

Legal Status

April 2023

1. Tax
2. IP / Media
3. Finance

Fight against tax haven



ALEJANDRO PUYO

Partner

apuyo@bartolomebriones.com

Recently, on 12 January 2023, the Ministry of Finance and Public Function has published an Order which determines the countries and territories, as well as the harmful tax regimes, which are considered as non-cooperative jurisdictions.

In the context of the fight against tax havens, the term "tax haven" has been adapted to the concept of "non-cooperative jurisdictions", updating the criteria for determining the countries and territories that have such consideration.

In this way, it is required that not only international transparency criteria should be taken into account, but also tax fairness criteria, identifying those countries and territories characterized by some of the following circumstances:

- Facilitating the existence of offshore companies aimed at attracting profits without real economic activity
- The existence of low or zero taxation
- Opacity and lack of transparency
- The absence of an effective exchange of tax information with Spain

All this aims to encourage the exchange of information at an international level and

combat fraud, tax evasion and money laundering more efficiently.

In this sense, those countries or territories that sign an agreement with Spain to avoid international double taxation with the information exchange clause or an agreement for the exchange of information in tax matters will no longer be considered as non-cooperative jurisdictions.

Many countries have adopted specific measures to comply with the standards of good governance established by the European Union, allowing updating and reducing the list contemplated in the Royal Decree 1080/1991, which initially included 48 tax havens, to the current 24.

The following countries and territories are considered as non-cooperative jurisdictions, as well as the following harmful tax regimes:

1. Anguilla
2. Emirate of the State of Bahrain
3. Barbados
4. Bermuda
5. Dominica
6. Fiji
7. Gibraltar
8. Guam
9. Guernsey
10. Isle of Man
11. Cayman Islands

12. Falkland Islands
13. Mariana Islands
14. Solomon Islands
15. Turks and Caicos Islands
16. British Virgin Islands
17. U.S. Virgin Islands
18. Jersey
19. Palau
20. Samoa, as regards the harmful tax regime (offshore business)
21. American Samoa
22. Seychelles
23. Trinidad and Tobago
24. Vanuatu

The possibility of leaving this category requires that the list of non-cooperative jurisdictions published by the Ministry of Finance is periodically reviewed in the light of new parameters or international agreements.

If this happens, the publication of new Ministerial Orders will be necessary to update the list currently provided.

April 2023

Artificial intelligence and intellectual property



ALEJANDRO DIEZ
Senior Associate
adiez@bartolomebriones.com

Intellectual property and artificial intelligence ("AI") are two increasingly interconnected concepts in our current society.

In Spain, as in many other countries, important debates on how to regulate intellectual property in the context of AI and how to protect authors' rights in an ever more technological world are taking place, and even more so since the launch of ChatGPT last November.

It is true that AI can be a valuable tool for intellectual property rights protection, especially in the fight against hacking and illegal distribution of protected content and tracking its use online. It also makes it easier for rights holders to take measures to protect their authorship, and to identify patterns of infringement and develop effective strategies to combat them.

However, it is also important to bear in mind that AI can generate apparently original content that could violate intellectual property rights if AI is used to create works without the consent of the original authors, which would open up a range of criminal possibilities (impersonation, labour intrusion, plagiarism, fraud, etc.)

AI has the ability to create works that are in principle wholly original, which raises important questions about who owns the authors' rights.

Article 5 of Royal Legislative Decree 1/1996, which approves the revised text of the Intellectual Property Law, defines the concept of author as *"a natural person who creates a literary, artistic or scientific work"*. And the Court of Justice of the European Union (CJEU C-145/10) defined an original work as *"an intellectual creation of the author which reflects his personality and expressing by his free and creative choices in the production of the work"*.

Therefore, AI cannot be considered the author of the creations made (nor are these considered works strictly speaking), which raises the question of whether the inventor of the algorithm is the author of the creation or if it is instead the program, or whether it is users themselves who establish the basic parameters of the creation made through a given system using AI.

Based on the aforementioned law and jurisprudence, in Spain, a creation generated exclusively by AI would not be protectable, since there would be no natural person author. However, protection should be granted in the event that the creation generated from AI has been used as a creative element or instrument for a larger work in which the author's free and creative decisions are reflected.

Thus, although AI opens up a range of possibilities at a global level that are of great use for economic and social development,

the potential illegitimate actions of this instrument must be taken into account as well in order to safeguard not only the intellectual property rights of authors, but also any right that could be infringed by any citizen.

April 2023

Cryptocurrencies: capital gain in the sale



JORDI BUIL

Associate

jbuil@bartolomebriones.com

Considering the growing impact of cryptocurrencies in the global economy, this article addresses the tax treatment applicable to their transmission.

Virtual currencies are a new reality with great potential for innovation in the financial sector, but at the same time they carry high risks, as they can be used by criminals to launder the proceeds of illicit activities.

The Tax Authorities consider that these virtual currencies may give rise to capital gains or losses based on Article 33.1 of the Personal Income Tax Law. From the article, it can be deduced that cryptocurrency trading operations can give rise to a capital gain or loss to the extent that, by carrying them out, an alteration in the composition of the taxpayer's net worth is generated.

The capital gain or loss is determined, for each sale transaction of each type of cryptocurrency, by the difference between the acquisition and transfer values of the assets and liabilities (unless the transfer value is lower than their normal market value on the date of the sale, in which case the normal market value prevails).

Such gains or losses obtained in the sales of cryptocurrencies must be allocated to the tax period in which such transfers are made and will constitute savings income.

Net savings taxable income – Up to euros	Total quota – Euros	Remaining net savings taxable income – Up to euros	Applicable type – Percentage
0	0	6,000	19
6,000	1,140	44,000	21
50,000	10,380	150,000	23
200,000	44,880	100,000	27
300,000	71,880	From there on	28

In addition, the General Directorate of Taxes in its consultancy V2179-22 states that the results derived from the differences in the exchange rate that may exist between the price in euros at which the currencies used in the purchase of the cryptocurrencies being transferred were acquired and the equivalent value in euros of such currencies on the date of acquisition of the said cryptocurrencies must also be recognized as capital gains or losses.

For this reason, although in Spain there is no specific legislation regulating the cryptocurrency market, the Tax Agency is trying to find a solution by requiring taxpayers to keep, during the prescription period, the receipts and documents evidencing transactions, revenues, expenses, income, reductions and deductions of any kind.

April 2023

