US/Spain Tax Regularization and FATCA Considerations
US/Spain Estate Planning Issues

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1. **Case Study**

**JOHN**
- Nationality → US
- Residency → ES

**ANA**
- Nationality → ES
- Residency → ES
- (Green-card holder)

**ASSETS:**
- Bank accounts
- Property

**HEIRS:**
- **MARTIN** /son
  - Residency → ES
- **JUAN** /son
  - Residency → US
- **MARIA** /daughter
  - Residency → US

- 1986: Ana and John meet and marry in NYC
- 1988: They move to Madrid, Spain
- 2016: John dies in Madrid
2. What are John and Ana’s income and wealth tax obligations when becoming Spanish tax residents in Madrid?

- **Personal Income Tax (PIT) and Wealth Tax (WT) in 2016**

- John and Ana are subject to PIT and WT

<table>
<thead>
<tr>
<th>Personal Income Tax (PIT)</th>
<th>System</th>
<th>Tax rate (%)</th>
<th>Accrual date</th>
<th>Filing period</th>
<th>Allowances</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Worldwide basis</td>
<td>General income: 19-43.50</td>
<td>December 31</td>
<td>June 30</td>
<td>Applicable</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Savings income: 19-23</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wealth Tax (WT)</td>
<td>Worldwide basis</td>
<td>0.2% - 2.5%</td>
<td>December 31</td>
<td>June 30</td>
<td>100% tax rebate in Madrid</td>
</tr>
</tbody>
</table>
What are the Spanish tax reporting obligations?

**Form 720. Reporting declaration of assets and rights located abroad**

- **Persons who must report:**
  - In general, individuals and companies resident in Spain who hold or are beneficiaries of assets located abroad on or before December 31

- **Assets to be reported:**
  - Accounts in financial institutions abroad
  - Securities, insurance and income deposited, managed or earned abroad
  - Real estate assets and interests on real estate situated abroad
4. John and Ana did not report their US assets in Spain. What can they do?

- **Consequences of failing to file Form 720**

  - **Formal penalties:**
    - A fine shall be levied in the amount of 5,000€ per data or group of data with respect to each asset, subject to a minimum of 10,000€ per each category of assets
  
  - **Unjustified capital gain (Art. 39.2 PIT Act):**
    - Having, declaring or acquiring assets in respect of which Form 720 has not been filed, will be considered as an unjustified capital gain (i.e. undeclared income) that will be included in the general tax base (43.5%)
    
  - **Exception** → It will not apply if the taxpayer can prove that: (i) the ownership of such assets and rights correspond to income that has already been declared or (ii) that such assets and income were obtained when the taxpayer was not tax resident in Spain

  - **Penalty:**
    - Failure to file Form 720 will imply a penalty of 150% of the payable tax liability described above
4. John and Ana did not report their US assets in Spain. What can they do?

- **Tax regularization**
  - Filing Forms 720 of last 4 years:
    - A fine shall be levied in the amount of 100€ per data or group of data with respect to each asset, subject to a minimum of 1,500€ per each category of assets, in the event that Form 720 is filed beyond the legal deadline without previous notification from the Spanish Tax Authorities.
  - Filing PIT and WT returns of last 4/5 years (5%-20% surcharges and delay interest)
  - Potential penalty of 150% (avoidable, based on General Tax Law, the Spanish Constitution and
Form 720. Violation of the Spanish Constitution and infringement of EU Law

- Art. 39.2 of PIT Act has been widely criticized as it is contrary to several constitutional principles (legal certainty, non bis in idem, proportionality, economic capacity and non-retroactivity of unfavorable punitive measures)

- Possible infringement of EU Law
  - Several complaints against Form 720 have been filed to the European Commission, as it is considered to be contrary to the following EU principles and freedoms:
    - The free movement of capitals and persons
5. John and Ana did not report their Spanish assets in the US. What can they do?

- **U.S. Voluntary Disclosure Programs**
  - 2014 Offshore Voluntary Disclosure Program ("OVDP")
  - Streamlined Filing Compliance Procedures ("Streamlined")
  - Delinquent FBAR Submission Procedures
  - Delinquent International Information Return Submission Procedures
  - "Quiet" Voluntary Disclosure
John and Ana did not report their Spanish assets in the US. What can they do?

U.S. Voluntary Disclosure Programs

- The IRS voluntary disclosure programs enable taxpayers to correct prior omissions and meet their federal tax obligations while mitigating the potential penalties of continued non-compliance.
- I.R.M. 9.5.11.9 provides that a voluntary disclosure occurs when the communication is truthful, timely, and complete.
- A voluntary disclosure will not automatically guarantee immunity from prosecution; however, a voluntary disclosure may result in prosecution not being recommended.
- Since OVDP began in 2009, there have been more than 54,000 disclosures. The IRS has collected more than $8 billion from this initiative.
- More than 30,000 taxpayers have used Streamlined to come back into compliance with U.S. tax laws. Two-thirds of these have used the Streamlined procedures since the IRS expanded the eligibility criteria in June 2014.
John and Ana did not report their Spanish assets in the US. What can they do?

**U.S. Voluntary Disclosure Programs**

- **2014 Offshore Voluntary Disclosure Program ("OVDP")**
  - The OVDP is specifically designed for taxpayers with exposure to potential criminal liability and/or substantial civil penalties due to a *willful* failure to report foreign financial assets and pay all tax due in respect of those assets
  - The current OVDP was modified in 2014 and is the successor to prior voluntary programs offered in 2012, 2011 and 2009

- OVDP pre-clearance fax and OVDP Letter

- File delinquent or amended U.S. tax returns and FBARs for past 8 years
- Pay tax, interest, statutory penalty on underpaid tax of 20 or 25 percent, plus a "Title 26 miscellaneous offshore penalty" equal to 27.5 percent (increased to 50 percent in certain circumstances) of the highest aggregate balance/value of the unreported foreign financial assets during the covered 8 year period
U.S. Voluntary Disclosure Programs

• Streamlined Filing Compliance Procedures (“Streamlined”)
  - First offered on September 1, 2012, but available only to non-resident, non-filers
  - On June 18, 2014, expanded Streamlined to accommodate a wider population of U.S. taxpayers living outside the country and, for the first time, to certain U.S. taxpayers residing in the United States
  - Taxpayers must certify that their failure to report foreign financial assets and pay all tax due in respect of those assets resulted from non-willful conduct on their part
  - Non-willful conduct is conduct that is due to negligence, inadvertence, or mistake or conduct that is the result of a good faith misunderstanding of the requirements of the law
  - A taxpayer who is eligible will not be subject to failure-to-file and failure-to-pay penalties, accuracy-related penalties, information return penalties, or FBAR penalties

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* U.S. Voluntary Disclosure Programs
  
  **Streamlined**
  
  - Streamlined Foreign Offshore Procedures
    
    - Meet the applicable non-residency requirement
    
    - File delinquent or amended U.S. tax returns for past 3 years
    
    - File delinquent or amended FBARs for past 6 years
    
    - Form 14653, Certification by U.S. Person Residing Outside of the United States for Streamlined Foreign Offshore Procedures
5. John and Ana did not report their Spanish assets in the US. What can they do?

- **U.S. Voluntary Disclosure Programs**
  - **Streamlined**
    - Streamlined Domestic Offshore Procedures
      - Fail to meet the applicable non-residency requirement
      - File amended U.S. tax returns for past 3 years (delinquent returns not permitted)
      - File delinquent or amended FBARs for past 6 years
      - Form 14654, Certification by U.S. Person Residing in the United States for Streamlined Domestic Offshore Procedures
    - Payment of tax and statutory interest, plus a "Title 26 miscellaneous offshore penalty" equal to 5 percent of the highest aggregate balance/value of the unreported foreign financial assets during the covered tax return and FBAR period.
5. John and Ana did not report their Spanish assets in the US. What can they do?

- **U.S. Voluntary Disclosure Programs**

  - **OVDP and Streamlined Issues**
    - Once a taxpayer makes a submission under Streamlined, the taxpayer may not participate in OVDP.
    - Similarly, a taxpayer who enters OVDP on or after July 1, 2014, is not eligible to participate in Streamlined.
    - However, a taxpayer who entered OVDP prior to July 1, 2014, but is eligible for Streamlined, may request treatment under the “Transition Rules” to apply the applicable Streamlined penalties.

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U.S. Voluntary Disclosure Programs

• Delinquent FBAR Submission Procedures
  - The IRS will not impose a penalty for the failure to file delinquent FBARs if you:
    ○ have not filed a required Report of Foreign Bank and Financial Accounts (FBAR) (FinCEN Form 114, previously Form TD F 90-22.1);
    ○ are not under a civil examination or a criminal investigation by the IRS;
    ○ have not already been contacted by the IRS about the delinquent FBARs; and

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**U.S. Voluntary Disclosure Programs**

- **Delinquent International Information Return Submission Procedures**
  
  - The IRS will not impose a penalty for the failure to file delinquent international information returns if you:
    
    - have not filed one or more required international information returns, e.g., Forms 3520, 3520-A, 5471;
    
    - have reasonable cause for not timely filing the international information returns;
    
    - are not under a civil examination or a criminal investigation by the IRS; and
**U.S. Voluntary Disclosure Programs**

- **“Quiet” Voluntary Disclosure**
  - The IRS is aware that some taxpayers have attempted so-called “quiet” disclosures by filing amended returns and paying any related tax and interest for previously unreported offshore income without otherwise notifying the IRS.
  - Those taxpayers making “quiet” disclosures should be aware of the risk of being examined and potentially criminally prosecuted for all applicable years.
  - The IRS will be closely reviewing these returns to determine whether enforcement action is appropriate.

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FATCA Considerations

- The IRS, working closely with the U.S. Department of Justice, continues to investigate foreign financial institutions that may have assisted U.S. taxpayers in avoiding their tax filing and payment obligations.

- On July 1, 2014, the new information reporting regime resulting from the Foreign Account Tax Compliance Act (FATCA) went into effect.

- Under FATCA and the network of intergovernmental agreements (IGAs) between the U.S. and partner jurisdictions, automatic third-party account reporting began in 2015, making it less likely that non-U.S. financial accounts will go unnoticed by the IRS.

- Spain and the U.S. signed a reciprocal Model 1 IGA, which entered into force on December 9, 2013, with information being exchanged on financial accounts maintained by financial institutions beginning in 2015 (with respect to reporting year 2014).

- For reporting year 2014, reported information included the taxpayer's name and address, account number, and account value or balance.
7. Following John’s death, what are the US and Spanish tax consequences for Ana and their children?

![US Estate Tax Table]

| JOHNN |  
|-------|---
| **System** | Worldwide basis |
| **Exemption** | USD 5,450,000 (2016 and indexed) |
| **Tax rate (%)** | 18-40 |
| **Applicable law and allowances** | US / No marital deduction for Ana and not portable |
| **International double taxation** | US Foreign Tax Credit for tax paid in Spain / No Estate and Gift Tax Treaty US-Spain |
Following John’s decease, what are the US and Spanish tax consequences for Ana and their children?

### Spanish Inheritance Tax

<table>
<thead>
<tr>
<th></th>
<th>ANA AND MARTIN</th>
<th>JUAN AND MARIA</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>System</strong></td>
<td>Worldwide basis</td>
<td>Assets located in Spain</td>
</tr>
<tr>
<td><strong>Accrual date</strong></td>
<td>Date of decease</td>
<td>Date of decease</td>
</tr>
<tr>
<td><strong>Filing date</strong></td>
<td>6 months after the decease</td>
<td>6 months after the decease</td>
</tr>
<tr>
<td><strong>Tax rate (%)</strong></td>
<td>7.65 - 34</td>
<td>7.65 - 34</td>
</tr>
<tr>
<td><strong>Applicable law and allowances</strong></td>
<td>Law of the Autonomous Community of Madrid - 99% tax rebate</td>
<td>State law – 15,956.87€ tax reduction</td>
</tr>
<tr>
<td><strong>International double taxation</strong></td>
<td>Deduction of the lowest between: (i) tax paid abroad or (ii) the result of applying the corresponding Spanish tax rate to the assets received and taxed abroad.</td>
<td>US Laws</td>
</tr>
</tbody>
</table>
8. What would be useful tips on easy succession planning to mitigate tax exposure?

- Spain
- U.S.
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