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# Taxation of investment funds in Spain

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**ABSTRACT**

This document analyses the applicable tax regime to different types of investment funds.

The application of a tax rate of 1% or 0% is the main characteristic of the tax regime of the different regulated vehicles under Corporate Income tax. This special tax regime is based on the principle of tax neutrality, which allows investors to defer taxation of income derived from investments until dividends are received or there is a transfer or redemption.

Foreign investment funds may be eligible for the application of the double-taxation agreements signed by Spain when it is considered an "individual", it is a "resident" in its home country and it is the "actual beneficiary" of the income generated in Spain, as provided for in the Official Commentaries to article 1 of the OECD Model Tax Convention. A foreign investment fund will not be considered a tax resident in Spain even if its management company is a tax resident in Spain.

Subject to specific requirements, income obtained by venture-capital funds from the transfer of their shareholdings will qualify for both double-taxation exemption and 99% partial exemption on Corporate Income Tax. Dividends will be exempt, regardless of the percentage of ownership and the holding period.

Individuals subject to Personal Income Tax may benefit, under certain requirements, from a special tax-deferral regime for transfers of units or shares in registered investment funds, a benefit that is not granted to direct investment in securities. Under this regime, taxation of income will be deferred until a definitive transfer or redemption of shares or units takes place. This deferral rule is also applicable to investment in foreign registered investment funds that comply with the UCIT Directive.

Positive unrealized income in foreign investment funds domiciled in tax havens is not granted with the special tax deferral regime and must be allocated in the taxable base on an annual basis.

Dividends and capital gains obtained by Corporate Income Tax taxpayers deriving from venture-capital entities may be eligible for double-taxation exemption regardless of the percentage of the shareholding in the venture-capital entity and the holding period.

According to the doctrine issued by the Spanish tax authorities, carried interest qualifies as corporate income (if obtained by a Corporate Income Tax taxpayer) or employment income or income from economic activity (if obtained by Personal Income Tax taxpayers), even if income derives from the holding of classes of shares that entitle special remuneration rights.

## SUMMARY AND CONCLUSIONS

The Spanish special tax regime applicable to collective investment undertakings (CIUs) is a series of tax rules that refer to both the taxation of CIUs and the taxation of their shareholders or unitholders and involves different taxes.

The special tax regime is based on the principle of tax neutrality. It is not a tax benefit, but rather a technical mechanism that seeks to prevent taxation from being an obstacle for those who invest in these undertakings, in contrast with those who invest in financial markets directly and individually. Hence, the most characteristic feature of this regime is the elimination of taxation at the CIU level (by applying a 1% tax rate under Corporate Income Tax). Taxation of such income is deferred until it is obtained by the shareholder or unitholder in the form of dividends or income from the transfer or redemption of shares or units. Income obtained by shareholders and unitholders will be taxed in their personal tax in compliance with the applicable legislation.

In order to be eligible for the application of the 1% tax rate, CIUs must have at least 100 unitholders or shareholders. A CIU is considered to be sufficiently "collective" when it has this minimum number of investors to qualify for the application of the 1% tax rate. In addition, legislation establishes a specific procedure of tax reassessment for undertakings that lose their CIU status, based on coordinated actions of the Spanish stock-market authority (CNMV) and the Spanish tax authorities.

Foreign CIUs are taxed on the basis of their Spanish source income, in accordance with double-taxation agreements. A foreign CIU may be eligible for the application of the double-taxation agreements signed by Spain when it is considered an "individual", it is a "resident" in its home country and it is the "actual beneficiary" of the income generated in Spain, as provided for in the Official Commentaries to article 1 of the OECD Model Tax Convention. According to Spanish tax authorities' doctrine, foreign CIUs will not be considered tax residents in Spain, even if their management companies are tax residents in Spain. Similarly, if the management company provides management services within the framework of the AIFM Directive, there will be no attraction of tax residence and the non-Spanish CIU will not be considered a tax resident in Spain.

Venture-capital entities registered with the Spanish stock-market authority may benefit from a favorable tax regime whose purpose is the promotion of investment in venture-capital through these entities. Income obtained by venture-capital entities from the transfer of shareholdings that are part of their permitted scope of business and that represent a shareholding of less than 5% may benefit, under certain requirements, from a 99% partial exemption on Corporate Income Tax. Income derived from shareholdings of 5% or more may also qualify for the application of domestic and international double-taxation exemption. Dividends obtained by venture-capital entities from shareholdings in entities that form part of their main corporate purpose will be tax exempt regardless of the fulfilment of the requisites related to the size of the shareholding and the holding period. In the case of dividends of non-

Spanish source, an additional minimum rate of 10% taxation is required of the company in which the shares are held to qualify for the double taxation exemption.

All other closed-end CIUs are subject to the general tax regime under Corporate Income tax.

Real-estate CIUs and Spanish REITs (SOCIMIs) also benefit from a special tax regime under Corporate Income Tax. The former apply a 1% tax rate when they have at least 100 shareholders or unitholders, they are solely dedicated to investment in urban properties for leasing, and they maintain the property of such assets for at least three years. SOCIMIs apply a 0% tax rate for income obtained from the leasing of urban properties and other activities that are within their permitted scope of business when they meet legal, mercantile and regulatory requirements, especially those involving the listing of their stock and the mandatory profit distribution of most of their income. In particular, SOCIMIs must pay a special tax rate equal to 19% of dividends paid to resident and non-resident shareholders holding stakes equal to or greater than 5% that are tax-exempt or are taxed at a rate of less than 10% in their personal taxes on such dividends.

Individuals subject to Personal Income Tax (PIT) may benefit, under certain requirements, from a special tax-deferral regime for transfers. Taxpayers holding shares or units in CIUs may change their investment from an “originating” CIU to a different “destination” CIU according to their risk profile, with the advantage that income derived from the reassignment of capital from one CIU to another is not taxed at the time of reassignment. Taxation of income will be deferred until a definitive transfer or redemption of shares or units takes place. This tax deferral regime is not applied to direct investment in securities. Subject to specific requirements, this deferral rule is also applicable to investment in foreign CIUs that comply with the UCIT Directive and are registered with the CNMV.

For Personal Income Tax and Corporate Income Tax taxpayers positive unrealized income in foreign CIUs domiciled in tax havens is not granted with the special tax deferral regime and must be allocated in the taxable base on an annual basis.

Dividends and capital gains obtained by Corporate Income Tax taxpayers deriving from venture-capital entities may be eligible for double-taxation exemption regardless of the size of the shareholding in the venture-capital entity and the holding period.

According to the doctrine issued by the Spanish tax authorities, carried interest qualifies as corporate income (if obtained by a Corporate Income Tax taxpayer) or employment income or income from economic activity (if obtained by Personal Income Tax taxpayers), even if income derives from the holding of classes of shares that entitle special remuneration rights.

## PART ONE. TAXATION OF THE INVESTMENT FUNDS

### 1.1. Widely held investment funds

Spanish widely held investment funds are the so-called Collective Investment Undertakings (CIUs). They have evolved greatly in the last 30 years, which has given rise to wide regulation throughout the European Union (EU) and Spain. CIUs are regulated by Spanish Act 35/2003 of 4 November 2003 on Collective Investment Undertakings (Spanish CIU Act) and implementing Regulation passed under Royal Decree 1082/2012 of 13 July (CIU Regulation). Both provisions are transpositions of Directive 2009/65/EC of the European Parliament and Council of 13 July 2009 (UCIT Directive).

CIUs are entities that raise funds from the public to manage and invest them in goods, rights, securities or other financial or non-financial instruments, being the investors' return determined on the basis of the collective profit or loss.

For investors, CIUs have the following advantages:

- Supervision: The activity of CIUs is supervised by the Spanish stock-market authority (*Comisión Nacional del Mercado de Valores*, hereinafter CNMV).

- Liquidity: In general terms, investors may acquire or redeem their investments on a daily basis.

- Professional management: Investments of CIUs are professionally managed by dedicated companies that must operate in observance of legal criteria regarding diversification, eligibility of financial instruments and risk-spreading in favor of investors.

- Transparency: Investors are entitled to obtain information on the terms and conditions of their investment at all times (issuance of a prospectus, applicable fees, reports on investment performance, disclosure of net asset value, relevant events, etc.)

Investment companies take on the form of corporations and are subject to the Spanish CIU Act, the CIU Regulation and the Spanish Companies Act. They must have a board of directors. When provided for in the company's bylaws, the directors may entrust the asset management to one or several management companies or to one or more companies that provide the investment-management service. Investment companies must have at least 100 shareholders.

Investment funds are investment pools with no legal personality that are owned by several investors, including other CIUs, whose management and representation correspond to a management company. Their net worth is divided into units without nominal value (they have net asset value). The management company issues and redeems the units upon request of any unitholder. Investment funds must have at least 100 unitholders.

Depending on their permitted scope of business, CIUs may be financial or non-financial (real estate CIUs).

Financial CIUs are common funds or investment companies that are dedicated to investment in securities and financial instruments. Financial investment companies are open-end investment companies known as *Sociedades de Inversión de Capital Variable* (SICAV). Although their capital varies, they must have at least €2.4 million in initial capital, and the capital must never exceed 10 times the initial level. The variability of their capital allows these companies to act as counterparties in sale and purchase orders of their shares (reducing or increasing working capital within the aforementioned limits), which provides shareholders with liquidity and makes the companies "open".

Securities, cash and other financial instruments must be put in the custody of an authorized depositary. SICAVs may agree to entrust fully or partially the asset management to a management company or an investment-services company, and they may list their shares on an exchange or a multilateral trading system.

Financial common funds must have a net worth of at least €3.0 million, which must be managed by a management company. The funds' investments are put in the custody of a depositary that also supervises the activity of the management company.

Real estate CIUs invest in urban properties for rental. Their share capital or net worth must be at least €9.0 million. Unlike financial CIUs, there are no rules regarding the quotation of the entity, aside from the obligation of maintaining a liquidity ratio of 10% of total assets in the months in which the unitholders or shareholders are entitled to redemption.

#### *1.1.1. Taxation of domestic widely held investment funds*

Investment companies and common funds are considered taxpayers on Corporate Income Tax (hereinafter, CIT) and taxed on their worldwide income.

CIUs are taxed through a special regime whose main characteristic is the application of a 1% tax rate. This regime is based, among others, on the principle of neutrality. Income obtained by CIUs is not subject to CIT (except for the 1% tax) and taxation on income obtained is deferred until such income is received by the unitholders or shareholders in the form of dividends or income deriving from transfers or redemptions. Income obtained in this manner by investors will be subject on their personal tax (Personal Income tax or Corporate Income Tax, as the case may be), in accordance with the applicable legislation.

CIUs that are incorporated in Spain and registered with the CNMV are considered "persons" and "residents" in Spain for the purposes of applying double-taxation agreements signed by Spain. In particular, their status as taxpayers under CIT allows them to be considered "persons" for the purposes of the double-taxation agreements, whether or not they have their own legal personality.

In the case of CIUs consisting of several investment compartments, the status of taxpayer under CIT corresponds to the CIU (common fund or investment company) considered as a whole, rather than each compartment.[1]

Calculation of CIU's taxable income is based on the recorded profit and loss account as defined in Circular 3/2008 of 11 September 2008 of the CNMV, which states that investments of CIUs will be classified for accounting purposes in financial instruments held for trading. Therefore, increase in the fair value of the financial assets held for trading recorded in the profit and loss account will be included in the CIT taxable base, with no possibility of applying domestic or international double-taxation exemption, as expressly prohibited in article 52.1 of Spanish Act 27/2014 of 27 November 2014 on Corporate Income Tax (Spanish *Ley del Impuesto sobre Sociedades, hereinafter, CIT Act*).

The taxation of the decrease in the fair value of the financial assets held for trading, pursuant to article 15, letters l) and k) of the CIT Act, is different depending on the subject of the CIU's investment:

a) Holdings in entities in which the CIU has less than 5% of sharecapital or holdings in nonresident entities not fulfilling the aforementioned 5% requisite but fulfilling that of having been subject to a tax identical to or analogous in nature to the Spanish CIT at a nominal rate of at least 10% (regardless of whether any type of exemption, relief, reduction or tax credit had been taken in this connection). In these cases, which should be the majority of financial CIUs, the decrease in the fair value of the financial assets may be included in the CIT taxable base.

b) Holdings in entities in which the CIU has 5% or more of capital (or, alternatively, a stake with an acquisition value of over €20 million), or in which the requirement of a minimum tax rate of 10% (being non-resident) is not met. In these cases, the decrease in the fair value of the financial assets may not be included in the CIT taxable base.

CIUs that have been incorporated as indicated under the Spanish CIU Act may be eligible for application of a 1% tax rate if they have at least 100 unitholders or shareholders. CIUs that do not meet this requirement are not eligible for the 1% tax rate and are usually taxed at the general rate, which is currently 25%.[2]

In the case of CIUs consisting of several investment compartments, each compartment must have at least 20 unitholders or shareholders, and the CIU's requirement of at least 100 unitholders or shareholders must be met at all times. In the case of hedge funds, a minimum of 25 unitholders or shareholders is required.

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[1] See Spanish General Directorate for Taxation (GDT) tax ruling dated 4 May 2006.

[2] The CIU Act provides for the possibility (not currently in force) that a number of less than 100 unitholders or shareholders will suffice on the basis of the type of CIU, its members, its liquidity or the distribution of the share capital.

CIUs that pay a 1% tax rate are not entitled to domestic or international double-taxation exemption as provided for in article 21 of the CIT Act, nor are they entitled to deductions for international double taxation established under articles 31 and 32 of the CIT Act.

CIUs are not required to make tax prepayments in installments. When the amount of withholding tax levied on income obtained by the CIU exceeds the amount of the CIUs total CIT due, the tax authorities will automatically return the excess.

Tax effects deriving from the loss of the right to apply the special tax regime

As provided for in article 27.2.d) of the CIT Act, the loss of the special tax regime triggers the modification of the company's legal status and the conclusion of the CIT tax period. Income obtained in this tax period will be taxed at the rate of 1%, and income obtained in the subsequent tax periods will be taxed at the general rate of 25%.

Positive income derived from the transfer of financial assets after the loss of the special tax regime but that were acquired by the CIU during the application of the special tax regime will be taxed at a differentiated rate on a linear basis. Thus, the part of such income that was generated on a linear basis until the loss of the tax regime will be taxed at the 1% tax rate and the part of such income that was generated from the loss of the special tax regime until the date of transfer will be taxed at the 25%. This special rule is applied unless taxpayer proofs evidence to the contrary.
When an open-end SICAV that has been subject to the 1% CIT tax rate under the tax special regime converts its legal status and becomes an ordinary company subject to the CIT general regime, the tax losses generated by the CIU during the tax periods in which the special tax regime was applied may be offset with the positive income obtained in the subsequent tax periods in which the general tax rate of 25% is applied.[3]

#### *1.1.2. Taxation of foreign widely held investment funds*

Foreign widely held investment funds deriving Spanish source income will be taxed according to the rules provided for in the double-taxation agreements signed by Spain.

A foreign widely held investment fund may be eligible for the application of the double-taxation agreements signed by Spain when it is considered an "individual", it is a "resident" in its home country and it is the "actual beneficiary" of the income generated in Spain, as provided for in the Official Commentaries to article 1 of the OECD Model Tax Convention.

To apply for the double-taxation agreements, the foreign widely held investment fund must have a tax-residency certificate issued by its home country for the purposes of the double-taxation agreement. According to the Spanish GDT administrative doctrine, no other type of documents certifying residency will be admissible.[4]

[3] See GDT tax ruling of 10 March 2008 (V0534-08).

[4] See GDT tax ruling of 2 June 2014 (V1456-14).

Pursuant to the double-taxation agreements, when income obtained by a foreign widely held investment fund is taxed in Spain, taxation will be levied under the Spanish Nonresident Income Tax (NRIT).

Taxation under NRIT depends on the fact that income derives or not from a permanent establishment in Spain. According to GDT tax ruling of 19 June 2015 (V1949-15), a foreign widely held investment fund would not qualify as a NRIT taxpayer with a permanent establishment in Spain due to the fact that the management company of the investment fund is established in Spain. The fact that the management entities are tax residents in Spain does not mean that nonresident investment funds are tax residents in Spain.

In other cases, if the management company is located in Spain and provides management services as defined under the Alternative Investment Fund Managers Directive[5], there will be no attraction of tax residence, and the foreign widely held investment fund will not be considered a tax resident in Spain.[6]

Taxation of foreign widely held investment funds in Spain, when applicable, will usually take place without permanent establishment, and the tax is levied separately for each accrual of income. To this end, Spanish law establishes exemptions for the following income derived by nonresidents:

- Interest received by EU residents without permanent establishment in Spain.

- Income from national debt securities.

- Interest from nonresident accounts.

- Capital gains derived from the transfer or redemption of CIUs traded in official Spanish secondary markets of securities, obtained by nonresident individuals or companies without permanent establishment in Spain, that are residents in a country that has signed with Spain a double-taxation agreement with an exchange of information clause, unless income is obtained through a tax haven.

- Capital gains from movable property obtained without a permanent establishment by residents in another EU member state, unless such capital gains:

  (i) derive from the transfer of shares or units in companies whose assets consist, directly or indirectly, of real estate located within Spain, or

[5] Directive 2011/61/EU of the European parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010.

[6] See GDT tax rulings of January 23, 2017 (V0129-17) and 21 June 2017 (V1593-17).

(ii) when, at some point in the 12 months prior to transfer, the nonresident individual taxpayer holds directly or indirectly at least 25% of the capital, or

(iii) in the case of nonresident entities, derive from the transfer of shareholdings that represent a stake of less than 5% or with an acquisition value under €20 million.

- Dividends obtained by UCIT Directive compliant investment funds that are established in EU or EEA countries that have signed with Spain a double-taxation agreement, unless the tax exemption results in a lower taxation than that corresponding to Spanish CIUs under Spanish CIT.

The current Spanish withholding tax at source on dividends, interest and capital gains is 19%.

#### *1.1.3. Taxation of domestically listed exchange-traded funds (ETFs)*

Taxation of domestic ETFs does not differ significantly from that indicated in section 1.1.1. Please see this section for more information.

#### *1.1.4. Taxation of foreign listed exchange traded funds (ETFs)*

Taxation of foreign ETFs does not differ from that indicated in section 1.1.2. Please see this section for more information.

### 1.2. Privately placed investment funds

Spanish alternative CIUs, also known as "Hedge Funds" and "Funds of Hedge Funds", are financial instruments designed for qualified investors. They may invest with less limitations and more flexibility than other CIUs, and are subject to less stringent rules regarding information and liquidity.

Hedge Funds (*Instituciones de Inversión Colectiva Libres*) are both common funds or investment companies and must have at least 25 shareholders or unitholders. The minimum required investment is €100,000, except for contributions made by professional investors. Investors must previously provide written acknowledgement of their awareness of the inherent investment risks.

Net asset value must be calculated on a quarterly basis or more frequently, although half-yearly calculation is acceptable if the underlying investments so require. Subscriptions and redemptions should take place only every three or six months (although common funds may offer monthly liquidity). They are broadly flexible in relation to the asset-management investments and may leverage investments by taking on debt up to five times their equity.

Funds of Hedge Funds (*Instituciones de Inversión Colectiva de Instituciones de Inversión Colectiva Libres*) are designed to provide retail investors access to hedge funds. They must invest at least 60% of their asset in hedge funds and must not concentrate over 10% of their asset in a single hedge fund. They must not invest in other funds of hedge funds or similar foreign companies.

Managed accounts, managed contracts and single-investor funds are not regulated as specific financial instruments in Spain. The most similar investment structure is the "Portfolio Management Contract" which does not benefit from a preferential tax treatment.

### *1.2.1. Taxation of domestic privately placed hedge funds/alternative CIUs*

Hedge Funds and Funds of Hedge Funds that are tax residents in Spain are subject to the tax regime described above in section 1.1.1 in relation to Spanish CIUs.

### *1.2.2. Taxation of foreign privately placed hedge funds/alternative CIUs*

In general, alternative CIUs that are not tax residents in Spain are subject to the tax regime described above in section 1.1.2.

### *1.2.3. Taxation of domestic privately placed private equity funds and venture-capital entities*

Spanish Act 22/2014 of 12 November 2014 establishes a specific legal framework for privately placed Private Equity Funds and Venture-Capital Entities, which are defined as funds or companies in which redemptions take place simultaneously for all investors and the amounts redeemed by each investor are proportional to the investment made.

Spanish Act 22/2014 regulates several types of entities:

(i) Closed-end CIUs, defined as a different type to those described in article 1.2 of the Commission Delegated Regulation (EU) No. 694/2014 of 17 December 2013, supplementing the AIFM Directive. They use investors' capital to invest in all types of financial and non-financial assets on the basis of a defined investment policy. As they are closed companies or funds, they require no previous administrative authorization, and registration with the CNMV will suffice.

    Closed-end CIUs must be managed by authorized management companies, as established by the AIFM Directive.

(ii) Venture-Capital Entities are a special kind of closed-end CIU with unique characteristics. They may be venture-capital funds or companies.

(iii) European Social Entrepreneurship Funds (EuSEF) and European Venture-Capital Funds (EuVECA), which are regulated directly under Regulation (EU) No. 346/2013.

CIT special tax regime for venture-capital entities

Although venture-capital entities (common funds or companies) are subject to CIT at the current general tax rate of 25%, they may benefit from specific tax exemptions.

A full tax exemption is granted by article 21 of the CIT Act to the positive income obtained by a venture-capital entity derived from the transfer of shareholdings of 5% or more (or, alternatively, with an acquisition value of over €20 million) and the shares have been held uninterruptedly for at least a year.

In the case of shareholdings in nonresident entities, an additional requirement must be met to qualify for the tax exemption in the taxable year income is derived from the transfer of the shareholding: the nonresident entity must have been subject to a tax identical to or analogous in nature to the Spanish CIT at a nominal rate of at least 10% (regardless the application of any type of exemption, relief, reduction or tax credit).[7]

Negative income obtained by a venture-capital entity will not be tax deductible if it derives from the transfer of shareholdings that meet the aforementioned 5% / €20 million shareholding requirement. In the case of negative income deriving from the transfer of shareholdings in non-resident entities, negative income will not be tax deductible if the entity whose shares are transferred does not meet the minimum 10% taxation requirement in its country of residence.

As provided in article 50.1 of the Spanish CIT Act, if the aforementioned requirements in the shareholding entities are not met (shareholdings under the 5% threshold), the positive income from the transfer of shareholdings in unlisted non-financial entities will benefit from a specific 99% tax exemption if transfer takes place between the second year of holding of the investment and the end of the fifteenth year. In exceptional circumstances, this period may be lengthened to 20 years if certain requirements are met. If the non-financial entity is listed in a regulated securities market, the 99% tax exemption will apply if the transfer takes place in the subsequent 3-year period to the initial listing date ("private to public" transactions).

The 99% tax exemption will also apply to income from the following transfers where the aforementioned shareholding requirements are not met:

- Transfers of "real estate entities", i.e. those whose assets are comprised of real estate in at least a 50% and in which at least 85% of the book value of the real estate is used in its economic activity other than the financial activity.

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[7] This requirement is considered to be met if the foreign entity is resident in a country that has signed a double taxation agreement with Spain with an exchange of information clause. By contrast, this requirement will not be met if the foreign entity is resident in a tax haven, unless the entity is resident in the EU and taxpayer proofs it has been incorporated for good business reasons and it carries on business activities.

– Transfers of non-financial companies listed on EU or OECD regulated markets if they are delisted in the subsequent 12 months ("public to private" transactions).

The 99% tax exemption will not be applicable when: (i) the party acquiring the entity is tax resident in a tax haven; (ii) the acquiring party is tax-related with the venture-capital entity unless it is another venture-capital entity, in which case the latter acquiring venture-capital entity will register the shareholding acquired for tax purposes at the value and date of acquisition of the transferring venture-capital entity and (iii) the securities transferred by the venture-capital entity had been acquired from a tax-related person or entity with the venture-capital entity.

Dividends and profit distributions obtained by venture-capital entities may benefit from a full tax exemption if they derive from its target companies regardless of the fulfilment of the requisites related to the minimum shareholding percentage and holding period. Should the dividend or profit distribution derive from nonresident entities, the 10% minimum taxation requirement must additionally be met.

These tax benefits will not be applied by venture-capital entities if income is obtained through a tax haven or when the acquiring party is resident in a tax haven.

<u>Taxation of privately placed private equity funds under CIT</u>

Unlike venture-capital funds, privately placed private equity funds have no special considerations in relation to CIT. They are taxed under the general regime at a rate of 25%.

Dividends and capital gains may be tax exempt under article 21 of the CIT Act if the minimum shareholding percentage and holding period requirements are met (shareholdings in resident entities) and additional 10% minimum taxation requisite is met (shareholdings in nonresident entities).

#### *1.2.4. Taxation of foreign privately placed private equity funds and venture-capital entities*

Foreign privately placed private equity funds and venture-capital entities are usually subject to the CIT tax regime described above in section 1.1.2.

### 1.3. Special Category. Closed-end funds and real estate funds

#### *1.3.1. Taxation of domestic closed-end funds*

Domestic closed-end funds do not exist as a special category. They are subject to the same regulations and are taxed as the privately placed private equity funds (see section 1.2.3).

### *1.3.2. Taxation of foreign closed-end funds*

Taxation of these entities does not differ from that corresponding to foreign investment funds as discussed in section 1.1.2.

### *1.3.3. Taxation of domestic real estate funds and real estate investment funds (Spanish REITS)*

Real estate CIUs

Real estate CIUs, both companies and funds, that are regulated under the Spanish CIU Act and are also registered with the CNMV may apply the 1% CIT tax rate if the following requirements are met:

- They must have at least 100 shareholders or unitholders.
- They must be solely dedicated to investment in urban properties for rental.
- They must not transfer the real estate assets in the 3-year period following its acquisition unless they have the express authorization of the CNMV. When this requirement is not met, income derived from the transfer of the real estate asset will be taxed at the general CIT tax rate of 25%. In addition, income derived in the tax periods where CIU was taxed at the 1% tax rate from the leasing of the real estate that is transferred will be taxed at a tax rate equal to the difference between the general tax rate in force in such tax periods and the 1% tax rate, plus delay interest, charges and penalties that may apply.

Real-estate CIUs may also be eligible for the 1% tax rate when, in addition to meeting the aforementioned requirements, they carry on the activity of development of dwellings to be leased and meet the following conditions:

(i) Investment corresponding to development of dwellings must not exceed 20% of the CIU assets.

(ii) The activities of development and leasing must be booked separately for each property.

(iii) Properties from the development business must remain leased or be available for lease for at least seven years after the completion of construction.

In the event of failure to meet the third requirement, income from the transfer will be taxed at the general tax rate and income derived in the tax periods where CIU was taxed at the 1% tax rate must be regularized as previously discussed.

Spanish REITS (SOCIMIs)

Spanish REITs are the so-called *Sociedades Anónimas Cotizadas de Inversión en el Mercado Inmobiliario* (SOCIMIs). SOCIMIs are Public Limited Liability Companies (*Sociedades Anónimas*) designed to promote investment in rental properties. Based on REITs in other countries, their legal framework and tax regime are regulated under Spanish Act 11/2009 of 26 October 2009. The following is a description of their main legal and regulatory characteristics whose fulfilment entitles the SOCIMI to opt for a special tax regime:

Spanish SOCIMIs must have a minimum share capital of €5 million and their main object consists of the following activities:

(a) Acquisition and developing of urban real estate for rental purposes, including restored buildings as defined under Value Added Tax Act.

(b) Holding stakes in other SOCIMIs or other non-resident companies in Spain that have the same corporate purpose as the SOCIMI and are subject to a mandatory profits distribution.

(c) Holding stakes in the share capital of other entities, resident or not, whose main corporate business is to acquire urban real estate for rental purposes and are subject to a similar mandatory profit distribution rule and investment regime of income and assets.

    The shares of these entities must be registered (not bearer). All their share capital must belong to SOCIMIs or any of the companies mentioned in (b) above, which cannot have any subsidiaries.

(d) Holding shares or units of real estate CIUs regulated in the Spanish CIU Act.

The SOCIMI may pursue other ancillary activities if they account for less than 20% of its annual income.

The administration of the SOCIMI will follow the general corporations administration regime and, if that were the case, the special characteristics of listed companies. It is not necessary for the SOCIMI to have a management company, although it may hire third parties to manage its properties.

The SOCIMI must annually pay its shareholders the following income as dividends:

- At least 80% of profit from the leasing of properties or from ancillary activities.

- 100% of dividends derived from subsidiaries that comply with the SOCIMI permitted scope of business.

- At least 50% of profits from the transfer of properties and shareholdings corresponding to subsidiaries that comply with the SOCIMI permitted scope of business, when the transfer takes place after a 3-year holding period.

The shares of the SOCIMI must be listed on a regulated market of Spain, of the EU, of the EEA, of a state with an effective exchange of information agreement, or on a multilateral trading facility of Spain, of the EU or of the EEA.

At least 80% of the value of the asset must be invested in:

- Leased urban real estate.

- Land for the development of real estate to be leased, subject to the condition to start the development in the 3-year period subsequent to the land acquisition.
- Shareholdings in companies that fall within the SOCIMI's permitted scope of business.

At least 80% of income from the tax period must derive from:

- The leasing of urban properties to non-related parties.

- Dividends and profit distributions from companies that may fall within the SOCIMI's permitted scope of business.

Investments in real estate and shareholdings in companies, when they are considered to fall within the SOCIMI's permitted scope of business, are subject to a 3-year minimum holding period.

SOCIMIs that meet the aforementioned legal requirements may opt for a special tax regime. The option must be authorized by the shareholders general meeting and reported to tax authorities within the three months period prior to the conclusion of the tax period in which it is intended to be applied. However, option for the special tax regime may take place in advance if the legal requirements are met in the two subsequent years.

The GDT considers that there are certain "essential" requirements that must be met in any case before opting for the special tax regime: fulfilment of the permitted scope of business, registration of shares and mandatory payment of dividends. The other requirements are not deemed essential and may be met during the subsequent two-year period.[8]

The special tax regime is incompatible with other special regimes provided for in CIT Act except: the tax regime for mergers, spin-offs, contributions of assets, exchanges of securities and changes of address of a *Sociedad Europaea* or *Sociedad Cooperativa Europaea* from one EU Member State to another EU Member State; the controlled foreign company rules; and the special tax regime for certain financial leasing agreements.

[8] See GDT tax rulings of 11 February 2014 (V0386-14) and 11 December 2014 (V3308-14).

The main characteristic of the special tax regime is the application of a 0% tax rate in CIT. Consequently, SOCIMIs are not entitled to offset tax losses or to apply specific tax credit aimed at fostering certain activities.[9]

SOCIMIs will levy withholding tax on paid-out dividends unless shareholders meet the requirements for application of Spanish Act 11/2009. SOCIMI's must also pre-pay advanced CIT installments but are not subject to a specific pre-payment equal to 23% of the profit and loss account recorded in the 3-month, 9-month or 11-month of the tax period, as provided for by the CIT Act for companies whose net turnover is over €10 million.

In certain circumstances, income that has been taxed under the special tax regime must be regularized. This implies taxation of such income at the general CIT tax rate (currently, 25%). Regularization is required in the following cases:

- In the event of failure to fulfil the minimum 3-year holding period for real estate or shareholdings in companies that are part of the SOCIMIs' assets. In this case, the SOCIMIs must regularize all income derived from leased real estate during all tax periods in which the special tax regime was applied.
- When SOCIMIs turn to be taxed under a CIT tax regime other than its special tax regime before the aforementioned 3-year holding period.

*"Special tax" applicable to SOCIMIs*

SOCIMIs will be subject to a special tax rate of 19% of the whole of the dividends paid to shareholders holding an equity equal to or greater than 5% and who are tax exempt or pay less than 10% in their personal income tax.

For the purpose of determining whether the shareholder's taxation of the dividend is less than 10%, the GDT has established that the effective taxation of the dividend considered on a standalone basis must be taken into account, regardless other sources of income that may alter taxation of the shareholder, such as offsetting of tax loss.[10]

In the case of SOCIMI's shareholders who are nonresident in Spain for tax purposes, specific consideration must be made on the fact that the shareholder's taxation of the dividend is less than 10% in regard of 19% special tax accrual. It must also be considered the tax rate to which the non-resident shareholder is subject in its country of residence, reduced by tax credits or tax exemptions, if applicable, to avoid international double taxation that may arise due to the dividend distribution. Therefore, if the withholding tax rate at the source is equal to or greater than 10%, then the

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[9] It must be born that the Spanish Government is currently considering the possibility to levy a CIT 15% tax rate on non-distributed profits.

[10] See GDT tax ruling of 11 February 2014 (V0386-14).

minimum taxation requisite is considered to be met and the special tax will not be levied, regardless the shareholder is granted with any double taxation relief in its country of residence.

The 19% "special tax" is to be accrued on the date on which the shareholders' meeting agrees to distribute profits and must be paid through the filing of Form 217.
This "special tax" will not accrue if the shareholder is another SOCIMI or a nonresident REIT who: is subject to a mandatory distribution of profits; has a stake of at least 5% in the SOCIMI; and dividend received is taxed less than 10%.

Shareholders with at least 5% must report to the SOCIMI within 10 days after dividend payment that they are taxed at least 10%. If this information is not reported to the SOCIMI, the profits distributed are deemed tax exempt or taxed at a lower rate than 10% and the "special tax" will accrue.

Spanish Act 11/2009 provide with specific rules for CIT taxpayers that opt to apply for the special tax regime for SOCIMIs and also for SOCIMIs that opt to apply for a different tax regime after having applied the SOCIMI tax regime.

In the following circumstances the right to the special tax regime will be lost:

- The SOCIMI is delisted.

- Substantial failure to comply with the obligations regarding information in the annual financial statements unless incompliance is corrected in the subsequent year.

- Full or partial incompliance with the mandatory profit distribution.

- Waiving of application of the special tax regime.

- Failure to meet any other legal requirements, unless incompliance is corrected in the subsequent year.

Once the right to apply the special regime has been lost, it may not be requested for the next three years.

#### *1.3.4. Taxation of foreign real estate funds*

In general terms, foreign REITs that are not tax residents in Spain are subject to the tax regime described above in section 1.1.2.

Notwithstanding the aforementioned, there is a debate in relation to dividends paid-out to NRIT taxpayers without a permanent establishment in Spain. According to GDT tax ruling of 25 March 2014 (V0823-14), paid-out dividends and profit distributions may claim the EU "Parent-subsidiary" Directive tax exemption. However, this favorable criterion should be carefully considered in view of the ECJ Judgement of 8 March 2017 (case C-448/15, *Belgische Staat v Wereldhave Belgium Comm.*

*VA and Others)*, in which the court stated that the tax benefits of the "parent-subsidiary" directive may not be applied if the EU parent entity receiving the dividends is a fund subject to a 0% tax rate conditioned to the mandatory rule of profit distribution, something which is frequently the case of non-Spanish REITs.

## PART TWO. TAXATION OF INVESTORS INVESTING IN INVESTMENT FUNDS

### 2.1. Widely held investment funds

#### *2.1.1. Taxation of investors in domestic widely held investment funds (CIUs)*

Taxation of individuals

Dividends from CIUs obtained by PIT taxpayers qualify as savings income.

Income derived from transfers or redemptions of shares or units in CIUs qualify as capital gains or losses from the transfer of assets on the basis of the difference between the acquisition value of the units, increased by the expenses and fees paid, and the transfer or redemption value reduced by the expenses and fees inherent to the transaction if paid by the taxpayer.

The transfer or redemption value will be the net asset value of the unit or, in its absence, the most recently disclosed net asset value. In the absence of net asset value, the book value resulting from the last approved balance sheet of the CIU prior to the date of PIT accrual date will be used.

In cases other than the redemption of shareholdings, the transfer value must not be less than the greater of the price agreed in the transfer or the market price.

In the case of ETFs, the transfer value will coincide with the quotation value.

When determining taxable income in the calculation of Spanish PIT, individuals who redeem or transfer shares or units in a CIU must take into account three special rules:

1. When there are homogeneous shares or units acquired on different dates, it will be considered that the first ones acquired have been transferred or redeemed, on a first in–first out basis.

2. Taxable income must not include capital losses from transfers of CIUs traded in any of the official secondary securities markets defined under Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (MIFID Directive), when the taxpayer has acquired homogeneous securities within a period of two months before or after said transfers.

3. There is a transitional provision that allows certain tax reductions on the capital gains derived from the transfer or redemptions in CIUs that were acquired prior to 31 December 1994.

Savings income and capital gains derived from an investment in a CIU are included in the CIT savings taxable base, where will be taxed at the tax rate resulting from the tax scale below:

| Taxable amount up to (€) | Tax liability in (€) | Remainder base up to (€) | Tax Rate (%) |
|---|---|---|---|
| | | | |
| 0.00 | 0 | 6,000.00 | 19% |
| 6,000.00 | 1,140.00 | 44,000.00 | 21% |
| 50,000.00 | 10,380.00 | or more | 23% |

Savings income and capital gains are subject to 19% withholding tax at source.

*Special PIT tax deferral rule for CIUs transfers*

Notwithstanding the aforementioned, PIT taxpayers may accumulate income from investment in CIUs and defer PIT payment until an effective redemption of shares or units in the CIU takes place.

As provided for in article 94.1.a) of the Spanish PIT Act, PIT taxpayers may change their investment from an "originating" CIU to a different "destination" CIU according to their risk profile, with the advantage that income derived from the reassignment of capital from one CIU to another CIU is not taxed at the time of reassignment. Taxation of such income will be deferred until a definitive transfer or redemption takes place.

In accordance with the established regulatory procedure, when the amount obtained in the redemption of an "originating" CIU is reassigned to the acquisition or subscription of a "destination" CIU, the capital gain or loss accrued will not be allocated in the PIT savings taxable base and the new shares or units in the "destination" CIU will retain for tax purposes the acquisition value and the acquisition date of the shares or units redeemed in the "originating" CIU. The following requisites should be met to benefit from this special tax deferral rule:

1. In the case of redemptions of units in common investment funds: no requisites need to be met.

2. In the case of redemptions of shares in investment companies (i.e., SICAV): the "originating" CIU must have at least 500 shareholders and the taxpayer must not have held a stake of over 5% in the capital of the "originating" CIU at any time within the 12 months prior to transfer.

This special rule will not be applicable when the amount derived from the redemption of the "originating" CIU is put by any means at the disposal of the taxpayer and when the "originating" or the "destination" CIU is an ETF.

Taxation of investors who are CIT taxpayers

Article 53.1 of the CIT Act provides for a special rule stating that dividends and income from the transfer or redemption of shares and units in CIUs is considered taxable income under CIT. Accordingly, income would be included in the CIT taxable base of the tax period in which dividends are received or the transfer or redemption of the CIU take place, with the resulting tax deferral.

However, it must be born in mind that calculation of CIT taxable base is linked to the recorded profit and loss account and that the accrual-basis principle on time allocation of income is applied, which results in a taxation scheme that is dependent on the accounting regime and on the classification of the CIU's financial assets as laid down in the Spanish General Accounting Plan.

In the case of CIUs that are recorded for accounting purposes in the category of financial assets held for trading or in the category of other financial assets at fair value with changes in the profit and loss account, increase in the fair value is included in the CIT taxable base, and not entitled to double taxation relief as this is expressly prohibited under article 53 of the CIT Act.

Decrease in the fair value (when such losses have not previously been included in the CIT taxable base) would be tax deductible if requisites provided for in article 15.k) of the CIT Act are not met (i.e. meeting the minimum 10% taxation requisite in the home country of residence but not meeting the minimum 5% / €20 million shareholding pursuant to article 21 of the CIT Act). Therefore, if shareholding in the CIU is less than 5%, then the unrealized losses in the fair value would be tax deductible. If the shareholding is equal to or greater than 5% or has an acquisition value of over €20 million, losses in the fair value would not normally be tax deductible.

Positive income derived from transfers or redemptions of shares or units in CIUs should amount towards zero as far as the positive unrealized income has already been included in the CIT taxable base because the accounting principles require the recording of the investment at fair value before the transfer takes place. In the event that income from the transfer or redemption is positive, double-taxation exemption is prohibited by article 53 of the CIT Act. And, if it is negative, it will not be tax deductible when it derives from shareholdings or units that meet the minimum 5% shareholding and the minimum taxation requirements.

In the case of investment in CIUs that are registered for accounting purposes in the category of financial assets available for sale, increase in value of the shares or units will not be included in the profit and loss account, nor, therefore, in the CIT taxable base, pursuant to article 17.1 of the CIT Act. Therefore, taxation of income will be deferred to the tax period in which the transfer or redemption takes place. Impairments will not be tax deductible, pursuant to articles 13.2.b) and 15 k) of the CIT Act.

Positive income derived from transfers or redemptions will be taxed in the tax period in which they take place. To this end, the acquisition value will be the initial fair value.

Regarding negative income from transfers or redemptions and the recapture of tax adjustments due to non-deductible decrease in fair value in the case of shareholdings covered by article 13.2.b) of the CIT Act will be included in the CIT taxable base of the tax period in which the transfer or redemption takes place. In the case of shareholdings whose decrease in value was not tax deductible pursuant to article 15.k) of the CIT Act, article 21.6 of the CIT Act would be applicable and such negative income could not be included in the CIT taxable base when the requirements of minimum shareholdings established under article 21 of the CIT Act are met (something which, in practice, would be unusual).

Unlike PIT taxpayers, CIT taxpayers that invest in CIUs cannot benefit from the special tax deferral rule for transfers.

Taxation of non-resident investors without permanent establishment

When income from an investment in a CIU is obtained by a non-resident and is subject to taxation in Spain, it will be taxed at a 19% tax rate under NRIT or the reduced tax rate established under double-taxation agreements in the case of dividends.

#### *2.1.2. Taxation of investors in foreign CIUs*

Taxation of investors who are PIT taxpayers

Income derived by PIT taxpayers from foreign CIUs will be taxed under the regime described in section 2.1.1 when the following requirements of article 94.2.a) of the Spanish PIT Act are met:

- The CIU is regulated by the UCIT Directive.
- The CIU was not incorporated in a tax haven.
- The CIU is registered with the CNMV for the purpose of being marketed by companies that are residents in Spain.

To apply for the special tax-deferral rule for transfers of such CIUs the following requirements must additionally be met:

- If the foreign CIU consists of several investment compartments, the requirement of a minimum of 500 shareholders in the "originating" CIU and the requirement of having not more than 5% of the "originating" CIU will be measured by compartment.
- The acquisition, subscription, transfer and redemption of the CIU must take place through the intervention of entities that are residents in Spain and registered with the CNMV for the purpose of marketing the CIU.

The GDT has indicated the following criteria to apply deferral for transfers of foreign CIUs:[11]

- Transfer must take place through the CIU's marketer in Spain, which must be registered with the CNMV and act as the main, required and exclusive marketer, not only in relation to transfer orders but also to the originating acquisition of the CIU.

- The fact that the securities are deposited abroad does not mean that the tax-deferral regime for transfers cannot be applied.

Other subsequent tax rulings of 2 February 2016 (V0408-16) and 23 January 2017 (V0375-17) have validated marketing structures in Spain of foreign CIUs where the application of the special tax-deferral rule for foreign CIUs is admitted when the order is given to a non-Spanish credit institution that has, by delegation of the marketer established in Spain, the power to receive subscription, transfer and redemption orders of the foreign CIU (direct orders and orders within a discretionary portfolio management agreement).
Investments in foreign CIUs that are registered in tax havens are subject to a specific tax regime. The positive difference between the net asset value on the last day of the tax period and the acquisition value must be allocated on a yearly basis in the PIT taxable base. To this end, the positive return is deemed to be 15% of acquisition value unless otherwise proven. The allocated amount will be considered greater acquisition value for the purpose of quantifying the capital gain or loss from future transfers or redemptions.

Dividends paid-out by a CIU with registered office in a tax haven will not be included in the PIT taxable base and will reduce the acquisition value of the shareholding.

There is no specific regulation regarding investments in foreign CIUs that are not UCIT Directive compliant or are not registered with the CNMV. Each case will have to be evaluated individually.

Taxation of investors who are CIT taxpayers

Except in relation to the special tax-deferral rule for transfers, the tax regime applicable to income from investment in foreign CIUs described in the preceding section will also be applicable for CIT taxpayers in regard to income from investment in CIUs that are UCIT Directive compliant not incorporated in a tax haven and are registered with the CNMV for the purpose of their marketing by resident companies in Spain.

### *2.1.3. Taxation of investors in domestic listed ETFs*

The main tax-related considerations of investment in ETFs listed in Spain affect PIT taxpayers. Specifically, the special tax-deferral rule for transfers may not be applied when there is a transfer,

[11] See GDT tax ruling of 29 April 2014 (V1186-14).

redemption or subscription in an ETF (listed fund or company). Notwithstanding the aforementioned, capital gains derived from ETF are not subject to CIT withholding tax.

#### *2.1.4. Taxation of investors in foreign listed ETFs*

The above described tax regime for income derived from domestic ETFs may also apply for income from investments in foreign ETFs that are listed in Spain as provided for in GDT tax ruling of 12 April 2006 (V0713-06).

Nonetheless, the subsequent GDT tax ruling of 27 October 2016 (V4596-16) seems to adopt different criteria in the case of foreign ETFs that are listed out of Spain and are marketed in Spain through entities that are residents in Spain and registered with the CNMV. In this case, the GDT has indicated that the special tax deferral rule for transfers may be applied in the same terms as investments in foreign CIUs adapted to the UCIT Directive and that capital gains derived from the investment in the ETF are subject to CIT withholding tax. This tax ruling has given rise to wide discussion because the application of the special tax-deferral rule for transfers is practically impossible as the marketer in Spain does not normally control the relevant tax information (previous chain of transfers, acquisition values and historical subscriptions, etc.)

### 2.2. Privately placed investment funds

#### *2.2.1. Taxation of investors in domestic hedge funds/alternative CIUs*

Investments in domestic alternative CIUs will be taxed under the regime described above in section 2.1.1. Please see this section for further information.

#### *2.2.2. Taxation of investors in foreign hedge funds/alternative CIUs*

There is no specific regulation in the CIT Act for foreign non-compliant UCIT Directive. The general rules of the CIT Act on income from investment in foreign securities may apply to this income.

Regarding this matter, there is an interesting debate as to whether the rules of the income-attribution regime or the controlled foreign company rules should be applied to income from these investments. This is particularly important in the case of investment in foreign alternative CIUs or hedge funds, which are not included in the UCIT Directive, or foreign CIUs registered in non-EU countries that are not considered tax havens.

The possible application of the income-attribution regime to a foreign CIU not adapted to the UCIT Directive involves the comparison of such CIU to a Spanish entity subject to the income-attribution regime. Comparability should be based in its tax regime and regulatory nature. At present there are no solid arguments that may lead to the application of the income-attribution regime to a foreign CIU not adapted to the UCIT Directive.

In regard to the possible application of the controlled foreign company rules to a foreign CIU that is not UCIT Directive compliant, such special tax regime may apply if the CIU meets specific requirements on control, low taxation in its home country and the obtaining of passive income. In addition, the taxpayer cannot prove that the incorporation and operation of the CIU responds to valid economic reasons and that it carries on economic activities. When the GDT had the opportunity to clarify this matter, its response was insufficient. In tax ruling of 10 September 2013 (V2701-13) the GDT analyzed an investment in a Luxembourg-based SIF (Specialized Investment Fund) and concluded that the controlled foreign company rules would be applicable if the foreign CIU met the requirements on control, low taxation jurisdiction and the obtaining of passive income. However, in its tax ruling the GDT did not specify in which cases the valid economic reasons and the economic activity of the CIU was considered to be proven. This proof would exclude the application of the controlled foreign company rules.

The valid proof of the CIU's valid economic reasons and its economic activity will be decisive to conclude whether or not an investment in a foreign CIU not adapted to the UCIT Directive will be subject to the controlled foreign company rules.

### *2.2.3. Taxation of investors in foreign hedge funds domiciled in an offshore/low tax jurisdiction*

PIT and CIT taxpayers must allocate in the taxable base the positive unrealized income in these funds as discussed in section 2.1.2.

### *2.2.4. Taxation of investors in domestic private equity funds and venture-capital entities*

Dividends and capital gains derived by PIT taxpayers from venture-capital entities and closed-end privately placed equity funds will be taxed as savings income at a rate currently ranging from 19% to 23%.

In the case of CIT taxpayers and NRIT tax payers with a permanent establishment in Spain there are special rules for income from investment in venture-capital entities. Specifically, article 50.3 of the CIT Act states that the tax exemption under article 21 of the CIT Act applies to dividends and positive income from transfers of units or shareholdings in venture-capital entities, regardless of the shareholding participation percentage and the holding period. In this sense, although there is not administrative GDT doctrine on the matter, negative income from the transfer would not be computable in the CIT taxable base as established in article 21.6 of the Spanish CIT Act. There are no special rules for income from investment in closed-end CIUs.

In the case of NRIT taxpayers without a permanent establishment in Spain, dividends and income from the transfer of shareholdings or units in venture-capital entities will not be subject to taxation in Spain, except for income obtained through tax havens. There are no special rules for income from investment in closed-end CIUs.

#### *2.2.5. Taxation of investors in foreign private equity funds/venture capital entities*

Taxation of income derived from foreign private equity funds or venture capital entities is subject to the general rules applicable to income from nonresident entities.

#### *2.2.6. Taxation of investors in foreign private equity funds/venture capital entities*

Income from these entities is taxed under the general rules applicable to foreign source income.

### 2.3. Special category: closed-end funds and real-estate funds

#### *2.3.1. Taxation of investors in domestic closed-end funds*

Income from these entities is taxed under PIT, CIT or NRIT general provisions.

#### *2.3.2. Taxation of investors in foreign closed-end funds*

Income from these entities is taxed under PIT, CIT or NRIT general provisions.

#### *2.3.3. Taxation of investors in domestic real-estate CIUs/Spanish REITS*

Income from domestic real estate CIUs will be taxed under the regime described above in section 2.1.1. Please see this section for further information.

Dividends and capital gains from the transfer of shares in a SOCIMI that correspond to profits that have been taxed in the SOCIMI at a 0% tax rate are taxed in the case of CIT taxpayers or NRIT taxpayers with a permanent establishment in Spain. Tax exemption for double taxation under article 21 of the CIT Act is not applicable. Losses from the transfer of shares are not included in the CIT or NRIT taxable base as provided for in article 21.6 of CIT Act.

PIT taxpayers who obtain dividends or capital gains from the transfer of shares of a SOCIMI will include such income in the savings tax base, where it will be taxed at a rate between 19% and 23%.

Regarding dividends obtained by NRIT taxpayers without a permanent establishment in Spain, the GDT tax ruling of 25 March 2014 (V0823-14) is favorable to the application of the “parent-subsidiary” exemption. Nonetheless, this favorable criterion should be carefully considered in view of the ECJ Judgement of 8 March 2017 (case C-448/15, *Belgische Staat v Wereldhave Belgium Comm. VA and Others*), in which the court stated that the tax benefits of the “parent-subsidiary” Directive may not be applied if the EU parent receiving the dividend is a fund that is subject to a 0% tax rate subject to the condition to mandatory profit distributions.

*2.3.4. Taxation of investors in foreign real estate CIUs/Spanish REITS*

Regarding taxation of income from foreign real estate CIUs, the UCIT Directive provides no legal cover for real-estate CIUs. Its tax regime gives rise to the same comments described above in section 2.2.2.

Income obtained by PIT or CIT taxpayers from investments in foreign REITs are taxed on the basis of the provisions of the double-taxation agreements signed by Spain. When such income is taxed in Spain, the rules of Spanish PIT or CIT will apply.

## PART THREE. TAXATION OF INVESTMENT MANAGERS

### 3.1. Investment managers managing widely held investment funds

Management of CIUs, closed-end CIUs and venture-capital funds is subject to restriction and supervision of the CNMV and must be performed by CIU management companies or closed-end-CIU management companies.

CIU management companies are corporations dedicated to the management of investments, control and oversight of management, and representation and management of subscriptions and redemptions of CIUs. They must be authorized by and registered with the CNMV. They may also carry on the management portfolios under a discretionary investment management agreement and oversee, represent, manage and market venture-capital funds, closed-end CIUs, European venture-capital funds and European social entrepreneurship funds.

Closed-end-CIU management companies are corporations that are dedicated to the management of investments of venture-capital funds and of closed-end CIUs and to the control and management of their risks. They must be authorized by and registered with by the CNMV.

There are no special rules regarding the tax regime applicable to CIU management companies and closed-end-CIU management companies for the calculation of CIT tax due. They will be taxed under the general regime at a rate of 25%, as well as other CIT taxpayers.

Regarding non-Spanish management companies, the GDT's tax ruling of 10 February 2014 (V0306-14) states that a foreign CIU management company that manages foreign funds and has two employees in Spain would not have a permanent establishment in Spain for tax purposes if the employees limit their activity to putting the investor in contact with the non-Spanish CIU management company, providing commercial information to investors, and intermediation between investors and the CIU management company, with no powers of negotiation.

### 3.2. Investment managers managing privately placed investment funds

In practice, directors who are involved with investment management of CIUs, closed-end CIUs and venture-capital entities are frequently provided with remuneration schemes.

Schemes are sometimes based on ratchet agreements, which are often used in the field of venture-capital investments, although they may also be used by other kind of companies for the case of disinvestments in the target companies.

A ratchet fee is an incentive for the management team linked to the return of a target company. It is worth noting that the remuneration is paid by a third party.

Although directors have no professional relationship with the entity that pay incentives, due to the broad definition of the concept of employment income under article 17.1 of Spanish PIT Act, the manager's remuneration will qualify for tax purposes as employment income. The amount of employment income may be subject to a 30% tax reduction (with a maximum base of reduction of €300,000) when the period of income generation is over two years and income is time-allocated in a single tax period.

The aforementioned employment income will be included in the CIT general taxable base, where it will be taxed at progressive tax rates currently ranging between 19% and 45%.

In other remuneration schemes, directors may subscribe a certain class of shares or units that entitle them to preferred dividends or profit distributions (carried interest). Under these schemes, in the event of transfer of a target company, the return derived by directors from such class of shares would be greater than that obtained by other investors.

In theory, taxation of return from directors' shareholdings is formally associated with investment in the company's capital, and, in the context of Spanish PIT, may qualify as savings income or capital gains.

Nonetheless, it must be noted that the GDT considers this return to be employment income (or professional income) for the purpose of calculating PIT tax due. Tax ruling of 22 October 2003 (1688-03) states that, as the right to receive the carried interest is not caused by the condition of the fund managers as shareholders, such income must be considered as employment income or professional income. Similarly, in the context of CIT, tax rulings of 22 September 2005 (V1868-05) and 7 December 2016 (V5220-16) state that carried interest does not correspond to the concept of dividends, but rather may be compared to the consideration obtained by the management company for his/her work, regardless it may be linked to a specific class of shares in the company, which means that income should be included in the CIT taxable base as income from economic activity. Clearly, the GDT considers that carried interest qualify as employment or professional income for PIT purposes or, in the case of CIT, as income from corporate activity, and at no time does it consider it to be a dividend.

### 3.3. Special category: tax treatment of managers managing closed-end funds or real estate funds

No special provisions different from the above discussed apply to management fees/performance fees obtained by managers of closed-end funds or real estate funds.