



# Tax developments for inbound expatriates, investors, workers and venture capital fund managers

Tax Alert



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After months of parliamentary negotiation, Law 28/2022 of 21 December 2022, to Promote the Start-up Ecosystem (widely known as the “Start-ups Law”) has been published in the Official State Gazette on 22 December 2022”.

The Start-ups Law provides for a set of **tax incentives** aimed at attracting talent and investment to these kinds of companies. It also ushers in other relevant tax measures intended, on the one hand, to incentivise the establishment in Spain of non-resident workers and entrepreneurs and, on the other, to attract investment by venture capital companies.

The Law will enter into force on 23 December 2022, the day after its publication in the Official State Gazette, with its main tax-related provisions taking effect as of 1 January 2023.

We set out below the most notable tax-related developments for investors, entrepreneurs, inbound expatriates and venture capital managers, the applicability of some of which is subject to evidence of “start-up” status, as provided for in the Law.

## 1. Incentives for workers and investors

**PIT/NRIT – Taxation of the delivery of shares, or share or stock options, to start-up employees.**

The PIT exemption envisaged for the delivery of shares or stocks to active workers of start-ups includes certain improvements with respect to that generally applicable for PIT purposes. Namely:

- It is increased, as of 1 January 2023, to a maximum of **Euros 50,000** per year per start-up employee (compared to the Euros 12,000 maximum ordinarily applicable).
- Start-ups are released from the requirement whereby the shares or stocks in question must be offered on the same terms to all of the workers of the company, group or subgroups. Nonetheless, the relevant offer must be made as part of a general company-wide remuneration policy and contribute to worker participation in the company.
- The scope of this exemption is expressly broadened to include non-resident individuals. The Start-ups Law amends article 14.1.a) of the Revised Non-resident Income Tax Law to

include within its scope remuneration in kind that is exempt under article 42.3 of the PIT Law.

- Where the delivery of stocks or shares is the result of the exercise of stock options previously granted to workers by the start-up, the eligibility requirements for classification as a start-up must have been met at the date on which the option was granted.
- Any employment income that is not exempt from taxation because the above limit is exceeded is to be recognised the sooner of:
  - o when the shares are admitted to trading on a stock market or any other Spanish or foreign multilateral trading facility;
  - o upon transfer of the shares by the taxpayer; or
  - o once ten years have elapsed as of the date of delivery of the shares or stocks, whichever occurs first.

**A special valuation rule** is introduced for these stocks or shares: they are to be valued according to the value used by an independent third party in the last capital increase performed in the year preceding the year in which the company stocks or shares are delivered. Where no such capital increase has taken place, the general rule of market value at the date of delivery to the worker shall apply.

To facilitate the structuring of this form of remuneration, the Law allows start-ups to issue treasury shares. Specifically, private limited start-up companies may stipulate in their articles of association that their directors, employees or other collaborators are to be remunerated through the delivery of shares, and they are authorised to purchase treasury shares accounting for up to 20% of the share capital in order to implement the remuneration plan.

### Start-up status and certification

The above incentive is subject to the entity in question being classed as a start-up company per the provisions of the Start-ups Law. Start-up status is temporary and the associated benefits therefore cease to apply under certain circumstances.

Thus, to be classed as a start-up, the following requirements must be met simultaneously:

- **No more than five years may have elapsed since the company's incorporation was registered** on the relevant Mercantile Register or Register of Cooperatives. This limit may be longer (seven years) where the start-up in question is a company operating in the biotechnology, energy, industrial or another strategic sector, or has developed proprietary technology in Spain.
- The entity must not have been created as the result of a merger, spin-off or change of corporate form.
- It must have its corporate headquarters or a permanent establishment in Spain, and the majority of its workforce must have been hired in Spain.
- It must not be listed or have distributed dividends.
- It must be **innovative**, which is taken to be the case where its corporate purpose is to solve a problem or improve an existing situation by developing products, services or processes which are new or substantially improved compared to the state of the art, and which carry a risk of technological or industrial failure.

Where the start-up is part of a group of companies, the above requirements must be met by both the group as a whole and each of the companies comprising it. Regard shall be had for these purposes to the definition of group set forth in article 42 of the Spanish Commercial Code.

Certification of the above is to be requested from Empresa Nacional de Innovación S.A. (ENISA), which will assess fulfilment or otherwise of the requirements for obtaining start-up status. Administrative silence should be interpreted as certification of such status by ENISA.

Start-up status must be registered on the competent Mercantile Register or Register of Cooperatives and such registration will suffice for the purpose of availing of the benefits and special treatment provided for in the Law. Nonetheless, the State Tax Agency has the power to verify whether the eligibility requirements for the tax incentives are met and continue to be met.

### Termination of benefits and special conditions

The start-up and its investors will not be eligible (or will cease to be eligible) for the benefits and special conditions provided for in this Law where:

1. Five or seven years have elapsed from the date on which the start-up was created.
2. Any of the other requirements listed in the preceding section cease to be met.
3. The start-up ceases to exist before the above time period elapses.
4. The start-up is acquired by another company that is not classed as a start-up.
5. The start-up's annual revenues exceed Euros ten million.
6. The start-up engages in an activity entailing significant environmental damage.
7. Shareholders directly or indirectly owning a stake of at least 5% in the share capital or the directors of the start-up are found guilty of certain criminal offences in a final non-appealable judgment.

### PIT - Tax credit for investing in newly or recently created companies.

The PIT regulations provide for a state tax credit for amounts paid in respect of the subscription of shares or stocks in newly or recently created companies.

As of 1 January 2023, the terms of this tax credit (not only for start-ups) are improved as follows:

- (i) the tax credit rate is increased from 30% to 50%;
- (ii) the maximum investment eligible for the tax credit is to increase from Euros 60,000 to Euros 100,000, and will correspond to the acquisition value of the subscribed stocks or shares;
- (iii) this measure will apply provided the stocks or shares have been acquired at the date of incorporation of the entity or by means of a capital increase in the five years following its incorporation (as compared to the three years provided for in the current rules);
- (iv) certain privileges are envisaged in relation to this tax credit for investments in Spanish start-ups: (i) the investment period is increased to seven years; (ii) founding shareholders may take this tax credit irrespective of their percentage stake in the entity's share capital. This is because the above founding members are not subject to the general prohibition on direct or indirect ownership -together with their spouse or other individuals to whom they are directly or indirectly related, by consanguinity or affinity, up to and including the second degree- of more than 40% of the share capital of the start-up in question.

## 2. Inbound expatriates regime

The Start-ups Law introduces certain relevant amendments to the inbound expatriates regime provided for in article 93 of the PIT Law, with a view to attracting foreign talent to Spain.

Individuals acquiring tax residence in Spain as a result of being posted to this country may opt to be taxed according to the NRIT rules during the year in which they acquire their Spanish tax residence status and the five following tax periods. Where this regime is applied, taxpayers are only taxed in Spain on income obtained in Spanish territory, subject - with certain specific exceptions - to the NRIT rules for the taxation of income obtained in Spain without a permanent establishment.

We set out below the most relevant amendments to this regime under the new Law, set to take effect as of **1 January 2023**:

- This regime may be applied where the posted individual has not been resident in Spain during the **five tax years preceding the year in which they were posted to Spain** (note that under the current regulation this period is ten years).
- The taxpayer may have been posted to Spain in the first year in which the regime is to be applied or in the preceding year.
- The list of **taxpayers eligible for the regime** is also extended:
  - o In addition to the taxpayers already eligible - those with employment contracts commencing an employment relationship or relationship governed by the articles of association, or those under an international assignment ordered by their employer- **the regime is extended to workers** posted to Spain to **work remotely using solely IT, telematic and telecommunications resources and systems**, irrespective of whether or not the posting is ordered by the employer. This condition is deemed met if the worker holds an international telework visa.
  - o The regime may also be applied to individuals acquiring **director** status at a Spanish company. The main development here is that the requirement whereby the director must not hold a stake affording related-party status (generally speaking, per article 18 of the CIT Law, this means a stake equal to or exceeding 25%) will only apply where the entity in question is an asset-holding company.
  - o It may also be applied where the worker is posted to Spain to engage in an **economic activity classed as entrepreneurial**. To this end, entrepreneurial activity is taken to mean an activity that is innovative and/or of particular economic interest to Spain, and in respect of which a favourable report has been issued by ENISA.

Likewise, the regime is applicable where the worker posted to Spain is a **highly qualified professional who is to render services to start-ups or engage in training, research, development or innovation activities**, for which they will receive remuneration accounting for over 40% of their employment income and income from economic activities. The term “highly qualified professional” and the requirements for activities to be classed as training, research, development and innovation will be defined in the future implementing regulations.

- The possibility of opting for this special regime is extended to the worker’s spouse or the other parent of their children (where they are unmarried), children under the age of 25 and disabled children, irrespective of their age, where:
  - a. They travel to Spain with the main inbound expatriate or on a subsequent date, provided that the first tax period in which the special regime is applicable to the main inbound expatriate has not ended.
  - b. They acquire tax residence in Spain.
  - c. They were not considered resident in Spain during the five tax periods prior to their displacement to Spain.
  - d. They do not obtain income that could be classified as having been obtained through a permanent establishment located in Spain.
  - e. The sum of the net taxable income in each of the tax periods in which they are subject to this special regime is lower than the net taxable income of the main inbound expatriate.

The special regime will apply in any successive tax periods in which, where such conditions are met, it also applies to the main inbound expatriate.

Elsewhere, the Law includes the following amendments to the **subject matter** of the inbound expatriates regime for NRIT purposes:

- All remuneration in kind that is exempt under article 42.3 of the PIT Law (delivery of stocks or shares to active workers, meal vouchers, transport passes, health insurance premiums, etc.) is exempt from NRIT.
- In addition to employment income, all income from economic activities classed as entrepreneurial activities will be deemed obtained in Spain.

### 3. Developments for fund managers: tax treatment of carried interest

Effective as of 1 January 2023, the Law regulates the tax treatment of the additional remuneration payable to venture capital fund managers for successful fund management (“carried interest”).

This remuneration is classed as **employment income** and is eligible for a 50% reduction for PIT purposes. This treatment will apply to income deriving directly or indirectly from shares, stocks or other rights, including **success fees**, affording special dividend rights in certain entities, where the following requirements are met:

- The **entity** from which the income derives must be:
  - a) A closed-end alternative investment fund of one of the types regulated under Directive 2011/61/E, including in some of the following categories:
    - i) The entities defined in [article 3 of Law 22/2014 of 12 November 2014 regulating venture capital institutions, other closed-end type collective investment undertakings and closed-end type collective investment undertaking managers](#).
    - ii) The European venture capital funds regulated in Regulation (EU) no. 345/2013.
    - iii) The European social entrepreneurship funds regulated in Regulation (EU) no. 346/2013.
    - iv) The European long-term investment funds regulated in Regulation (EU) no. 2015/760
  - b) Another like investment body.

- **The recipient** must be a director, manager or employee of one of the above entities, their management entities or an entity of their group
- The special dividend rights arising directly or indirectly from stocks, shares or other rights, including success fees, must be subject to the investors obtaining a minimum guaranteed return to be defined in the regulations or articles of association of the entity in question and must be retained for at least five years, subject to certain exceptions such as in the case of early settlement. The retention requirement does not apply in the case of mortis causa transmission of these rights.

The 50% tax reduction for PIT purposes will not apply where the special dividend rights arise directly or indirectly from an entity resident in a country or territory classed as a non-cooperative jurisdiction or with which no arrangement for mutual assistance in the exchange of tax information exists.

#### 4. Other considerations

The entry into force of these measures places Spain at the forefront in terms of taxation in Europe, with one of the most attractive special systems among member states, thus calling for a review of:

- Corporate plans in place to attract/retain talent, in light of the new special regime for inbound expatriates and its scope of application.
- Plans concerning the remuneration of/investment in personnel at start-ups, to ensure the best possible tax treatment, aligned with these new tax incentives.
- The way in which remuneration in respect of successful management by venture capital fund managers should be structured, to enable them to benefit from the envisaged reduction.

The KPMG People Services team is formed by professionals with proven expertise in these matters. They would be delighted to meet you to discuss any concerns you may have in greater depth.

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