

# Legal 500

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**Spain**

**Tax Disputes**

**Contributor**

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This country-specific Q&A provides an overview of tax disputes laws and regulations applicable in Spain.

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## Spain: Tax Disputes

### 1. Is it necessary for a taxpayer to register with the tax authority? Are separate registrations required for corporate income tax and value added tax/sales tax?

Yes. Taxpayers must register through form 036 with the Spanish Tax Authorities ("STA") and obtain a Tax Identification Number ("TIN") that must be used in all tax related matters. The registration is the same for corporate income tax and value added tax/sales tax.

### 2. In general terms, when a taxpayer files a tax return, does the tax authority check it and issue a tax assessment – or is there a system of self-assessment where the taxpayer makes their own assessment which stands unless checked?

For most relevant taxes (CIT, VAT, Transfer Tax or Stamp Duty) self-assessment is the procedure used to file tax returns. The "declaration" procedure only remains for some minor taxes (local real estate capital gains tax, or inheritance and gift tax in some regions): the taxpayers provide the relevant information and the STA issue the relevant tax assessment.

### 3. Can a taxpayer amend the taxpayer's return after it has been filed? Are there any time limits to do this?

Yes. Taxpayers may amend their tax returns within a period of four years after its submission (i.e., the general period of the statute of limitations).

### 4. Please summarise the main methods for a tax authority to challenge the amount of tax a taxpayer has paid by way of an initial assessment/self-assessment.

#### Tax management procedures:

- Procedure to verify data ("Procedimiento de verificación de datos"): this procedure can be used by the STA when: (i) there are formal or arithmetic errors in the tax assessment; (ii) the data included in the tax assessment does not

match the data heard available to the STA; (iii) there is a clear misapplication of the tax regulations; or (iv) a clarification of a data included in the tax assessment is required, in so far it does not refer to the carrying out of economic activities.

- Procedure to verify values ("Procedimiento de comprobación de valores"): this procedure can be used by the STA to verify the value of income, products, goods and any other element used to appraise the tax liability.
- Limited verification procedure ("Procedimiento de comprobación limitada"): this procedure can be used by the STA to verify facts, events, elements, activities, operations, and any other circumstances related to the tax liability. The actions that the STA can perform in this procedure are limited as compared to the general tax audit procedure. In particular, the STA cannot: (i) request the financial statements of the taxpayer, (ii) request financial movements information to third parties or (iii) access the taxpayers' premises.

#### Tax audit procedure:

- This procedure is the widest procedure the STA can use to investigate a taxpayer.
- Within this procedure, the STA can request any type of documentation with tax significance, including the financial statements of the taxpayer.
- The STA can also access properties, business premises and any other premises where activities subject to taxation are carried out, provided that an administrative warrant is obtained. However, a court authorization is required to access the taxpayer's constitutionally protected domicile unless he/she waives this requirement.

### 5. What are the time limits that apply to such challenges (disregarding any override of these limits to comply with obligations to relief from double taxation under a tax treaty)?

The statute of limitations for taxes is four years. As a rule, this period runs from the day following the day on which

the statutory period for filing the corresponding return or self-assessment ends.

## 6. How is tax fraud defined in your law?

From an administrative side, tax fraud is defined as the failure to pay all or part of the tax debt that should result from the correct self-assessment in a given period.

From a criminal law standpoint, tax fraud is defined as any act or omission aimed at defrauding the state, regional or local tax authorities. For such offence to exist, both an objective and a subjective element must be present. The objective element refers to the fact that the unpaid debt exceeds EUR 120,000 while the subjective element requires the knowledge and the will to carry out the fraudulent acts. Spanish criminal law regulates an aggravated offence when (i) the amount of the unpaid tax debt exceeds EUR 600,000; (ii) the fraud is committed within an organisation or a criminal group and; when (iii) mechanisms are used to conceal the identity of the taxpayer.

## 7. How is tax fraud treated? Does the tax authority conduct a criminal investigation with a view to seeking a prosecution and custodial sentence?

The STA must refer a given tax audit to the Public Prosecutor if they consider that tax fraud concurs. The Public Prosecutor's Office will decide whether or not to initiate criminal proceedings. If they decide so, a judicial procedure will be initiated seeking a fine or a custodial sentence; if not, the STA will continue the tax audit.

## 8. In practice, how often is a taxpayer audited after a return is filed? Does a tax authority need to have any justification to commence an audit?

There are no statistics on how often a taxpayer is audited after a return is filed. The initiation of a tax audit is based on a risk-approach criteria and must be justified: the taxpayer must be included in the annual Tax Audit Plan, which is a document that establishes, on an annual basis, the action programmes, priority areas and guidelines that serve to select the taxpayers on which tax audits must be initiated in the year in question. If not, the Chief Auditor (*Inspector Jefe*) must issue a reasoned decision including a given taxpayer in the audit plan.

## 9. Does the tax authority have to abide by any standards or a code of conduct when carrying out audits? Does the tax authority publish any details of how it in practice conducts audits?

The tax audits procedures are regulated in the General Tax Law (and its regulations) and therefore they must comply with the provisions established on it. Noncompliance with these provisions may result in the annulment of the tax audit.

## 10. Does the tax authority have the power to compulsorily request information? Does this extend to emails? Is there a right of appeal against the use of such a power?

The Spanish Tax Authority, through the tax audit procedure, may request information that will be useful to verify the taxpayer's compliance with his/her tax obligations. This information includes, among others, documents, accounting books, computer files and even correspondence (i.e., emails) with tax implications, if it considers it necessary for the tax audit procedure to be carried out. In addition, the STA may access enter the premises, businesses, or other establishments of the taxpayer and seize documents.

Taxpayers cannot appeal these information requests but can appeal the administrative act issued as a result of the tax audit procedure in which the information has been requested.

## 11. Can the tax authority have the power to compulsorily request information from third parties? Is there a right of appeal against the use of such a power?

Yes, all persons and entities, whether public or private, must provide the information requested by the STA. The requirement may concern information related to their tax obligations, or economic and financial relations with other entities or persons.

The third party who is requested to provide information does have the right to appeal the request through the submission of an administrative appeal (*recurso de reposición*) or an economic-administrative appeal (*reclamación económico-administrativa*) within one month from the day following the day on which the request was notified.

## 12. Is it possible to settle an audit by way of a binding agreement, i.e. without litigation?

Yes. Tax audits may end with an *acta de conformidad* or *acta con acuerdo* in which the taxpayer agrees with the content of the tax audit. By doing so, sanctions must be reduced up to 65% (for *actas con acuerdo*) or 30% (for *actas de conformidad*). The taxpayer has the right to appeal the administrative decision deriving from an *acta de conformidad*, but not the *acta con acuerdo*, that only can be challenged in extraordinary circumstances. The sanction reduction –and the additional 40% reduction if the sanction is timely paid– will not apply in these cases and the taxpayer shall reimburse the amount of the reduction applied.

## 13. If a taxpayer is concerned about how they are being treated, or the speed at which an audit is being conducted, do they have any remedies?

Yes. Taxpayers may defend their rights when challenging the administrative act, e.g. the tax assessment. The duration of the tax audit cannot exceed 18 months or 27 months in specific circumstances.

## 14. If a taxpayer disagrees with a tax assessment, does the taxpayer have a right of appeal?

Yes. The taxpayer's right to appeal can be exercised by means of an administrative appeal (*recurso de reposición*) or an economic-administrative appeal (*reclamación económico-administrativa*), which cannot be filed simultaneously. The Economic-Administrative courts are administrative courts, incorporated in the Ministry of Finance. If the taxpayer claims are dismissed, a judicial appeal must be filed.

## 15. Is the right of appeal to an administrative body (independent or otherwise) or judicial in nature (i.e. to a tribunal or court)?

The taxpayer's "initial" right of appeal has an administrative nature (administrative appeal and economic-administrative appeal). If the administrative appeal is dismissed, the taxpayer may submit a judicial appeal before courts.

## 16. Is the hearing in public? Is the decision

## published? What other information about the appeal can be accessed by a third party/the public?

While administrative hearings are not public, court hearings are usually public under Spanish legislation. However, the administrative judicial procedure is mostly written, so no hearings are usually held.

Decisions of the Economic-Administrative Courts are usually published online pursuant the Spanish legislation if they have great relevance and impact. Court decisions are published.

## 17. Is the procedure mainly written or a combination of written and oral?

The administrative procedure is mainly written. However, some procedures could include or require oral phases, especially those relating to the gathering of evidence, examination of expert witnesses, among others.

## 18. Is there a document discovery process?

The Spanish tax legislation does not foresee a document discovery process per se. Nevertheless, the tax regulations governing the administrative procedure establish the obligation for the Administration to provide the so-called "*expediente administrativo*" (administrative file) to the interested party.

## 19. Are witnesses called to give evidence?

The use of witnesses to give evidence mostly relates to a oral procedure so this means of gathering evidence is quite unlikely in the Spanish system. However, the Spanish legislation allows the STA or the judicial bodies to compulsorily request information from third parties.

## 20. Is the burden on the taxpayer to disprove the assessment the subject of the appeal?

Yes. Acts carried out by Spanish Tax Authorities shall be presumed valid and shall produce effects from the date on which they are issued –presumption of legality of the administrative act–. Although this presumption of legality of the administrative action does not imply always shifting the burden of proof to the taxpayer: the STA shall justify their tax assessments/settlements whereas the taxpayer shall prove the rights they exercise (such as when claiming tax benefits or credits).

## 21. How long does an appeal usually take to conclude?

Whereas the administrative appeal could be concluded within 6 to 12 months, depending on the complexity, economic-administrative appeals usually take from 3 to 4 years to be processed. In some cases there is a double instance (Regional Economic-Administrative Court and Central Economic-Administrative Court). Considering that the judicial appeal may take 3-4 more years, complex cases can take up to 10-12 years to be concluded.

## 22. Does the taxpayer have to pay the assessment pending the outcome of the appeal?

Yes, the *solve et repete* principle applies. The submission of an appeal does not imply the automatic suspension of the tax debt because tax assessments are enforceable since they are issued by the STA. Suspension may be granted if the taxpayer offers a guarantee before the STA.

## 23. Are there any restrictions on who can conduct or appear in the appeal on behalf of the taxpayer?

A taxpayer with full capacity can conduct or appear in the administrative appeal. None of the administrative appeal proceedings before STA or the Economic-Administrative Courts require the taxpayer's representation by an attorney (legal representative) or a lawyer. However, a legal representation is needed to appear before court: taxpayers will need to grant powers to an attorney (*procurador*) in cases exceeding EUR 30,000.

## 24. Is there a system where the "loser pays" the winner's legal/professional costs of an appeal?

Yes, within the judicial procedure, legal/professional costs of an appeal may be imposed on the party whose claim has been dismissed, unless the court finds serious doubts about the facts or the applicable law. However, the amount is usually limited by courts, usually up to EUR 5,000, but this amount depends on each tribunal.

## 25. Is it possible to use alternative forms of dispute resolution – such as voluntary mediation or binding arbitration? Are there any restrictions on when this alternative form of dispute resolution can be pursued?

No, there are no alternative forms of dispute resolution in

Spain. However, the STA set up a Large Business Forum (*Foro de Grandes Empresas*) as a cooperative relationship body to promote the collaboration between large companies and the tax administration sharing the problems that may arise in the functioning of the tax system.

## 26. Is there a right of onward appeal? If so, what are all the levels of onward appeal before the case reaches the highest appellate court.

Yes, once the available administrative appeals (administrative appeal and economic-administrative appeal) are dismissed, the taxpayer may resort to the courts.

The Spanish courts (*tribunales contencioso-administrativos*) with competence in tax matters are the following:

- National High Court (*Audiencia Nacional*): deals with appeals against decisions of the Central Economic-Administrative Court.
- High Courts of Justice (*Tribunales Superiores de Justicia*): deals with appeals against decisions of the regional Economic-Administrative Courts.

Some of the judgments of these courts can be appealed before the Spanish Supreme Court. However, the access to this appeal is reduced as far as the Supreme Court must declare the existence of an objective interest (*interés casacional*).

Local taxes are governed by different rules as per the appeal regime.

## 27. What are the main penalties that can be applied when additional tax is charged? What are the minimum and maximum penalties?

In the event that the taxpayer does not pay, in whole or in part, the amount of the debt resulting from a tax return, a penalty may be imposed if the infringement is attributable to the taxpayer as a consequence of its intention or recklessness.

The sanction will range from 50 to 150 per cent of the unpaid tax, depending on whether the infringement is classified as minor, serious or very serious. The use of fraudulent means or the use of nominees/shell entities shall automatically lead to the qualification of the infringement as serious or very serious, as well as the

incorrect keeping of account books when it has a certain impact on the unpaid tax.

## 28. If penalties can be mitigated, what factors are taken into account?

The tax penalties applied shall be reduced by 65 per cent (in case of special agreement between the Spanish Tax Authorities and the taxpayer – *actas con acuerdo*) or by 30 per cent (in case of *actas de conformidad*).

Additionally, except for the 65 per cent reduction, a further reduction of 40 per cent could be applied if the amount of the penalty is paid in full during the voluntary period without having requested an appeal.

## 29. Within your jurisdiction, are you finding that tax authorities are more inclined to bring challenges in particular areas? If so, what are these?

Spanish tax authorities have significantly increased their scrutiny in the following areas:

- Tax audit proceedings of multinational groups and large companies. The main areas of performance are anti-tax avoidance measures, especially hybrid instruments, controlled foreign companies (CFCs), financial expense deduction and tax treaty abuse.
- Control of tax and company groups.
- The principal purpose test and effectiveness of substance requirements required by the Spanish anti-abuse regulations on non-resident entities recipient of payments derived from interest, royalties and dividends from Spanish entities, i.e., the business purpose test of non-resident entities benefitting from tax

incentives derived from EU Directives or double taxation treaties.

- In the field of transfer pricing within the scope of multinational corporate groups, the tax authorities are focusing on: (i) the review of the correct allocation of profits by Spanish entities according to the risks and functions assumed and performed, respectively, by the Spanish entity; (ii) recharacterization of business models adopted by Spanish entities according to the real functions and risks; and (iii) determination of PE in Spain derived from the functions carried out by dependent commercial agents (e.g. substantial functions vs ancillary or auxiliary functions), etc.
- Taxation derived from operating via a company without their own means and resources by individual professionals due to the different rates for corporate tax and personal tax purposes.
- Tax residency issues and the implications for direct taxes and formal obligations.
- Customs control has been strengthened for avoidance of tax fraud, as well as in relation to several sectors such as e-commerce and the digital economy.
- The transposition of the Directive on Administrative Cooperation (DAC6) is focusing attention on those transactions that are subject to reporting under the DAC6 provisions.
- In the field of VAT, the tax authorities have strengthened their control thanks to implemented systems and regimes such as the Immediate Supply of Information (SII) system, which means an in-time electronic supply of invoicing records through the tax authorities' website, which is mandatory for corporations.
- Derivation claims to the company directors.

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