



SPAIN

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Spain is currently the fifth largest economy in the European Union and is ranked 14th worldwide. The most important trading partners are Germany and France. In terms of Spanish imports, which in particular include vehicles and car parts, machines, electrical engineering and electronics, Germany is the supplying country with the largest volume, followed by France. After France, Germany is the second largest destination country for Spanish exports, whereby in particular vehicles and car parts, foods, chemical products, machines and electrotechnical products are exported. In 2012, German direct investments in Spain amounted to 1.4 billion euros. At the present time approx. 1,100 German companies have subsidiaries in Spain.

The economic crisis has had a strong effect on the Spanish domestic market and liquidity remains a problem for companies, although in the meantime due to reforms carried out there are signs of a recovery in the Spanish economy. As a reaction to the crisis companies in Spain are seeking to achieve success more and more through a considerable increase in internationalisation and increasing their exports.

An interesting point with regard to the founding of a subsidiary in Spain is that a Spanish Sociedad Limitada (S.L.), i.e. a company with limited liability, can already be founded with a minimum share capital of 3,000 euros, whereby a joint stock company (Sociedad Anónima, S.A.) requires a share capital to the amount of at least 60,000 euros. It should be observed that the full amount of the capital has to be paid in before the company is founded.

A further particularity in Spain is that the shareholders of a company are not shown in the commercial register unless the company is a sole trader. With the possible takeover of a company or with a joint venture, due to the lack of a publication of the ownership structure, it is therefore necessary to disclose the memorandum of association and all subsequent transfers of shares or shareholdings.

The company management of Spanish companies can be transferred to a sole managing director, to a number of managing directors entitled to sole or joint power of representation or to a board of directors. This includes the interesting possibility of appointing a legal entity as a managing director. This entity must then approve a natural person to represent the legal entity in the course of exercising its duties as managing director. Foreign managing directors have to have a so-called foreigner identification number (NIE) which can be applied for either at the police authorities in Spain or at Spanish embassies or consulates in Germany near to the place of residence of the applicant.

Spanish law does not recognise the granting of a general power of attorney. In order to grant full general powers, it is therefore necessary to individually list all of the authorisations to be transferred in a corresponding power of attorney document. The power of attorney has to be notarially certified and possibly also translated into Spanish by a state certified translator and – to the extent that they are certified by a German notary – accompanied by an apostille from Den Haag. General authorisations which authorise the execution of an undefined number of legal transactions are subject to mandatory registration in the commercial register.

If property is acquired in Spain it is interesting that this can be simply made by a privately written contract between the parties. Registration in the land register is only a bureaucratic formality and does not constitute conclusive evidence of ownership of title. Notarial certification only takes place when the purchaser expressly requests this in order to register the acquisition of the property in the land register or if the acquisition is to be financed by a loan secured by a mortgage. It is also worthy of note that in Spain it is possible to register rental relationships in the land register.

In Spain labour law is regulated in the employee statute (Estatuto de Trabajadores) and in individual laws which find application on special employment relationships such as contracts with management personnel or with outside sales personnel. Furthermore, it should be emphasised that tariff agreements are generally binding which means that their requirements must be complied with to the extent that a company falls into a collective bargaining area.

In the course of the termination of employment relationships it should be observed that a notice of termination on the side of the entrepreneur has to be justified in terms of disciplinary or objective reasons (this includes operational reasons) as the Spanish employee statute does not recognise ordinary dismissal with due notice.

The condition for termination without notice on disciplinary grounds is a serious and culpable breach of contract on the side of the employee which must be explained in the letter giving notice of the termination. The affected employee can make a complaint against unfair dismissal within 20 working days. An out of court arbitration process takes place prior to proceedings against unlawful dismissal. If there is no agreement the labour court decides whether the notice of termination was justified, not justified or void. In the case of an unjustified notice of termination the employer has – in contrast to Germany – the right to choose between the reinstatement of the employee or the payment of the legal redundancy compensation to the amount of 33 days' pay per year of company service with a maximum of 24 salary months (exception: workers' representatives). If the termination is void, e.g. due to an infringement of fundamental rights or discrimination, the employee must be reinstated.

Notice of termination for objective reasons is in particular permissible with the presentation of economic, organisational, production-related or technical reasons. The notice of termination must be expressed with a period of notice of 15 days and at the same time the employee must be paid the legal redundancy compensation to the amount of 20 days' pay per year of company service (maximum 12 salary months). If in the course of proceedings against unfair dismissal the notice of termination is declared to be unjustified, the employee is entitled to the legal redundancy compensation in the case of unjustified disciplinary notice of termination.

In relation to the tax obligations of Spanish companies, a number of particularities should be mentioned:

The registration of a company in Spain and the application for a Spanish tax number does not automatically lead to the issue of a sales tax identification number due to the fact that this is not the same number as the Spanish tax number. An express application of a sales tax identification number is required, whereby verification must be provided that the company is actually engaged in intra-community transactions.

Furthermore, it should be observed that the deadlines of the Spanish administration have in principle to be strictly adhered to. In Spain it is not possible to apply to extend the deadline to submit a certain tax return. It is only possible to agree to a deferment of payment of the tax liability.

The payment of taxes cannot be made by bank transfer because the Spanish state does not provide the appropriate accounts. The most common form of payment is payment to a bank which issues a number code which is given when the tax return is submitted or a direct debit mandate where the tax authorities have direct access to the account of the taxpayer.

The system from the Spanish tax authorities for electronic transmission is also surprising for foreign entrepreneurs. All notifications of the tax authorities are made to an electronic address of the company, whereby a communication in paper form is not made. Access to this electronic address requires either an electronic certificate of the company which can be applied for with regard to this purpose or through the issue of power of attorney to a third party who receives the electronic notifications on behalf of the company.

Foreign companies which distribute their products in the whole of Spain should observe that the Canary Islands constitute a special tax zone because they do not belong to the legal sales tax community and are therefore considered to be a third party country.

The managing directors of joint stock companies are obliged within three months after the closing of the financial year to prepare the annual financial statement which must be approved by the shareholders' meeting within six months after the closing of the financial year. The above-mentioned deadlines are mandatory and cannot be extended. Within one month of the approval of the annual financial statement it must be submitted to the commercial register. If a year has passed since the closing of the financial year without the submission of the annual financial statement to the commercial register, the company is penalised to the extent that until the submission has been made to the commercial register further registrations are not possible.

The annual financial statement has to be audited by an auditor provided the company does not fulfil 2 of the following criteria in 2 consecutive years:

- › Total assets do not exceed 2,850,000 euros,
- › the net amount of turnover does not exceed 5,700,000 euros, and
- › the average number of employees during the financial year does not exceed 50.

The auditor of the annual financial statement has to be appointed by the shareholders' meeting before the end of the financial year to be audited for a time period which must be for at least three years and can be up to a maximum of nine years notwithstanding the possibilities of extension.

As well as the usual reasons for the liquidation of a company, for Spanish companies there is the particularity that a legal reason for liquidation exists if the net assets of the company due to losses is reduced to less than half of the share capital. The managing directors have to call a shareholders' meeting within a period of two months in order to make a resolution to carry out this liquidation or to introduce a different measure in order to rebalance the assets of the company. If the managing directors do not fulfil their duty to call a shareholders' meeting within the said period of notice, or do not apply for a dissolution of the company or as necessary declare insolvency of the company due to the fact that the company is illiquid, the managing directors are severally liable for the debts of the company which occur after this ground for liquidation is present as far as the shareholders' meeting has not taken place or there was no resolution to start liquidation within two months of the date of the shareholders' meeting.

In addition to the acceptance of a capital contribution without consideration, the increase or reduction of the capital or of a simultaneous execution of the aforementioned measures, the balancing of the assets can be re-established through the granting of a participating loan. In the case of a participating loan the lender receives a variable interest rate which orients

towards the development of the activities of the borrower. The criteria for the determination of this development can be the net income of the company, its turnover, its total assets or a different criterion to be agreed. In respect of the reestablishment of the balance in the equity of the company a participating loan is regarded as net capital.

Practical examples

Auditing

Background facts:

The Spanish subsidiary of a German company records a loss and finds itself with an imbalance of assets, i.e. due to above-mentioned losses the net assets of the company are reduced to less than half of the share capital. This represents a legal ground to liquidate the company. For the purpose of increasing the equity of the company and to re-establish the asset balance of the company, the German shareholders make a resolution to form a voluntary capital reserve.

When the resolution is presented to the Spanish financial accounting employee, he wants to post this amount according to the Spanish chart of accounts as a non-retrievable contribution of the shareholder.

What can be done now?

The Spanish chart of accounts understands the contributions of shareholders to be the provision of asset elements by the shareholder without a form of consideration. In order for the contributions to be seen as net assets of the company and therefore able to contribute to the improvement of the financial situation of the company, the contributions have to be non retrievable.

Due to the possibility of reintegration, a voluntary capital reserve according to the German commercial code will not lead to an increase of the net assets of the company.

What should one have done differently from the beginning?

If a shareholder contribution without consideration due to a lack of retrievability is not intended, there is the possibility of granting a participating loan in favour of the subsidiary. For such a participating loan the German company as lender receives a variable rate of interest which orients towards the development of the activities of the Spanish subsidiary as borrower. The criteria for the determination of this development can be the net income of the company, its turnover, its total assets or a different agreed criterion. In respect of the re establishment of the balance of the equity of the company, participating loans are viewed as net capital and are therefore suitable to compensate losses of the company.

Tax

Background facts:

The company Jamón Ibérico, S.L. is founded on March 25, 2010 and its financial year respectively ends December 31. In its first financial year, the income statement of the company records losses to the amount of 300,000 euros.

In July 2011 the company submits its corporation tax return for the financial year which closed December 31, 2010 with the following figures:

| | |
|----------------------------|----------------|
| Accounting result | -300.000 euros |
| Regulation corporation tax | |
| Taxable amount | -300.00 euros |
| Tax rate | 30 % |
| Tax amount | 0 euros |

In the financial year for 2011 the company begins to record better operational results and increases turnover such that a profit to the amount of 405,000 euros is recorded.

In the month of July 2012 the company submits the corporation tax return for the financial year for 2011 with the following results:

| | |
|---|---------------|
| Accounting result | 405.000 euros |
| Regulation corporation tax | 45.000 euros |
| Provisional taxable amount | 450.000 euros |
| Tax rate | 30 % |
| Reconciliation with the tax amount of the previous year | -300.000 |
| Taxable amount | 150.000 euros |
| Tax rate | 30 % |
| Tax amount | 45.000 euros |

In 2012, under consideration of the good results of the previous year, the company undertakes a bigger investment. The turnover, however, does not develop as expected and the company records a loss to December 31 to the amount of 1,000,000 euros. The shareholders' meeting therefore decides as from December 31 to end and liquidate the company.

In July 2013 the company submits its last corporation tax return for the financial year 2012 with the following results:

| | |
|----------------------------|------------------|
| Accounting result | -1.000.000 euros |
| Regulation corporation tax | |
| Taxable amount | -1.000.000 euros |
| Tax rate | 30 % |
| Tax amount | 0 euros |

In this last corporation tax return for the financial year of 2012, the company would like to retroactively apply for the repayment of the tax paid in the year of 2011 through the retroactive offsetting of the losses of 2012 with the profit of 2011.

What can be done now?

According to Spanish law retroactive offsetting is not permitted, therefore it is not possible to apply for the repayment of the tax paid in the financial year of 2011.

What should one have done differently from the beginning?

Spanish law only allows the offsetting of profits with losses from preceding financial years, but does not allow the retroactive offsetting of profits with losses made in the following years.

In the last three years of the business operations, the company only recorded a profit in the financial year of 2011. The consideration of all three financial years results in a total loss to the amount of 850,000 euros. Due to the Spanish regulations, however, the company is obliged in the financial year for 2011 to pay the respective tax because in this year a profit was recorded, though the losses from the preceding financial year were taken into consideration. For the year of 2012 there is, however, it is not possible to retroactively compensate the losses recorded in this year with the profit recorded in the financial year of 2011 and therefore to successfully achieve the repayment of the paid taxes.

Law

Background facts:

For a number of years a German company has been selling its products via a distributor in Spain. Due to the previous success the German company decides to acquire shares in the company of the distributor. Due to its many years of business relations and the supposed knowledge of the Spanish company the process of due diligence is not carried out.

After the shares are transferred, it turns out that the articles of association of the company require an enhanced majority for various decisions and as a result decisions cannot be taken without the agreement of the other shareholder.

Due to language problems the co-operation with the administration personnel of the Spanish company who partly have many years of service turns out to be difficult and as a result some employment contracts are to be terminated.

Furthermore, the legal relationship to an alleged free employee of the Spanish company is to be ended. After the notice of termination has been expressed, however, this worker goes before the labour court and complains that due to disguised self-employment he is to be seen as an employee of the company and therefore cannot be ordinarily dismissed.

What can be done now?

The change of the required majority can only be effected through a change in the corresponding articles of association.

According to Spanish law, a notice of termination must be justified through objective or disciplinary grounds, whereby an ordinary notice of termination does not exist. If, in the present case, a notice of termination is nevertheless expressed for an administration employee and this employee applies for protection against unfair dismissal, the notice of termination will be declared by the labour court to be unlawful.

The employer has the right to choose between the reinstatement of the employee or the termination of the employment relationship under payment of the legal redundancy compensation for the case of unjustified notice of termination to the amount of 33 days' pay per year of company service and for a maximum of 24 salary months. In the case that the company employee has a very long period of company service, the compensation can be correspondingly high.

If the apparently self-employed person succeeds proving before court the presence of a disguised employment relationship, he is also entitled to previously mentioned compensation due to unlawful notice of termination.

What should one have done differently from the beginning?

If the contents of the articles of association had been known as a result of due diligence carried out, in the process of the acquisition of the share in the company the obligation to accept the change to the articles of association could have been negotiated.

In respect of employment relationships, after an internal audit had been carried out in advance it could have been agreed that the employment relationships of the affected employees could have been ended before the acquisition of the share in the Spanish company or a guarantee for possible disguised self-employed persons could have been negotiated such that the seller is liable for any compensation to be paid including outstanding social security contributions.

Fraud

Background facts:

The wife of the general director of the subsidiary of a German company in Spain is also a shareholder and managing director of an own company. This company establishes parallel sales structures to the German subsidiary company. Services are also performed which are invoiced with excessive amounts. The Spanish general director feels safe as in Spain wives do not have the same family name. In an internal audit the invoices are questioned, but the family relationship remains undiscovered. The facts of the case only become clear after a tip is received from the workforce.

What can be done now?

In such cases a number of perspectives have to be presented.

The legal employment contract of the general director is subject to extraordinary termination. Here it is important that the facts of the case are comprehensively represented in the notice of termination. It is not permissible to add reasons afterwards.

Charges of unjust enrichment can be brought against the company of the wife, due to the fact that the service and the financial compensation are not in proportion.

Claims for infringement of anti-trust laws can also be asserted against the company.

Finally, criminal proceedings can be initiated against the husband and wife. However, here it should be taken into consideration that possibly the customers of the company may be called upon by the public prosecutor to give evidence.

What should one have done differently from the beginning?

This situation could have been avoided. On the one hand the compliance rules should have been published and on the other hand when suppliers are entered into the system the user rights should be restricted such that these facts would become known to the shareholders.