unilateral relief for "similar taxes paid abroad" to those liable by way of *obligación personal* (i.e. those resident in Spain). The

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32 If there is a savings element, there may be a charge to income tax on the policy gain. Note that ISD has some fairly comprehensive rules about the taxation of proceeds of insurance policies generally, and in certain circumstances insurance companies can be held to be jointly and severally liable (as opposed to merely subsidiarily liable) for payment of tax (ISD) due.

lesser of two sums may be deducted from the Spanish tax: a) the amount of foreign tax paid, or b) the result of applying the average rate of ISD on the gift/inheritance in question to those foreign assets on which foreign tax has been paid.

Patently, no relief is available where no foreign tax has been paid. The prime example of this would probably be the death of one of an English domiciled couple resident in Spain. There is no UK IHT to be relieved against the ISD on any transfer between those spouses.

Planning

General It should be remembered firstly that Spain's is an acquisitions tax, and that there may be some mismatch with the UK's transfer tax (IHT); secondly that a spouse is not an exempt beneficiary and that therefore first death planning is crucial.

Trusts Unsurprisingly, the Dirección General de Tributos cannot give any general guidelines for the tax treatment of interests in trusts, and can only deal with them on a case by case basis. It should be remembered by planners that the trigger for consideration of a charge to ISD is an increase in an individual's wealth. Receipts from trustees can fall with a resounding thud into this definition; the thud is due to the facts that (a) transfers from trustees will be inter vivos, so no personal allowance is available and (b) the body of persons composed by trustees is by definition (even if the trustees themselves are blood relatives) unrelated to the recipient, and that therefore the tax can be double that of a direct receipt from a close relative (spouse or parent, for example).[33]

Spouses As signalled above, inter-spouse planning is quintessential. This is particularly true of residents and the family home. The problem is exacerbated if the "spouses" are not married. Often, the most practical solution (where health, age, and so forth permit) may be to write cross-held life assurance policies on a life-of-another basis to provide the cash necessary to fund the tax.

This whole area can be vastly complicated by the forced heirship rules under the terms of which the children of the deceased are in general entitled to one third of the estate absolutely and a reversionary interest in a further third, leaving the surviving spouse with a life tenancy to one third of the estate, and perhaps an absolute interest

33 Evidently, a receipt from an "own benefit" settlement is likely to be a most painful experience (i.e. chargeable to ISD and with a minimum co-efficient of 2). Planners thinking about offshore settlements of non-UK sited assets by non-domiciled residents of the UK during the moments before the 17/20 deemed domicile provision bites, should be wary if the client expresses any future interest in taking up residence in Spain.

in the final third only if those were the terms of the deceased spouse's will (that final third being the only portion subject to full testamentary freedom). For those of British domicile, these rules apply only to Spanish-sited immoveable property.

"Common Law Spouses" Get married? (It can halve the charge to ISD!)

Children As the reader will have deduced, ISD draws no distinction between adult children and spouses, both being Group II recipients. The common "second death" approach to planning for IHT is therefore generally inappropriate as an approach to ISD. Provision for the surviving spouse is usually much more important.

Companies generally Although very far from being a general rule, in certain limited circumstances the interposition of a company may produce results which are on balance beneficial. The use of a non-Spanish company to hold assets (other than Spanish real property) can alter the situs of the gift. Tax valuation of unquoted shares of a Spanish company is a relatively crude affair and assets can often "trade" at an effective discount when put into a company.

Use of offshore companies In considering the use of offshore entities to hold Spanish sited assets, there are many factors to be taken into account. Where real property is concerned, not the least of these is the annual 3% Gravamen Especial, and the potential effects of Art 70 of the income tax Regulations. Also to be given serious consideration is the effect of Spain's Corporation Tax law, which deems a rental income to arise in consequence of use of a company's property, which income is subject to withholding tax (non-treaty rate 25%) on the gross rental in the hands of a non-resident company, or to the general or reduced rate for a resident company.

In general a resident recipient will gain no ISD advantage from the simple interposition of a non-resident company. A trust superimposed on the company may in certain circumstances avoid ISD but will bring other taxes with it, together with a greatly more complex compliance scene. This may be worth considering in some circumstances.

A non-resident recipient may benefit from the use of a property-owning company, but should be aware of that tide in the affairs of Spain which continues to move to negate such advantages where the property company is resident in a tax-haven.

It is just possible to hypothesise circumstances in which the use of an offshore company, even for residents, would result in an immediate saving of ISD. The circumstances, however, would be somewhat extreme, and the additional complications may be a disincentive (i.e. ultimately getting the value into the intended beneficiary's hands would be a whole further three-ring circus - though I suppose it would be a matter deferred for later).

Conclusion

This has been a somewhat breathless skate over the key features of an important tax. Inevitably it has left much unsaid; and much of that is to do with the interrelationships between this and other taxes. This is a tax the unplanned, or poorly planned, consequences of which can result, inter alia, in much sadness and financial worry, especially for a surviving spouse. In less emotional terms, and in larger estates, it can produce an unwanted and unexpected erosion of value and worth. Informed planning is crucial.