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The obligation to withhold and the role of "mediators" in payments made to non-residents

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The Spanish Directorate-General for Taxation analyses the requirements that must be met in order for a payer of income to non-residents to be considered a simple payment mediator exempt from withholding tax.

The Directorate-General for Taxation ("DGT"), in its formal binding answer to a taxpayer's query V0367-18, of 12 February 2018, analyses the case of a Spanish undertaking engaged in managing the rental of third-party owned tourist dwellings located in Spain - management conducted through the use of internet platforms - in order to determine whether such an undertaking has the obligation to withhold tax on the rental income received and subsequently paid to the owners of the dwellings, some such individuals not resident in Spain, after deducting the fees that the undertaking charges for its management.

The answer given by the DGT is based on the provisions of Spanish legislation, although with the caveat that a double taxation agreement might be applicable, an unknown because the taxpayer querier deferred to above does not provide information on the tax residence of the dwelling owners.

Thus, from an domestic perspective, the DGT begins by recalling both the literal wording of art. 12(1) of the Non-Resident Income Tax (Recast) Act - referring to the taxable event of such tax - and of art. 13(1) of the same legal corpus, insofar as providing that the income earned by the dwelling owners not resident in Spain may be subject to taxation under that tax in two cases: firstly, in the

case of earnings from business activities or operations carried on through a permanent establishment situated in Spanish territory (para. (a)) and, secondly, in the case of direct or indirect earnings from real estate situated in Spain or from rights relating to them (para. (g)).

Now, with regard to the possibility of considering that the income earned by non-residents has been generated through a permanent establishment, and this in those cases where the rental of real estate is for touristic use, the DGT refers to the formal binding answer V1241-17, of 19 May, which already addressed this issue. In that regard, it then concluded that the above condition would be met when, in accordance with art. 27 of Act 35/2006, the income earned by the owners could be understood to be derived from carrying on a business activity, the latter being an aspect which, in turn, was the subject of the formal binding answer V1188-15 of 16 April. In that case, the DGT determined that, if the rental of the dwelling for touristic use was supplemented by the provision of services specific to the hotel industry such as "restaurant, cleaning, laundry and other similar services", the income earned from the rental of the dwelling for touristic use would be characterised as earnings from business activities, in accordance with the provisions of the aforementioned art. 27 of the Personal Income Tax Act.

In view of the foregoing, and given that such information cannot be inferred from the written query, the DGT assumes that, in this case, the income earned in Spain by non-residents for tax purposes from the rental of real estate does not constitute business activity and, therefore, is subject to taxation in Spain, in accordance with the provisions of art. 13(1)(g) of the Non-Resident Income Tax (Recast) Act.

At this point, and in relation to the question raised regarding the obligation to withhold tax on such income, the DGT jointly analyses the provisions of arts. 31(a) and 9 of the Non-Resident Income Tax (Recast) Act. The obligation to withhold and pay on account in respect of the income subject to this tax paid by "undertakings, including undertakings under an attribution system, resident in Spanish territory" is inferred from the aforementioned provisions, unless it is understood that such undertakings limit themselves to a simple mediation by paying amounts on behalf and on the instructions of a third party, in which case there is no obligation to withhold.

Given the importance of the concept of "payment mediation", the DGT recalls the conditions which should be met in order to be able to consider that the role of the payer is that of a mere mediator, requirements which it laid down in one of its answers (30 December 1992) concerning payments made by insurance companies to their agents. In particular, it then referred to the following conditions: the third party must be the party obliged to pay, he must identify the recipient, he must quantify the income and he must make the necessary funds available to the mediator. In the light of these facts, the mediator is not obliged to withhold.

Hence, applying that standard, repeated in answers such as V0986-06 of 25 May or V0622-14 of 7 March, the DGT concludes, in the case under analysis, that the querier may be considered to carry out a simple payment mediation when the end users of the dwellings, that is to say, the

persons staying in them, accurately and clearly identify the owner of the same (this cannot be deduced from the information provided in this case, as it is not clear whether or not the end user is informed as to the identity of the dwelling owner), quantify the income and make it available to the querier for payment to the latter.

However, the fact that such circumstances exempt the mediator from the obligation to withhold does not mean that the mediator does not have a formal obligation to provide information regarding these assignments of the right to use tourist dwellings located in Spanish territory, as follows from the provisions of art. 54 *ter* of Royal Decree 1065/2007.

On the other hand, if all of the above conditions are not met, the querier cannot be considered a simple payment mediator, in which case it would be understood that its payment of income requires the fulfilment of the material and formal obligations that affect withholding agents, to which the DGT has also referred.