

ROYAL DECREE 1145/2011, of 29 July, ("RD 1145/2011") which amends the General Regulations on tax management and inspection activities and procedures

On 30 July, the Official State Gazette published RD 1145/2011 amending RD 1065/2007 ("**RD 1065/2007**") regulating tax management and inspection activities and procedures. The entry into force of RD 1145/2011 represents a significant modification of the information obligations envisaged in Law 13/1985, of 25 May, ("**Law 13/1985**") for preferred securities and debt instruments issued in accordance with Law 13/1985. In addition, RD 1145/2011 amends the information procedure established for Public Debt securities, currently regulated by Royal Decree 1285/1991, of 2 August ("**RD 1285/1991**").

1. Background

RD 1065/2007 regulated the information obligations regarding investors in preferred securities and debt instruments issued in accordance with Law 13/1985 and, until the entry into force of RD 1145/2011, established, among other things, the obligation for issuers to inform the Spanish tax authorities of the identity and country of residence of the recipient of payments by them. This obligation was in respect of all investors regardless of their country of residence.

RD 1285/1991 regulated the procedure for paying interest on Public Debt securities to non-resident investors who did not operate in Spain through a permanent establishment. It required the management entities of the book-entry Public Debt securities market (the "**Management Entities**") to declare through the Bank of Spain's book-entry system the name, country of residence and amount of income obtained by each of the non-resident holders of Public Debt securities. In order to do so, the Management Entities were to obtain the relevant information from various intermediaries and could, as a last recourse, oblige an investor to supply a tax residency certificate issued by the tax authorities in its country of residence.

The enactment of Law 4/2008, of 23 December amended the aforementioned information collection obligations by limiting them to those investors who were (i) individuals resident in Spain, (ii) Spanish corporation tax taxpayers or (iii) non-resident investors operating in Spain through a permanent establishment.

Nevertheless, RD 1285/1991 (in respect of Public Debt securities) and RD 1065/2007 (in respect of securities issued under Law 13/1985) were not amended accordingly and continued to maintain the obligation to supply information in relation to all investors (including non-resident ones).

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If you would like to know more about the subjects covered in this publication or our services, please contact:

[Yolanda Azanza](#)

[Roberto Grau](#)

[Antonio Henriquez](#)

To email one of the above, please use firstname.lastname@cliffordchance.com

Clifford Chance, Paseo de la Castellana
110, 28046 Madrid, Spain
www.cliffordchance.com

In view of the contradiction between the requirements of Law 13/1985 as modified by Law 4/2008 and the requirements of RD 1285/1991 and RD 1065/2007, on 20 January 2009 the Directorate General for Taxation ("DGT") issued responses to binding queries in which it stated that until the revision of the rules governing both procedures was performed in line with the amendments introduced by Law 4/2008, the procedures envisaged in RD 1285/1991 regarding Public Debt securities and in RD 1065/2007 regarding securities issued under Law 13/1985 would continue to apply. As a result, the information collection obligations applicable in respect of non-resident investors that existed prior to the enactment of Law 4/2008 were maintained.

2. New investor information procedure

RD 1145/2011 amends the previous information collection regime applicable in the case of both Public Debt securities and securities issued under Law 13/1985. In general:

Entities required to provide information

The entities who are required to provide the relevant information are:

- *Public Debt Securities*: Management Entities and securities clearing and settlement entities resident outside of Spain that have signed an agreement with a Spanish securities clearing and settlement entity.
- *Securities issued under Law 13/1985 and initially registered in a Spanish clearing and settlement entity (currently, Iberclear) ("Domestic Securities")*: participant entities in Iberclear that maintain the securities registered in their third-party accounts (or non-Spanish securities clearing and settlement entities that have signed an agreement with Iberclear).
- *Securities issued under Law 13/1985 and initially registered in a foreign clearing and settlement entity but recognised by Spanish regulations, or those of another OECD country, for that purpose (such as Euroclear and Clearstream) ("International Securities")*: the payment agent designated by the issuer.

Content of the declaration

The content of declaration required under RD 1145/2011 differs substantially from that envisaged by the previous regime. Going forward, it will be necessary to:

- a) identify the securities;
- b) specify the date of payments of the return on the relevant securities; and
- c) specify the total amount of the return on the relevant securities.

The other items of the declaration would vary depending on the type of securities. In the case of Public Debt securities and Domestic Securities, it will be necessary to:

- d) specify the total amount of the return corresponding to individuals resident in Spain; and
- e) specify the total amount of the return that may be paid free of withholding tax in Spain (namely, that portion of the total amount of the return on the relevant securities paid to all investors who are not individuals resident in Spain).

In the case of International Securities, the information described in paragraphs (d) and (e) above will not be required. Instead, the declaration need only include the total amount of the return on the relevant securities corresponding to each of the securities clearing and settlement entities resident outside of Spain.

Therefore, RD 1145/2011 introduces a number of important changes, including:

- although Law 4/2008 modified the information collection obligations of Spanish issuers by excluding those taxpayers not resident in Spain who operated without a permanent establishment in Spain, it maintained those

obligations in respect of Spanish resident individual investors, corporation tax taxpayers and non-residents operating through a permanent establishment in Spain. However, RD 1145/2011 has limited those obligations to individual investors resident in Spain.

- pursuant to the wording of RD 1145/2011, it would not even be necessary to supply the identity of investors who are individuals resident in Spain. In the case of Public Debt securities and Domestic Securities, it would be sufficient to indicate the total amount of the earnings received by the relevant individuals investors. In the case of International Securities, it will not even be necessary to indicate the amount of earnings obtained by Spanish resident individuals.
- payments made by the issuer or a paying agent on its behalf and which correspond to non-resident investors who operate without a permanent establishment in Spain or to corporation tax taxpayers (including the permanent establishments of non-resident entities) will be made directly free of withholding tax in Spain.
- The relevant declaration will have to be presented to the issuer on the business day immediately prior to the each interest payment date.
- In the event that, on the date indicated, any of the obliged entities fails to present the corresponding declaration, the issuer or a paying agent on its behalf will make a withholding at the general rate (currently 19%) on the total amount of the return on the relevant securities otherwise payable to such entity.

3. Conclusions

As of 31 July 2011, the date on which RD 1145/2011 entered into force, Spanish issuers (including the Spanish treasury in the case of Public Debt securities) will not be obliged to supply information to the Spanish tax authorities on a periodic basis on the identity and country of residence of the investors that acquire their securities. They will simply obtain a declaration from the relevant entities, prepared in accordance with the standard form included in RD 1145/2011, including an identification of the securities, the total return payable and, except in the case of International Securities, the amounts received by individual investors resident in Spain.

However, there are still some pending issues that will require further clarification.

- The most relevant would be if the exclusion of the information obligation for income obtained by individuals resident in Spain and derived from International Securities implies, in practice, an exemption from withholding on the basis that the issuer would not be in a position to know the identity of the individual receiving the income.
- Also, if the amendments made to the procedure in respect of Public Debt securities would also apply to debt securities issued by the Autonomous Communities. In our view, the answer should be positive in accordance with the provisions of Royal Decree 1948/2000, of 1 December that extends to the debt securities issued by the Autonomous Communities the interest payment procedures applicable to debt securities issued by the Kingdom of Spain.

This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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