Immovable Property under Domestic Law, EU Law and Tax Treaties, comprising the proceedings and working documents of an annual seminar held in Milan in November 2014, provides a thorough analysis of the taxation of immovable properties.

The analysis starts from a survey of the concept of "immovable property" in common and civil law jurisdictions and then considers how different approaches affected taxation of income deriving therefrom.

EU tax law issues are then taken into consideration, both from an income tax and VAT viewpoint. In particular, the income tax analysis provides an extensive examination on how taxation of immovable property applied by EU Member States may affect fundamental freedoms.

The book then moves to selected tax treaty issues. In particular, the analysis examines: (i) the relationships between tax treaty law and national law; (ii) the interaction between articles 6, 7 and 21 of the OECD Model Convention; and (iii) the concept of "enterprise" in the context of article 6 of the OECD Model Convention and its possible implications. Finally, the evolution of article 6 of the OECD Model Convention with respect to income from agriculture, forestry and mining is reviewed.

Individual country surveys provide in-depth analyses of the above concepts and issues from a national viewpoint in selected European and North American jurisdictions, as well as in Australia.

As a presentation of a unique and detailed insight into the taxation of immovable properties in both domestic and international contexts, this book is an essential reference source for international tax practitioners.

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Chapter 17

Spain

by Eva Aliaga Agulló[1] and Juan Benito Gallego López[2]

17.1. Legal rights over immovable property

17.1.1. Non-tax law definition of immovable property

There are three non-tax laws in the Spanish legal system that specifically contain the meaning of the term "immovable property": the Civil Code (hereinafter CC); common law that has a state scope; and the Regional Civil Acts of Navarra[3] and Catalonia.[4]

The analysis in this section will also refer to the Consolidated Text of the Immovable Property Cadastre Act, 2004 (hereinafter CTIPCA), – amended in 2015 –, which undoubtedly serves fiscal purposes and objectives, but not exclusively.[5]

As will be seen below, Spanish civil laws do not offer a definition of "immovable property"[6] but merely provide a list of the various things to which this legal consideration is attributed.

1. Dr, Professor of Tax Law, University Miguel Hernández de Elche (Alicante).
2. Dr, Assistant Professor of Tax Law, University Miguel Hernández de Elche (Alicante).
3. ES: Compilation of Regional Civil Law of Navarra, 1973.
4. ES: Civil Code of Catalonian, 2006, Book Five on rights in rem.
5. In this regard, it should be noted that the Immovable Property Cadastre (hereinafter Cadastre) is an administrative register under the Ministry of Finance and Public Administrations. The original purpose of the Cadastre was fiscal, providing the information necessary for the management, collection and control of various taxes by state, regional and local administrations. However, in addition to that purpose, in recent years the uses and applications of cadastral information has significantly increased among public administrations, public notaries, companies and citizens. In this respect, it emphasizes a general access to cadastral information, except in cases where such information is restricted only to the cadastral title-holders.
6. Likewise, it must be pointed out that the Mortgage Act, 1946 (hereinafter MA) does not offer a definition of this type of property. Thus, when listing the titles that can be registered in the Immovable Property Registry (hereinafter IPR) (statewide public register), this Act only relates to declarative and translated titles of immovable property or rights over them, specifying in some cases certain rights over immovable property and in other cases referring in a general way to those rights.

After establishing in section 333 that "all things that are subject to appropriation are considered movable or immovable property", section 334 of the CC provides a comprehensive and heterogeneous list of the things that can be considered immovable property under the Spanish legal system.[7] When it systematizes the different types of immovable property related in the ten paragraphs that form section 334, the scientific doctrine generally distinguishes four categories:[8] (a) immovable property by nature: soil and subsoil – "lands" – as well as mines, quarries, dumps and water (paragraphs 1 and 8); (b) immovable property by inclusion: those objects attached to the land in a permanent way in that they cannot be separated without breaking the material or deteriorating the assets to which they are attached, including all kinds of buildings, trees, plants, etc. (paragraphs 1, 2 and 3); (c) immovable property by destination: things that are movable property by nature, whether or not they are attached to an immovable property, but form a unit with it and permanently serve its purposes (e.g. machines used in a farm or floating constructions that remain in a fixed point of a river, lake or coast) (paragraphs 4, 5, 6, 7 and 9); and (d) immovable property by analogy: intangible property or rights considered immovable property because they affect assets of this nature. Administrative concessions of public works, as well as servitudes and other rights over immovable property, are included in the latter category. Moreover, income or pensions, whether life or hereditary annuities, attached to a person or family must be added to these cases referred to in section 334(10) of the CC, provided that they encumber with a real lien an immovable property (section 336 *a contrario*).

Like the CC, section 347 of the Compilation of Regional Civil Law of Navarra and section 511(2) of Book Five of the Civil Code of Catalonia also refer to the meaning of "immovable property" by making a list, but less thorough, of the various things that receive this legal treatment. In order to adapt the legal framework of rights over immovable property to the situation existing at the time of its approval, Book Five of the Catalonian Civil Code now explicitly includes a type of right over immovable property not contemplated in the CC in the notion of immovable property, i.e. the "rights of urban use" (section 511(2)(2)(d)).

7. On the other hand, movable property is defined by section 335 of the CC on a residual basis: "[P]roperty capable of appropriation not included in the preceding chapter and, generally, all property which may be transported from one point to another without impairment of the immovable property to which it is joined...." This definition of the concept of movable property is completed by section 336 of the CC, which sets out an exemplary, but not exhaustive, list of assets that are included in this category.

8. *See*, inter alia, M. López, *Comentario al artículo 334 del Código Civil*, in *Comentarios al Código Civil* pp. 462-463 (Lex Nova 2010).

In contrast to the civil legislation analysed above, and only for cadastral purposes, section 6(1) of the CTIPCA establishes a definition of immovable property, indicating that it may be considered as such "the parcel or portion of soil of the same nature, and nestled in a municipal district, and enclosed by a polygonal boundary line that marks out the spatial scope of the property right of individual or multiple ownership and, if this is the case, buildings located within that parcel, whatever their possessor, irrespective of other rights over the immovable property." Section 6(2) also includes within the concept of property: (a) under the special joint ownership system: different private elements of the buildings that are subject to independent use; the set of different interlinked private elements jointly acquired at the same time; and *pro indiviso* storage rooms and parking spaces; (b) immovable properties of special features and (c) the spatial scope of surface rights and an administrative concession on the property or on the public services linked to them.

In this context it should be noted that the concept of "immovable property" for cadastral purposes does not always coincide with the notion contained in section 334 of the CC or with that used in mortgage legislation. It can be said that in the cadastral scope the meaning of that term is more restricted, as it is limited only to the properties having greater physical fixity or being attached to the land,[9] so therefore only some of the assumptions or hypotheses of section 334 of the CC can be included in the cadastral concept, mainly those referred to in paragraphs 1 (land, buildings, roads and constructions attached to the land), 9 (certain river and sea constructions) and 10 (administrative concessions on public works and easements and other rights over immovable property).

The cadastral legislation distinguishes three categories of immovable property: urban, rural and with special features (categories that are defined in sections 7 and 8 of the CTIPCA).[10] This classification of immovable property, non-existent in the civil legislation, together with the information in the Immovable Property Cadastre (hereinafter Cadastre) about each property, its

9. L. Vidal, *El Catastro desde una perspectiva inmobiliaria*, Foro de Actualidad Jurídica Uría Menéndez 15, pp. 71-72 (2006).

10. According to section 7 of the CTIPCA, the nature of the soil determines, in an objective manner, the classification of immovable property (including buildings constructed on it) as urban or rustic. However, the category of immovable property of special features is determined by the nature of the building (section 8). In particular, in this last category of immovable property are included those intended for the production of electricity and gas and refined petroleum products, as well as nuclear power plants; dams, waterfalls and water reservoirs, including its bed or vessel, except those intended solely for irrigation; highways, roads and toll tunnels, and airports and commercial ports (sec. 8(2)).

valuation and title-holders, is important as a reference for the management of various taxes that affect immovable property in the three territorial levels of the Spanish tax administration.

17.1.2. Types of rights over immovable property

The rights over immovable property referred to in section 334(10) of the CC are within the category coined by the scientific doctrine of the so-called property by analogy. Nevertheless, the CC establishes neither a unitary definition of "right over immovable property" nor an exhaustive catalogue of such rights. Consequently, the *numerus apertus* system of property rights is applied in Spain, which has allowed the Spanish scientific doctrine and jurisprudence to recognize new rights over immovable property in the legal framework over time and always exceptionally. After this process, rights over immovable property recognized in Spain can currently be systematized into two main groups:

(1) Full right over immovable property: ownership.[11] According to section 348 of the CC, the owner "has the right to enjoy and dispose of a thing, without greater limitations than those set forth in the laws." In case an immovable property belongs *pro indiviso* to several persons, it will be a joint ownership (section 392 of the CC).

(2) Limited rights over immovable property. A further threefold distinction of these can be made:

   (a) *Rights of enjoyment:* Usufruct, use, habitation, easements, ground rent, surface right and the right to use immovable property on a timeshare basis.

   Usufruct is a complete right of enjoyment over immovable property, transferable and with a limited duration. It entitles a person "to enjoy another's property with the obligation to preserve the form and substance, unless otherwise authorized by the deed pursuant to which it was created or by law"[12] (section 467 of the CC). Therefore, the title-holder of the usufruct has the right to use another's property

11. The legal nature of possession is a controversial issue in Spanish scientific doctrine. However, at present, a major doctrinal trend is in favour of the characterization of possession as a fact as well as a right, which is legally protected by interdictory defence.
12. In Spain, usufruct may be created by law, by the will of individuals and by prescription (sec. 468 of the CC), as well as by judicial decision.

(immovable or movable) and obtain its fruits and incomes, but not the right of disposition over it (i.e. sell, assign, mortgage, etc.) as this right belongs only to the bare owner. In this case, the right to ownership is still in force, although its content is limited. The bare owner only has the right of disposition and, once the usufruct terminates, the right to recover the asset and the full ownership over it.

Similar to usufruct, but more restricted, are the rights of use and habitation (section 524 of the CC). The holder of the right of use may receive the fruits of a thing belonging to another, but only those sufficient for the needs of the user and his family. Whoever has the right of habitation is entitled to occupy certain rooms in another's house whenever he or the persons in his family needs them.

As regards easements, it must be pointed out that the CC contemplates appurtenance easement and easement in gross (sections 530 and 531 respectively). As a right over another's immovable property, appurtenance easement is defined as "an encumbrance imposed on an immovable property for the benefit of another belonging to a different owner". Easement in gross can be considered as "the right in rem constituted in favour of one or more persons whereby the power to obtain one or more specific profits of another's real estate is granted".[13]

Although it is not an unitary figure, section 1604 of the CC offers a general definition of the ground rent right: "A ground rent is constituted when certain immovable properties are earmarked for the payment of an annual rent or annuity as remuneration for a capital sum received in cash, or the full or limited ownership transferred in respect of the same properties." Nevertheless, the CC subsequently makes a distinction between ground rent rights themselves (*censo consignativo* and *censo reservativo*, sections 1606 and 1607) and emphyteusis (so-called emphyteutic ground rent, section 1605).

The CC only includes a brief mention of the right of surfaces in section 1611, in fine. In fact, its legal status is established in the Consolidated Land Act, 2008[14] and section 40(1) configures it as a property right that entitles the holder to build or construct on another's soil – including the

13. S. Navas, *Comentario al artículo 531 del Código Civil*, in *Comentarios al Código Civil* pp. 659-680 (Lex Nova 2010).
14. Specifically, secs. 40 and 41.

subsoil –, acquiring temporary ownership of the built or constructed assets, or to acquire temporary ownership of what is already constructed or built.
Lastly, reference is made to the time-sharing right. This is regulated in the Consolidated Text of the Contracts Relating the Right to Use Immovable Properties on a Timeshare Basis Act, 2012 (hereinafter CTCRUIPTB), which establishes two possible modalities in the legal status of this right by stating that it "may be constituted as a limited right in rem or with obligational content" (section 23(1)). This right in rem could not be considered in any case an undivided part of the ownership right.

(b) *Security rights:* Mortgage and *anthicresis*

Mortgage is regulated in section 1874 et seq. of the CC and section 104 et seq. of the Mortgage Act, 1946. In both legal bodies, mortgage is characterized as a security right that "binds the property which it encumbers, whatever its possessor, directly and immediately to the performance of the obligation in security whereof it was constituted."[15]

Antichresis is a security right that, in contrast to the pledge right, is applicable over immovable property and which section 1881 of the CC defines as: "Pursuant to *antichresis* the creditor acquires the right to receive the fruits of an immovable property belonging to the debtor, with the obligation to allocate them to the payment of any interest, if any is due, and subsequently to the principal of his credit."

(c) *Rights of acquisition:* Right of first refusal, right of repurchase and option right

In Spain, the rights of first refusal and repurchase, as well as the call option, are considered pre-emption rights. The right of first refusal gives its holder the right to purchase, on a preferential basis, one asset whose owner projects transferring to a third party. This right is recognized in the scope of legal relationships of certain institutions, such as emphyteusis or tenancies. The right of repurchase is the right of the holder to be subrogated, with the same conditions stipulated in the contract, in place of anyone who has already obtained the property by purchase or dation in payment. Note the distinction between the legal right of

15. In particular, *see* section 1876 of the CC and section 104 of the MA.

repurchase (i.e. imposed by law in certain legal transactions – such as co-owner's right or tenant's right) and repurchase on a conventional basis, deriving from an agreement between the parties.

According to the jurisprudence of the Supreme Court, the right of option derives from the execution of a contract "whereby one party grants another the exclusive power to decide the conclusion or not of another main purchase contract that will have to take place on a concrete date and under certain conditions."[16] In the Spanish legal reality the purchase or call option has greater relevance than the put option.

17.1.3. Characterization of foreign legal rights over immovable property

17.1.3.1. Preliminary questions

When a situation or relationship with a foreign element is presented to a Spanish judicial (or extrajudicial) authority, this authority has to answer two questions: first, whether or not it is competent to resolve the issue and, second, if so, what law should be applied to resolve it (i.e. the determination of the law applicable to the substance of the case in accordance with Spanish rules of conflict). This process of application of the conflict rule also requires a "characterization", i.e. to assess the concrete terms of the conflict in order to subsume it in the concrete fact of the conflict rule. These issues will be analysed in relation to immovable property located in Spain paying particular attention to how judges and courts characterize foreign legal rights over immovable property situated in Spain (in cases not related to tax matters).

17.1.3.2. Rules of international jurisdiction: Court on immovable property located in Spain

Considering that Spain is a member of the European Union, Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters plays an important role in this

16. *See*, inter alia, judgements issued on 19 April 1995 and 16 October 1997. Furthermore, it should be noted that the classification of the call option over immovable property as a right in rem of acquisition is determined by its registration in the Registry of Immovable Property under the circumstances provided in section 14 of the Mortgage Regulations, 1947.

area.[17] In general, this Regulation is applied where the defendant is domiciled in an EU Member State; otherwise, jurisdiction is governed by the provisions of the Spanish Judiciary Act, 1985 (hereinafter JA).[18] Nevertheless, article 24 of Regulation 1215/2012 is always applicable (as article 4 establishes) and takes priority over national law; therefore, in the cases included in it, the JA cannot actually be applied.

According to article 24 mentioned above, the following courts shall have exclusive jurisdiction, regardless of domicile (of the defendant): (a) in matters relating to property rights or tenancies of immovable property, the courts of the Member State in which the property is situated[19] and (b) regarding the validity of entries in public registers, including registrations of buildings, the courts of the Member State in which the register is kept. Therefore, Regulation 1215/2012 provides the *forum rei sitae* as a rule; consequently, in the case of immovable property located in Spain, only Spanish judges and courts are competent.[20] This exclusive forum is mandatory and operates in any case, regardless of the will of the parties; therefore, a possible resolution adopted ignoring that would not be recognized or enforced in Spain.[21]

17.1.3.3. Determination of the applicable law: The law governing property rights/issue of "characterization"

If a Spanish authority has jurisdiction concerning a situation or relationship with an international element, the law applicable to the substance should be chosen according to Spanish rules of conflict. The law governing property rights is set out, with general character, in section 10(1) of the CC, which, in

17. In force since 10 January 2015. It is applicable, except in Denmark, in the territory of the Member States, in all proceedings in civil and commercial matters with foreign elements, expressly excluding revenue, customs or administrative matters (art. 1(1)).
18. Section 22 of the JA determines the jurisdiction of Spanish judges and courts in the civil order.
19. However, as set out in article 24 of Regulation 1215/2012, in the case of tenancies of immovable property "concluded for temporary private use for a maximum period of six consecutive months", the courts of the Member State where the defendant is domiciled shall be equally competent, "provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State."
20. This provision is consistent with the rule in section 22 of the JA, which cannot be applied in practice at this point. Even so, the Draft JA Reform approved by the government on 4 April 2014 expects this rule to continue in section 60. However, it introduces an amendment including an identical paragraph to Regulation 1215/2012 relating to tenancies of immovable property concluded for temporary use.
21. It is grounds for refusal of recognition and enforcement (art. 45(1)(e) of Regulation 1215/2012).

this area, establishes the *lex rei sitae* by providing that "possession, ownership and other rights over immovable property and publicity thereof shall be governed by the law of the place where such property is located."

The scope of the law governing property rights is broad since such law essentially determines: (a) things that can be the subject of a right; (b) property rights that can be established over things; (c) creation of immovable property rights; (d) conditions of acquisition, alteration, transfer and loss of property right; (e) their duration, content and effects[22] and (f) publicity of the acts of constitution, transfer and termination of the right.[23] By contrast, outside the scope of the *lex rei sitae* are key issues such as: (a) one's ability to acquire property rights; (b) the form of the legal act or transaction by which it is constituted, transmits or extinguishes the particular property right[24] and (c) the title of acquisition of property rights and its validity.[25] Therefore, not all that relates to immovable property falls within the scope of section 10(1) of the CC, but also other conflict rules may be applied; thus, for example, the provisions of section 9(1) and (11) of the CC are applicable in terms of the ability that natural and legal persons respectively have to acquire these.[26]

The determination of the specific conflict rule applicable to this case leads to one of the more classic and complicated problems of private international

22. As regards the effects generated by those property rights, it should be noted that in the case of an eventual opposition against a third party having the status of collective creditors in bankruptcy proceedings, the specific legislation shall be applied, i.e. Regulation (EC) 1346/2000 of the Council of 29 May 2000 on insolvency proceedings and, when it is not applicable, the Spanish Insolvency Act, 2003 (amended in 2014).
23. Regulated by the MA.
24. Governed by the provisions of article 11 of Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, which contains in its paragraph 5 a specific rule for immovable property referring to the rules of the law of the country where the property is situated, in most cases; and, if not covered by this Regulation, by the provisions of section 11 of the Spanish CC.
25. These questions shall be determined by the regulation applicable to the specific acquisition title: namely, Regulation 593/2008 for contracts relating to a right in rem in immovable property refers, in most cases, to the law of the country where the property is situated (arts. 3 and 4), and in the case of inheritance, from 17 August 2015 onwards, Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012, on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.
26. Moreover, there are special internal rules and international treaties for certain properties (e.g. regarding cultural property, the Spanish Historical Heritage Act, 1985 and the UNIDROIT Convention of 24 June 1995 on stolen or illegally exported cultural property).

law: i.e. the issue of "characterization".[27] To resolve the problem of characterization, Spanish law clearly opts for characterizing *ex lege fori* (law of the authority that should hear the case). Indeed, section 12(1) of the CC establishes that "classification to determine the applicable conflict-of-laws rule shall always be made in accordance with Spanish law." Therefore, the Spanish legal practitioner, whether judicial or extrajudicial authority, must always comply with the provisions of the law of the *forum* in interpreting the institutions and legal categories set out in the rules of Spanish conflict of law. Nevertheless, it should be borne in mind that classification *ex lege fori* has exceptions, as when there is an international treaty or EU law to describe or define the legal categories used by it, such description or definition will have to be met ("autonomous characterization").[28]

The general rule states that the Spanish authorities will characterize under the provisions of the law of the *forum* in order to subsume the controversial issue in the concrete fact of the Spanish conflict rule. Therefore, the problem arises when they meet "foreign" institutions unknown to the Spanish legal system (such as the Anglo-Saxon trust or "provisional mortgage" under French law). In this situation, there are various solutions to determine the law governing legal institutions unknown to the Spanish legal system:

(1) The first solution is viable when the Spanish rule of conflict uses "broad concepts". This allows certain institutions, unknown to the Spanish legal system but playing a similar role to these, to be subsumed under the Spanish conflict of laws rule.[29]

(2) However, when the Spanish rule does not allow this, Spanish courts will have to adapt the Spanish rule of conflict to the unknown foreign institution by making a jurisprudential development. This mechanism is called "transposition of institutions".[30]

(3) Nevertheless, there are legal institutions that pursue goals or fulfil functions completely unknown to Spanish law, functions that the legislature does not want to protect, because they fulfil purposes that Spanish law

27. *See* J.L. Iglesias & C. Esplugues, *Derecho Internacional Privado*, 8th edn, pp. 288-289 (Tirant lo Blanch 2014) and A.L. Calvo & J. Carrascosa, *Derecho Internacional Privado* vol. I, 11th edn, p. 170 (Comares 2010).
28. In this regard, *see*, inter alia, AT: ECJ, 20 Jan. 2005, Case C-27/02, *Petra Engler v. Janus Versand GmbH*.
29. In this sense, section 9(6) of the CC mentions "guardianship and other institutions to protect incapable persons".
30. This mechanism seeks to make institutions equivalent, considering their features and goals. It also presents many serious problems in practice.

does not admit. The key point in these cases is that these unknown foreign institutions are not valid for the Spanish legal system. Accordingly, such foreign institutions, e.g. the Anglo-Saxon trust, would produce no legal effect to the Spanish authorities, as the Spanish Supreme Court has confirmed.[31]

17.2. Taxation of immovable property under domestic law

17.2.1. Application of income and corporate income taxes to immovable property[32]

17.2.1.1. Definition of immovable property

Although immovable property, as will be seen further on, can generate different types of income that is subject to taxation in Personal Income Tax (hereinafter PIT), no specific definition of this type of property exists in its regulation: Personal Income Tax Act, 2006 (hereinafter PITA), recently amended in 2014,[33] and the Royal Decree adopting the Personal Income Tax Regulation, 2007 (hereinafter PITR), also amended in 2014. Given this situation and taking into account the criterion for the interpretation of section 12(1) and (2) of the General Tax Act, 2003 (hereinafter GTA), the Directorate General for Taxation (hereinafter DGT)[34] considers that the sense to be applied to the term "immovable property", used in the mentioned tax regulation but not defined in it, is the one given by section 334 of the CC. However, not all immovable property is treated equally in the PIT. The tax regime can differ according to the rural or urban character of the property.[35] As explained in section 17.1. of this Report, this classification

31. Judgement issued on 30 April 2008.
32. There are three basic taxes on income in the Spanish tax system: Personal Income Tax; Corporate Income Tax and Non-Residents Income Tax (hereinafter NRIT). In addition to these there are other local taxes on income, such as the Economic Activities Tax, which is a tax on income deriving from economic activities carried out in the local territory (levied on natural and legal persons, unless they are exempted) and the Tax on the Increase in Value of Urban Land, which is also a tax on incomes deriving from the transfer of urban land by natural or legal persons. These latter taxes are regulated in the Consolidated Text of the Regulation of Local Tax Administrations Act, 2004.
33. ES: Act of amendment of the PIT and the NRIT of 2014.
34. *See* Enquiry V0638-14 of 2 May 2014.
35. E.g. *see* the special tax regime for property income that is applicable exclusively to non-rented urban property that is not assigned to economic activities, except for main residences and unbuilt land (sec. 8 of the PITA).

does not exist in civil law so on this point section 8(1) of the PITA refers to section 7 of the CTIPCA to specify what is understood by rural and urban property.

We shall pay special attention to a specific type of immovable property as a main residence, to which several tax benefits are applied, as will be seen. According to its tax concept, established in additional provision 23 of the PITA, a main residence is understood to be a building where the taxpayer lives and where several temporary conditions referring to both the term of occupation since the moment the purchase was made and the minimum permanence length in it (3 years) are met (with some exceptions). The term "building", however, is not defined in the CC, so the DGT,[36] considering the grammatical sense of the word, understands that a building is a fixed construction permanently situated on a land.[37]

In the area of the Corporate Income Tax (hereinafter CIT), the new Corporate Income Tax, 2004 and the Royal Decree adopting Corporate Income Tax Regulation 2014 (hereinafter CITA) do not determine the criteria to classify property as movable or immovable. In light of the silence by the tax legislator, and as was indicated in the case of the PIT, the term "immovable property" in the CIT must be delimited by what section 334 of the CC establishes. This means that a wide sense of the term must be applied, thus including even immovable property by analogy[38] (e.g. easements).[39]

36. *See* Enquiry V1060-08 of 28 May 2008.

37. Hence, a prefabricated house that has these characteristics can be said to be a main residence. However, given their movable nature, caravans and ships cannot be considered as such. In this sense, *see* P. Álvarez, *Los beneficios fiscales de la vivienda habitual en el IRPF* p. 24 (Netbiblo 2011).

38. The DGT considers this to be so in Enquiry V0341-13 of 18 June 2013.

39. However, as García Torres mentions, in depreciation matters the principle of individuality has to be applied. Thus, in the case of immovable property by destination (e.g. machinery or installations) these must be depreciated separately from the property where they might be incorporated. *See* his essay, *Valoración y deducibilidad fiscal de la depreciación en los bienes inmuebles, Estudios sobre fiscalidad inmobiliaria y doble imposición interna* p. 35 (Comares 2000).

17.2.1.2. Taxation of immovable property

17.2.1.2.1. *Relevance of building and land registries for tax purposes in personal income tax or corporate tax*

It is important to analyse section 108(3) of the GTA[40] to specify the relevance that the public property registries in Spain (Immovable Property Registry – hereinafter IPR – and Cadastre) have in the application of taxation in general, and consequently, also in the taxes that are applicable to income. This regulation grants the tax authorities the right to consider anyone who appears as such in a tax registry or in any other registry with a public character as the holder of any right or property, unless evidence to the contrary, and hence to allocate said person any attributed income according to the ownership of the property.

To these effects, what is relevant in PIT is not the formal ownership of land or buildings, but their material ownership, which is determined according to what the civil legislation establishes (section 11(3) and (5) of the PITA). Therefore, the inscription of immovable property in the Cadastre (which is the most common tax registry) does not substitute nor replace what is established in these civil regulations, which determine ownership in a legal and material sense and therefore with tax effects.

However, when formal and material owners of a property are not the same person and the latter cannot be determined (in light of the evidence presented by the taxpayers or found by inspection and verification organs of the Spanish tax administrations), the rebuttable presumption established in the GTA waivers the administration from having to find evidence of such material ownership, allowing it to consider for both fields, PIT and CIT, that the

40. According to section 1 of the MA, it is in the IPR where the inscription or annotation of the acts and contracts related to the possession and other rights in rem over the immovable property takes place (use and enjoyment, guarantee or preferential purchase). Registering the property in this registry, in some cases, has a declarative character and it is not compulsory (e.g. purchase of the domain of a property); in other cases, however, it has a constitutive character (e.g. mortgages). However, inscription in the Cadastre is always compulsory, even though this registry only accounts for the holding of rights of ownership, rights in rem of surface and usufruct and the administrative concessions over immovable property. The reason for this is that the original function of this registry was as a management element for the local Property Tax, where the only thing subject to taxation is ownership of the mentioned rights.

taxpayer is the owner of a property when it is so inscribed in the Cadastre or in the IPR. Nonetheless, this attribution of ownership can be easily refuted by any means accepted by the law (section 106(1) of the GTA).

17.2.1.2.2. *Imputation of income from immovable property*

The PIT is established as an individual tax[41] – as it is based on natural persons, regardless of their marital status – where income is understood to be perceived by the taxpayers according to its origin or source, whatever the matrimonial property scheme is, given the case (section 11(1) of the PITA). Apart from this general criterion, the PITA establishes specific rules for individualization for each component of the income (section 11(2) to (5)).

There are types of income, such as income from capital (investment income and property income), the attributed income from urban immovable property and capital gains obtained from the transfer of property and rights attributed to those who hold the ownership in a legal material sense of the property that generates them,[42] according to what the civil laws establish, as has already been seen.[43] When there are rights of use and enjoyment over the property, the owner of the right (i.e. the beneficial owner) is the one who obtains the income from the property (in the case of tenancies) or to whom property income is imputed[44] (in these cases, the bare owner is not imputed any income). If the ownership of the immovable property is an entity in the income allocation system,[45] the members, and not the entity itself, will be the ones taxed in accordance with the regulations and agreements applicable to each individual case.

41. This does not mean that the members of a family unit cannot, under some circumstances, opt to have joint taxation, where they accumulate all the income in only one annual tax return.
42. Capital gains that are not justified, defined in section 39 of the PITA, are accounted to the owner of the property in which they are reflected.
43. Hence, in the case of marriage, property capital gains deriving from joint ownership of a property are imputed jointly to both spouses. This is also the case of property acquired *pro indiviso* by spouses under separate property. However, the gains obtained from particular property of each spouse are wholly imputed to the owner and those obtained from common property are imputed according to the proportion of ownership of each spouse.
44. *See* the specific rules established in section 85(3) of the PITA for time-sharing.
45. Secs. 86-90 PITA. Within this special system can be found certain civil law companies (those that are not subject to CIT because they do not have a commercial form), joint ownerships and other entities in section 35(4) of the GTA, as well as any entity constituted abroad having the same legal nature as the entities in the income allocation system constituted following the Spanish regulations.

As will now be seen, immovable property can also generate other types of income, such as labour income, which is assigned to those who have generated their right to receiving it (section 11(2) of the PITA) or income generated by economic activities. In the latter, the income is understood to be obtained by the person who develops the economic activity, i.e. the person that regularly, personally and directly organizes the means of production and the human resources used for the economic activities. In this sense a rebuttable presumption is established for the person that appears as the formal owner of the economic activities[46] (section 11(4)).

Unlike what is established in the PIT, regulations for the CIT do not establish any specific taxation criteria for income obtained from immovable property so that this income will be imputed to the taxpayer who is the owner of the immovable property or of the right in rem that generates it.

17.2.1.2.3. *Computation of income deriving from immovable property*

Immovable property can generate different types of income that are subject to the PIT. Their quantification depends on their characterization. Hence, the gain or loss of capital deriving from the transfer of an immovable property is determined by the difference between the transfer value and the acquisition value of the immovable property. However, net income deriving from immovable property (from labour, capital and economic activities) is calculated reducing deductible expenses from gross income. In addition, some reductions have to be applied to gross or net income deriving from each source of income before they are computed for the purposes of taxation (e.g. when the income to be computed in the PIT has an irregular nature[47] – generated in more than 2 years or classified as notoriously irregular) they are reduced by a certain percentage (30%).

46. It should be noted that in this case, it is understood that the income is obtained by the owner of the economic exploitation and not by the owner of the property and rights attached to the mentioned exploitation, even if that person is a spouse. Hence, according to the conditions and limits of section 30(2)(3) of the PITA, any cession of property or rights to one of the spouses (or underage children) for the purpose of the activity of the other spouse are understood as immovable property income for the assignor spouse or children and as deductible expenses for the owner of the exploitation. Nonetheless, this regulation is not applicable to immovable property owned jointly by the spouses used in the activities of one of them exclusively. In such cases, section 29(3) of the PITA defines them as being attached to the economic activity, thus unable to generate income.
47. There are two different types of taxable base in the PIT with very different taxation (secs. 44-46 PITA): the general taxable base, constituted by all the income nor deriving from savings, and the savings taxable base, where capital gains and losses deriving from

After these general ideas, we shall now continue to assess the different types of income that immovable property can generate. In this respect, we should differentiate between two main groups.

17.2.1.2.3.1. Income deriving from the ownership of immovable property

(a) Immovable property (rural or urban) for which the use or enjoyment has been totally or partially assigned to a third party (a lease agreement, an establishment or an assignment of rights of use and enjoyment agreement). This can generate different types of income:[48]

- *Income from immovable property:* When the tenancy, assignment or constitution of rights are not the object of an economic activity,[49] all the amounts paid to the owner or holder of the rights for all the concepts (including those deriving from the assigned goods together with the property) will be understood as income.[50] To calculate the net income allowance is made to deduct all the necessary expenses to obtain such income,[51] as well as depreciation of the property and any other goods attached to it. The net income will

the transfer of property or of a right, as well as some income from capital (dividends, interests, income deriving from life insurance policies and other assimilated products) will be included.

48. In addition, when the employer provides the employee a house for his particular use, within the framework of an employment relationship, the employee will include such house as income in kind within his labour income. If the employer owns the house, the total income will be calculated using a percentage (usually 10%, although it can sometimes be lower) of the cadastral value of the house. Otherwise, the income to be taxed will be the rent paid by the employer (tax included). To this must be added the total amount of the payment on account made by the employer over the value of the income in kind, unless this has already been recoverable in the income in cash of the employee (sec. 43(2) PITA). Some allowable expenses must be deducted from the total income as established in section 19 of the PITA, as well as those reductions established in section 20 of the PITA.

49. Section 27(2) of the PITA establishes the condition needed to understand that the lease of immovable property constitutes an economic activity, i.e. there has to be a person with a full-time employment contract in the activity.

50. As an exception, *see* the regulations to calculate the minimum net income taxable in case of leases among relatives, established in section 24 of the PITA, so as to avoid any possible fraud.

51. Among such expenses, sections 23(1)(a) of the PITA and 13 of the PITR expressly establish the interests of loans for the acquisition and improvement of the property, other financing expenses, conservation and repair expenses, local taxes and surcharges, as well as state taxes and surcharges, third-party expenses as a consequence of personal services (administration, doorman, etc.), doubtful loans, etc. The total amount of deductible expenses for third-party financing and conservation and repair, however, will not surpass, for each property or right, the amount of the total gross income. Notwithstanding this, the excess can be deducted in the subsequent 4 years without surpassing this limit.

be reduced in a determined percentage (60%) when the lease of immovable property is destined as a house (section 23(2) of the PITA).

- *Income from movable property:* The quantities obtained by the sublessee as well as those deriving from the lease of businesses are not income from immovable property but rather income from movable property (section 25(4) of the PITA). To calculate the net income of these, including the part that belongs to the cession of the use of the property, all expenses established for income from immovable property can be deducted, including the depreciation of the property, without the expense limitations.

- *Income from economic activities:* When the lease of immovable property constitutes the object of an economic activity, the income obtained must be considered as deriving from such activity. This is also the case when the sale of the immovable property is set within the framework of an economic activity. In addition, if an immovable property is attached to the exercise of business activities,[52] it will generate income and expenses related to the economic activity.

In this last case, the amount of the taxed income is generally determined by the ordinary direct assessment method (sections 28 and 30 of the PITA) where the net income is calculated by the difference between gross income and deductible expenses, as established in the CIT, with some nuances and exceptions.[53] However, leases and sales of immovable property activities can also apply the simplified direct assessment method,[54] which is used to calculate the income of those exploitations whose net turnover does not exceed EUR 600,000 annually. With this method, which has a voluntary nature, the net income is calculated using the same regulations established in the ordinary direct assessment method, with two special tools: a simplified depreciation table and a

52. *See* sections 29 of the PITA and 22 and 23 of the PITR related to the property assigned to economic activities.

53. E.g. to determine the net income of economic activities the gains or losses of capital deriving from the disposal of fixed assets of an immovable nature are not included (sec. 28(2) PITA). Such gains or losses will be quantified according to what is established for the rest of the assets (secs. 34-38 of the PITA). Hence, these gains will be taxed together with those deriving from the transfer of property from taxpayers' personal assets.

54. In addition, there is also an objective assessment method for economic activities that the Ministry of Finance issues every year through a ministerial order, only for those that comply with the established requirements (secs. 31 of the PITA and 32 to 39 of the PITR); among these, however, the sale or lease or immovable property is not included.

fixed percentage over the net income to account for provisions and expenditure that is difficult to substantiate (sections 30 of the PITA and 28 to 31 of the PITR).

(b) Urban immovable property that is not rented or assigned to economic activities (except for the main residence and land not built on). Holding the right of ownership or rights of enjoyment over such property is taxed in PIT using a special tax regime for property income (attributed income). In such cases, a taxed income is presumed and calculated objectively, using a percentage of the cadastral value of the property (usually 2% with some exceptions where a lower percentage is established) and without accepting deductible expenses.

17.2.1.2.3.2. Income deriving from the transfer of immovable property

The gain or loss of value that immovable property can experience during its permanence as part of the assets of the taxpayer that is attested when it is transferred (for consideration or not) to a third party is taxed in PIT as a capital gain or loss (section 33(1) of the PITA).[55] In general,[56] the value of the capital variation is calculated by the difference between the transfer value of the immovable property (minus the paid taxes inherent to the transfer and expenses)[57] and its acquisition value (plus expenses, costs and improvements)[58] (sections 35 and 36 of the PITA).

55. There are, however, some cases that are not taxed; because they sometimes constitute not-subject cases according to section 33(2) and (3) of the PITA (e.g. the dissolution of a joint ownership unless there has been over-endowment or transfers for no consideration because of death of the taxpayer); in other cases, because they are, according to the law, capital gains that are exempted from taxation (e.g. gains deriving from the onerous or without consideration transfer of main residences by people who are over 65 or in case of severe dependence, as well as those deriving from the transfer of the main residence of the taxpayer that does not meet the previous requirements, whenever the obtained amount from the transfer is reinvested in the purchase of a new principal residence (secs. 33(4) of the PITA and 38 of the PITR, respectively).

56. Together with this general rule, there exist several specific quantification rules in the PIT that apply to specific cases (e.g. transfer of business premises, exchange of goods or rights, transfer or extinction of a right in rem of use and enjoyment over immovable property or transfer of goods attached to economic activities). *See* sub-paras. (f), (h), (k) and (n) of section 37(1) of the PITA.

57. This means that the transfer value will be the real amount of the transfer whenever this is not below market value, in which case the value will be the market one (onerous transfer) or the value of the transferred property for the purposes of the Inheritance and Gift Tax, without exceeding that of market value (lucrative transfer, e.g. a donation). From this amount we have to deduct the expenses and taxes that the transferring party has already paid (i.e. Tax on the Increase in Urban Land Value).

58. The acquisition value is the actual amount of the purchase (or the value of the purchase for the purposes of the Inheritance and Gift Tax Act) without exceeding that market

It must be pointed out that with effect from 1 January 2015, the Act of amendment of the PIT and the NRIT of 2014 has derogated the set coefficients that allowed updating the acquisition value to calculate the capital gain generated from sales of immovable property purchased after 31 December 1994. Without doubt, this issue means the taxation of capital gains linked only to the monetary depreciation and, thus, they are not real.

Under the CIT, the taxable base is made up by the amount of the business profit in the tax period minus the set-off for negative taxable bases from previous tax periods, with limitations. As a general rule, the taxable base is determined by the direct assessment method[59] and, in this case, it is calculated correcting the accounting profit (estimated according to the regulations established in the Commercial Code, in the other acts that deal with this issue and in their developing regulations)[60] using the requirements set in the CITA (section 10(3)).

It should be noted that the previous rules of CIT, valid until 31 December 2014, contemplated a measure to correct merely monetary income related to the transfer of immovable property (fixed assets or non-current assets which were kept for their sale). However, this measure is removed with the entry into force of the new CITA.

value. To this amount are to be added the cost of inversions and improvements made to the acquired property, expenses (notary public, inscription in the IPR, etc.) and taxes (e.g. Value Added Tax) that are inherent to the purchase, without considering interests, that had been paid by the purchaser. Moreover, when transferring a property that had previously been rented or sub-rented, any depreciation that is deductible will be reduced from the result of the previous calculations (section 40 of the PITR).

59. In the income that constitutes the accounting profit we could include, apart from other items and related to immovable property, income that arises from the sales that are the object of the company, as would be the case of real estate and construction companies; the income deriving from the cession of rights of use of property, plant and equipment or of investment property, as would be those deriving from the rent of immovable property belonging to the taxpayer; and the profits deriving from the acquisition of property, plant and equipment not for consideration as well as from the transfers, whether or not for consideration. On the expenditure side, we can highlight, inter alia, the allocation for the depreciation of property, plant and equipment, intangible goods and investment property that correspond to the actual depreciation of these goods because of their functioning, use, enjoyment or obsolescence (section 11(1) of the CITA). However, there are some special situations that apply to immovable property, such as the inapplicability to buildings of the diminishing balance depreciation method for the outstanding capital.

60. Within this context of regulations reference is made to the Consolidated Text on the Corporations Act, 2010, the General Accounting Plan (hereinafter GAP), 2007, the General Accounting Plan for Small and Medium-sized Companies, 2007, and the General Accounting Plans for specific sectors and, lastly, the resolutions that the Institute of Accounting and Auditing has published.

Real estate developers and construction companies, however, have a specific accounting treatment,[61] which in turn generates a series of special situations. The criteria fixed in these sector-specific rules are accepted by the DGT[62] whenever they do not contradict what is established in the GAP currently in force.

17.2.1.2.4. *Tax rates applicable to income from immovable property*

There is not a specific rate for immovable property income in the PIT. The tax rate applicable to such income depends on its characterization and later integration in the general taxable base or in the taxable base on savings.[63]

There is a general tax rate in the CIT (28% in 2015) and several specific rates that can be applied depending on several items, inter alia, the specific characteristics of some taxpayers (section 29 of the CITA). Considering the object of this report, certain specific tax rates will be highlighted. Hence, the tax rate to be applied in 2015 to companies whose activity is the exploration, prospecting and exploitation of hydrocarbon deposits and related issues would be 33%; the one applicable to immovable property investment companies and funds would be 1%, when they meet the requirements regarding the number of shareholders they have and their only activity is investment in any kind of urban immovable property for its subsequent tenancy; and for public limited immovable property market investment companies (hereinafter SOCIMIs) it would be 0% when they meet the requirements established by the regulating legislation, the SOCIMI Act, 2009 (hereinafter SOCIMIA), amended in 2012.[64]

61. The rules to adapt the GAP 1990 to construction companies were established in the Order of 27 January 1993 from the Ministry of Economy and Taxation, while those to adapt the plan to developer companies were set up in the Order of 28 December 1994.
62. *See*, inter alia, Queries V1580-08 of 28 July 2008 and V0975-09 of 6 May 2009.
63. In 2015, the national tax rate scale to apply to the general tax base will have five levels and its marginal rates will vary from 20% and 47%. Conversely, tax rates on savings (national plus autonomic) will be 20% (up to EUR 6,000), 22% (from EUR 6,000.01 to 50,000) and 24% onwards. It must be taken into account that PIT is partially assigned to the Autonomous Communities (hereinafter ACs) who have regulating competences to establish the personal and family exempt minimum for autonomic taxes, the tax rates scales and the deductions, with some limitations, for their residents (section 46 of the Financing System for Autonomous Communities and Cities with a Statute of Autonomy Act, 2009 (hereinafter FSACC)).
64. SOCIMIs are public limited companies whose main economic activity is, directly or indirectly, investing in urban immovable property for its subsequent tenancy. SOCIMIs are subject to a special extra tax (rate 19%) over the amount of the distributed profits when the conditions established in section 9 of the SOCIMIA are met. This special tax is considered as part of the tax due. It should be noted that there is also a special tax

17.2.1.2.5. *Tax incentives for agricultural immovable property and for immovable property of cultural/historical interest*

For the PIT, rural immovable property is not taxed under the immovable property attributed income scheme. In addition, the yearly ministerial order that regulates the objective assessment method establishes corrective indexes for the income deriving from agricultural activities, which reduce it (even though they are not always tax benefits). For the CIT, there is a special scheme for protected cooperatives (inter alia, agricultural cooperatives and community land exploitation cooperatives)[65] where the benefits applicable to protected cooperatives are established, as well as a deduction of the CIT tax liability of 50%, which can become 80% in the case of priority agricultural associative holdings.

For both the PIT and the CIT there is a deduction of the tax liability (gift deduction) through which the giving of immovable property of historical heritage and of cultural interest have been established as such by the Spanish legal system to non-profit organizations[66] (25% for PIT and 35% for CIT of the amount of the deduction).[67] In addition, for the PIT there are deductions for activities for the protection and spread of Spanish Historical Heritage and World Heritage. These can reduce the amount of the tax liability by 15% of the investments and expenses destined, inter alia, to the acquisition of such assets abroad to take them to Spain or to the conservation and restoration of assets belonging to the taxpayer that have been declared of cultural interest according to Spanish legislation (section 68(5) of the PITA).

scheme which is optional for companies that have as their main activity renting immovable property destined for housing in Spain (secs. 48 and 49 of the CITA). This scheme is especially characterized by an important reduction (85%) of the tax liability for the part of the profit that meets the requirements established by law. In addition, it is compatible with other complementary activities and with the transfer of rented immovable property after a minimum term has expired.
65. *See* the Cooperatives Taxation Act, 1990 (sec. 33 et seq.) and the Cooperatives Act, 1999 (secs. 93 and 94).
66. *See* secs. 2 and 3 of the Fiscal Regime Act for Non-Profit Organisations and for Tax Incentives for Patronage, 2002 (hereinafter FRANPO&TIP). These organizations have several tax benefits regardless of whether they are taxed under the FRANPO&TIP or under the scheme for partially exempted organizations of the CIT (sec. 9(3) of the CITA).
67. The percentages indicated are incremented in 5% if the donations are destined to priority patronage activities. In any case, it must be considered that gift deductions and deductions for activities for the protection and spread of Spanish Historical Heritage have a maximum threshold of 10% of the net taxable base (sec. 69(1) of the PITA). In addition, this benefit is established with the exemption for PIT of capital gains and for CIT of the positive income that these gifts may generate (secs. 33(4)(a) and 68(3) of the PITA and section 6 of the FRANPO&TIP).

17.2.1.3. Cross-border aspects

17.2.1.3.1. *Taxation of foreign (as compared to domestic) immovable property*

Resident natural persons and companies[68] are taxed under PIT or CIT for their worldwide income (including immovable property income) without prejudice to what the treaties signed by Spain on income establish. Hence, for example, a resident natural person who has immovable property abroad or rights in rem over such property[69] will be subject to taxation for the income derived from such property or rights, according to the general principles of the PIT, i.e. they will have to integrate and compensate every type of income in the general taxable base or in the taxable base on savings, according to their characterization, and apply the progressive tax rates scales, taking into account their worldwide income and personal circumstances. They will also be able to apply PIT deductions, especially those related to international double taxation (section 80 of the PITA) when there is no applicable treaty.

17.2.1.3.2. *Tax case law/administrative guidelines/literature (if any) regarding the tax treatment of foreign legal rights over immovable property*

The tax treatment of foreign legal rights over immovable property that are not acknowledged in the Spanish legislation is a controversial issue. This is the case of the Anglo-Saxon trust. Given the fact that this item does not

68. For the PIT, residency in Spain is established according to two circumstances: being in the country for over 183 days in a natural year, or having the base of their business or economic activities in Spain. This general rule is completed with specific rules for certain jobs abroad (such as diplomats) and with some residence presumptions to avoid fraud (secs. 9 and 19 of the PITA). Regarding CIT, *see* sec. 8(1) of the CITA. However, it must be noted that in Spain there are resident natural persons who can opt to be taxed under the NRIT (scheme for posted workers in Spain, sec. 93 of the PITA) and other persons that without residing in Spain can opt to be taxed under the PIT. This occurs with residents in other EU Member States and with residents in the European Economic Area (hereinafter EEA), with effective exchange of tax information, as will be further seen.

69. In these cases, the obligation to provide information to the tax administration is reinforced by requiring resident natural and legal persons, as well as permanent establishments (hereinafter PEs) located in Spain, to submit an information statement of their immovable property assets and rights in rem over them located abroad (including real owners) (section 54(*bis*) of the General Regulations for actions and procedures in tax management and inspection matters and to implement common rules governing tax application procedures, 2007).

have a legal definition in Spain,[70] the DGT[71] understands that the ownership of the properties and therefore of the income derived from them must be attributed to the settlor.[72]

Equally controversial is the treatment of certain rights in rem regulated in common law countries. There are no administrative or judicial rulings in this respect. However, some Spanish scholars have tried to equate states in land in common law with rights in rem over immovable property existing in Spain, specifically leaseholds with emphyteutic ground rent established in the CC.[73] However, the tax scheme for these two items is different and equating them in taxation terms might contravene the prohibition to establish analogies regulated in section 14 of the GTA.

17.2.1.3.3. *Taxation of non-residents (as compared to residents) on immovable property*

The different types of income from immovable property obtained in Spain by non-resident natural persons or companies are taxed under the Non-Residents Income Tax (hereinafter NRIT).[74] However, as already mentioned, a resident in another EU Member State (unless it is a tax haven) or in the European Economic Area (hereinafter EEA), with effective exchange of tax information, that meets the requirements established in section 46 of the CTNRITA, recently amended in 2014,[75] can be taxed under the PIT if they wish. With this scheme, the requirements stipulated by the ECJ regarding the non-discrimination principle of article 18 of the Treaty on the

70. Spain has not ratified the Hague Convention of 1 July 1985 on applicable legislation to trust and its acknowledgement.

71. *See*, inter alia, Enquiry V1226-14 of 7 May 2014.

72. Some trusts or partnerships can be taxed under the tax scheme for companies under the income allocation system, established in sec. 7 of the CTNRITA, referring back to the PITA. The rule to be applied to these companies when they do not have a presence in Spain is that its non-resident members will be taxed according to the regulations of non-residents without a PE for the part of the incomes obtained by the companies attribute to them (sec. 39 of the CTNRITA).

73. C. Ferrández & S. Nasarre, *Métodos alternativos de acceso a la vivienda en Derecho privado*, Revista Iuris 158, p. 41 (2011).

74. Regulated in the CTNRITA, 2004 (amended in 2014) and the Royal Decree adopting the Non-Residents Income Tax Regulation 2004 (hereinafter NRITR).

75. In accordance with section 46 of the CTNRITA, when these people meet the requirements established in section 46 (taxpayers with low incomes or who have obtained labour income or economic activities income that represent, at least, 75% of their total income in Spain) will be able to be taxed under a similar scheme to that of residents (being able to be taxed either separately or jointly, apply the average tax rate of PIT to their income obtained in Spain according to their worldwide income and their family situations, have PIT benefits, etc.).

Functioning of the European Union (hereinafter TFEU) on direct taxation have been incorporated into the Spanish legal system. As we will see, it is not the only rule that responds to this foundation.

Taking everything mentioned previously into account, the taxation criteria for non-residents depends on two circumstances: having (or not) a permanent establishment (hereinafter PE)[76] through which they act and the existence of treaties. In the first case, incomes obtained through a PE (section 16 et seq. of the CTNRITA) will be taxed according to the global profit of the PE, using the regulations (with certain specialities) of the general scheme of the CIT,[77] both if the title-holder of the PE is a company or a natural person. There are several particularities that have an impact on the calculation of the tax liability. In any case, the particularity that should be highlighted is the existence of an extra tax (20% in 2015) applicable to quantities transferred abroad (Branch Profits Tax).[78]

In the second case, non-residents without a PE are taxed for their income from immovable property that has been obtained in Spain (sections 13(1)[79]

76. In general, treaties signed by Spain follow the concept of PE established in article 5 of the OECD Model. The national legal system defines it in section 13(1)(a) of the CTNRITA also following the conventional concept, although the terms are not exactly the same (e.g. they use the expression through "authorised agent" rather than "a person other than an agent with an independent status"). Regarding this issue, *see*, F. Serrano, *Los aspectos internacionales de los establecimientos permanentes*, in *Fiscalidad Internacional*, 5th edn vol. I, p. 185 et seq. (CEF 2013).

77. From the non-discrimination perspective of article 24(3) of the OECD Model and the freedom of establishment of the TFEU, it should be noted that PEs can be taxed under the special schemes of the CIT, such as the scheme for small companies or the one for non-profit organizations, in the same conditions and circumstances as resident companies.

78. The purpose of this tax is to give a similar tax treatment to income obtained through a PE and income obtained through subsidiaries. This is not applicable to PEs of companies whose residence is in a different EU Member State (unless it is a tax haven) or in a country with which Spain has signed a treaty (in reciprocal conditions), unless the treaty establishes otherwise.

79. *See* sec. 13(1) CTNRITA. In the case of income from immovable property the main criterion is territoriality (location of the immovable property in Spain). This occurs with direct or indirect capital income, the attributed income from urban immovable property (only for natural persons) and capital gains from transfers of immovable property or rights over them, among which there are two cases to avoid tax evasion through the use of legal persons: those deriving from the transfer of shares and participations on companies, whether or not resident, whose assets are made up mainly by immovable property situated in Spain or that grant their owner a right of enjoyment over such immovable property. Capital gains from immovable property of an enterprise are considered as income from an economic activity and will be understood to have been obtained in Spain when the economic activities are carried out in Spain (although this regulation will only be enforced when there are no treaties between the states or the income could not be taxed under any of the previously mentioned criteria). The application of these criteria will determine

and 24 et seq. of the CTNRITA). To determine the tax scheme one must differentiate between residents in other EU/EEA Member States[80] and residents in other countries.

The tax that is applicable to the non-residents without a PE can be defined as an objective, direct and instantaneous tax, and it is levied independently for each type of income. As such, the different types of income from immovable property are classified according to PIT regulations (with no distinction between natural persons or companies). They are taxed according to their total value, without the possibility of compensating positive or negative concepts, and without deductions of the necessary expenses for the rent's acquisition, with some exceptions,[81] and without applying the reductions over income established in the PIT. Capital gains cannot be compensated by capital losses and, in addition, some cases of exemption (exemption for reinvesting in main residence) and non-subjection (dissolution of joint ownership) cannot be applied, nor can tax-deferral schemes established for the participations in collective investment institutions. To this should be added the fact that in immovable property transfers carried out by non-residents the acquirer has to withhold 3% of the agreed price on account of the NRIT.[82] In addition, and unlike for the PIT, income is taxed at a proportional rate (in 2015, 24% except for capital gains, which are taxed at 20%). Taxation is not personalized and the majority of deductions are not applied (unless those for gifts). Moreover, the Spanish tax administration can require non-residents without a PE to appoint a representative in Spain, even when they do not carry out economic activities in the country (section 10 of the CTNRITA).

There has been a progressive confluence in Spain concerning the taxation of residents and non-residents under the TFEU, which can be seen in the recent amendment of the NRIT in 2014. In this sense, it can be highlighted that one tax rate for all types of income has been introduced (20% in 2015) for residents in other EU/EEA Member States.[83] This tax rate is the same as the

effective taxation, unless the income shall be deemed exempted from taxation (e.g. capital gains deriving from the sale of urban immovable property acquired between 5 December 2012 and 31 December 2012 carried out by non-residents without a PE are exempted at 50%).

80. With an effective exchange of tax information.

81. Unless the income generated from the exploitation of the property is characterized as income from economic activities, in which case personnel, materials and supplies costs could be deducted.

82. In the case of transfers of shares of companies dealing with immovable property located in a country without an information exchange system, several special valuation regulations have been established for the calculation of the gain (weighing market value of the underlying asset) and the property is security for tax payment.

83. An effective exchange of tax information is necessary.

lowest rate of the PIT's tax rate scale and it is applied to net income, being able to deduct expenses related to the income obtained in Spain and that are linked to the activity carried out therein (natural persons can deduct expenses included in the PIT while companies can deduct expenses included in the CIT). In addition, for capital gains the same cases of exemption and non-liability as for residents can be applied, including the exception for reinvestment of the gains from the transfer of their main residence in Spain. However, there are still some differences in taxation between residents in Spain and residents in other EU Member States. As will be seen in section 17.4. of this Report, some of these differences give raise to compatibility issues with the fundamental freedoms established in the TFEU.

17.2.1.3.4. *Conditions for local immovable property to qualify as a PE and related consequences*

As has already been established, the taxation of income obtained by non-residents is different depending on whether or not it was obtained through a PE in Spain. A PE is an enterprise; therefore what is taxed under the first modality of taxation is the result of non-residents carrying on an economic activity in Spain, having thus a permanent or habitual presence therein. As far as agricultural, forestry and livestock activities are concerned, section 13(1)(a) of the CTNRITA establishes that when a non-resident holds such rural properties, or other place for exploitation or extracting of natural resources, it must be understood that he is operating in Spain through a PE.[84]

84. As for income from agriculture and forestry, article 6 of the OECD Model establishes that such income will be taxed in the contracting state where the property is located, although the Commentary on Article 6 indicates that each country, through their corresponding treaty, will have the power to treat this income as business profits. A controversial issue is whether these activities can be classified as a PE in Spain, and thus generating a business profit, as in the treaty signed by Spain this is not established, nor is it in article 5(2) of the OECD Model. Regarding this issue, article 3(2) of the OECD Model establishes that any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that state for the purposes of the taxes to which the convention applies (in this case it would be Spain). Likewise, it should be mentioned that section 13(1) of the CTNRITA classifies these activities as a PE (including livestock activities). Therefore, from a practical perspective, there is no distinction between these types of income in Spain in terms of allocation of taxing right, although there is a difference in the calculation of the tax liability.

Nevertheless, the exploitation of urban immovable property does not always constitute an economic activity.[85] The CTNRITA does not define this concept, therefore reference must be made to the PIT regulations. In this sense, to determine the existence of an economic activity in the purchase or sale of immovable property the principles included in section 27(1) of the PITA (creation on their own account of means of production and human resources or of one of them) must be taken into consideration. However, according to this act, the tenancy of immovable property is only considered as an economic activity when the special requirement established in section 27(2) of the PITA is met.

Therefore, in the case of exploitation of urban immovable property, several requirements have to be met for it to be a PE, such as having a place destined only to the management of the activity[86] or a different type of PE (commissioned agent).[87] If these requirements are met, income from economic activities obtained from the exploitation of immovable property will be understood to have been obtained through a PE and will be taxed according to a similar tax scheme as that established in the CIT for resident companies, as has already been seen.

17.2.2. Application of wealth, inheritance, estate and gift taxes to immovable property

17.2.2.1. General perspective

There are several taxes on immovable property in the Spanish tax system:[88] firstly, the Wealth Tax (hereinafter WT),[89] regulated by the Wealth Tax Act,

85. Regarding the tax liability of PEs under the local Economic Activities Tax, *see* DGT Enquiry V0139-11 of 28 January 2011.
86. *See*, inter alia, DGT Enquiry 1363-02 of 19 September 2002.
87. *See Memento Práctico Fiscal 2014* (Francis Lefebvre 2014), m.no. 5019.
88. In addition to these, there is a group of autonomic taxes that tax immovable property in different circumstances (e.g. when it has effects on the environment or when it is non-utilized rural property); inter alia, there is the tax from Extremadura on facilities that affect the environment.
89. A deduction of 100% of the tax liability of the WT was established in 2008 for taxpayers subject to unlimited tax liability. However, for years 2011 to 2015 this deduction has been eliminated and taxpayers are therefore accountable for the payment of the tax again. As a general rule, WT and IGT, which will be mentioned further on, are applicable in the whole of the Spanish territory. However, the regulations for the international application of these taxes (treaties signed by Spain in this field) and the *foral* tax legislations (historical territories of the Basque Country and Navarra) must be taken into account. In addition, ACs have legislative power over the WT and IGT when the collection of these

1991 (hereinafter WTA) amended in 2014, is a personal tax that is levied on the net wealth of the natural person;[90] secondly, the Immovable Property Tax (hereinafter PT), regulated by the Consolidated Text of the Regulation of Local Tax Administrations Act, 2004 (hereinafter CTRLTAA), established as a local tax levied on the title of an administrative concession of immovable property, a surface right, a usufruct and the right of property, following this priority order;[91] this tax is levied on both natural persons and legal persons; and, lastly, with a non-evasive nature, there is the Special Tax on Immovable Property of Non-Resident Organizations (hereinafter STIPNRO), which levies immovable property when its ownership belongs to certain non-resident organizations (section 40 et seq. of the CTNRITA).[92]

On the other hand, *mortis causa* acquisitions and inter vivos acquisitions for no consideration as well as some gains from life insurance are taxable under the Inheritance and Gift Tax (hereinafter IGT), only when the beneficiary is a natural person[93] (regulated in the Inheritance and Gift Tax Act, 1987 (hereinafter IGTA), recently amended in 2014, and the Royal Decree adopting Inheritance and Gift Tax Regulation, 1991 (hereinafter IGTR).

17.2.2.2. Definition of immovable property in wealth, inheritance, estate and gift taxes

For the application of the PT, a reference is made to which we refer as is defined as immovable property by the Cadastre (sections 6-8 of the

taxes belongs to the automatice administrations as FSACC establishes (sec. 28 et seq.). The ACs can regulate several aspects of the WT: the taxing threshold, the tax rate and the deductions and credits in the tax liability; regarding IGT they can regulate the tax rate, the deductions and credits in the liability, as well as reductions on the taxable base (improving the national conditions or creating new ones).

90. An analogous tax on the wealth of legal persons does not exist in the Spanish legal system.

91. E.g. if there is a usufruct right over immovable property, only the ownership of the right is levied, but not the ownership of the property.

92. Even though it is regulated in the CTNRITA, this tax is levied on wealth and the taxpayers are the organizations residing in a country or territory that is considered as a tax haven and which own immovable property or any right in rem of enjoyment over immovable property. However, inter alia, organizations that carry out economic activities, occasionally or permanently, other than the ownership or letting of immovable property are exempt from this tax when they meet all the requirements established in section 20(2) of the NRITR. The tax due of the STIPNRO, which can be deducted as expense in the NRIT, is accrued on 31 December of each year and is calculated applying 3% of the cadastral value of the immovable property, or of the WT in its absence.

93. Acquisitions for no consideration, however, made by organizations are taxed under the CIT or NRIT.

CTIPCA). This reference is established by section 61(3) of the CTRLTAA, which specifies that, for the purposes of this tax, immovable property is classified into urban, rural and with special features. However, the WTA[94] and the IGTA do not specify what should be understood as immovable property, so reference must be made to section 334 of the CC to define this concept.[95]

17.2.2.3. Taxation of immovable property

17.2.2.3.1. *Importance of the buildings and land registries for wealth tax and inheritance, estate and gift tax/ imputation of immovable property*

In order to determine the assets belonging to each person, section 7 of the WTA attributes immovable property and taxed rights, as well as charges, encumbrances and debts on them, to the persons according to the applicable regulations on legal titles (inter alia, civil laws). This regulation is applied together with a rebuttable presumption of ownership in favour of the tax administration in the same terms and conditions of section 108(3) of the GTA, which we have already analysed.

For IGT and PT, civil laws establishing the legal title of immovable property and taxed rights are also applied. Nevertheless, for IGT there is a rebuttable presumption of a transfer for no consideration when, from tax registries (e.g. Cadastre) or from the data the tax administration holds, there is a decrease in the wealth of a person and, simultaneously or subsequently (within 4 years), there is an increase in the wealth of their spouse, descendants, heirs or legatees (section 4(1) of the IGTA).

Lastly, the PT is a census-based tax, managed according to the Cadastre; so the taxpayer is the one that appears as the cadastral title-holder in that registry. However, there is abundant case law[96] that specifies that cadastral title holding cannot prevail over registries or other means of proof and that private law has to determine the ownership of immovable property.

94. Except in the case of regulation of the partial exemption on the taxpayer's habitual residence (section 4(9) of the WTA), which refers back to the definition established in the PIT (analysed above).

95. In the application of these taxes, however (as with the PIT), cadastral regulations are also relevant, not only to specify what is understood as urban and rural immovable property, but also because the value of the property, which is established by these regulations (cadastral value), influences the calculation of the taxable base.

96. *See* ES: Supreme Court, 6 Oct. 2010.

17.2.2.3.2. *Quantification of taxes*[97]

The taxable base for the WT is the value of the net wealth of the taxpayer, i.e. the difference between the value of the property and rights that are subject to taxation and the charges and encumbrances that decrease its value, and the personal debts[98] or liabilities of the owner (section 9 of the WTA). On the other hand, section 10 of the WTA establishes that immovable property will be valued according to the largest amount among these three:[99] cadastral value; the value attested by the tax administration for other taxes (Asset Transfer Tax or Value Added Tax) or the acquisition value. From the taxable base, the threshold for exemption must be deducted (if the ACs have not established one, section 28 of the WTA sets up EUR 700,000). The tax rate scale will be applied to the net taxable base, thus resulting in the tax due, from which the deductions established in the national legislation, and, if there were, those established in the autonomous legislation could be deducted (until 31 December 2014, only for persons subject to unlimited tax liability).

The taxable base for the IGT is made up by the net value of the acquisition of each taxpayer, i.e. the real value of the property[100] and rights from which deductible charges (e.g. a ground rent), debts and expenses have been applied. Additional reductions can be made to this taxable base, according to, first, what the national legislation establishes,[101] and then to what the ACs

97. The analysis in this section regarding the quantification of the WT and EGT has been made according to the legislation in force until 31 December 2014. The amendments to those rules, with effect from 1 January 2015, as a result of the transcendental ECJ decision of 3 September 2014, Case C-127/12, *Commission v. Spain*, will be discussed in section 17.4 of this Report.

98. In the case that a loan was secured by a mortgage on immovable property, this mortgage would not be considered as an encumbrance that diminishes the value of that immovable property. Conversely, the amount of the debts could be deducted to calculate the net wealth.

99. The same valuation rule is applied to immovable property assigned to an economic activity (section 11 of the WTA). In addition, if there are rights of enjoyment over immovable property, they are a charge that reduces their value for the owner of the immovable property. However, they are an asset with an economic value for the owner of the right. Section 20 of the WTA refers to the valuation criteria of Asset Transfer and Documented Legal Acts Tax for the valuation of rights of enjoyment and ownership, taking the value assigned to the immovable property in WT as a reference. In addition, it must be noted that the right of time-sharing over immovable property, whatever its nature, is valued according to its acquisition price (*see* sec. 36 of the CTCRUIPTB).

100. The real value could be determined by the tax administration using the means established in sections 57, 134 and 135 of the GTA.

101. There are subjective reductions for inheritances (because of kinship) or objective reductions (according to the type of immovable property that has been acquired, e.g. the acquisition of the main residence of the deceased) (sec. 20(2) and (3) of the IGTA).

have approved, but only when they can be applied to the taxpayer (until 31 December 2014, only taxpayers subject to unlimited tax liability and with exceptions). The progressive tax rate scale is applied to the net taxable base, thus resulting in the tax liability to which a multiplier coefficient, which has been established by the ACs, has to be applied (this varies depending on the degree of relatedness and the pre-existing wealth of the acquirer). If this multiplier coefficient is not established by the ACs, then the one established by the national legislation will be applied. Lastly, state deductions and allowances, as well as autonomic ones, if there were any, can be deducted from this amount.

Lastly, the taxable base for the PT is made up by the cadastral value of each immovable property (section 65 of the CTRLTAA). In addition, during the subsequent 9 years following the revision of the cadastral value,[102] a reduction could be applied to the taxable base in some cases, thus resulting in the net taxable base, to which tax rates (*see* following section), as well as deductions established by the legislation, will be applied.

17.2.2.3.3. *Tax rates*

The WTA establishes a progressive scale of tax rates. The scale to be applied would be that established by each AC, unless there is not one or it is not applicable to the taxpayer (until 31 December 2014, all persons subject to limited tax liability), in which case the national scale will be applied (section 30).[103] There is also a progressive tax rate scale for the IGT. As with the WT, the rate to be applied is the one established by each AC (or the national one in its absence, section 21(1) of the IGTA).[104]

Section 72 of the CTRLTAA regulates the proportional tax rates applicable for PT and establishes thresholds for the local authorities to fix their tax rates for each type of property. There are different tax rates according to the type of property, whether urban immovable property, rural immovable property or immovable property with special features.[105] There is a permitted 50% surcharge on tax due for residential immovable property that is permanently vacant.

102. The aim of this is to avoid the increase of the taxable base of a taxpayer as a result of a process of cadastral valuation other than the mere actualization of prices (secs. 66-70 of the CTRLTAA).

103. There is a minimum tax rate of 0.5% and a maximum rate of 2.5%.

104. There is a minimum tax rate of 7.65% and a maximum rate of 34%.

105. Tax rates applicable to rural immovable property are lower. Local councils can establish in their local regulations a minimum rate of 0.3% and a maximum rate of 0.9%,

17.2.2.3.4. *Tax incentives for immovable property destined for farming and immovable property of cultural interest*[106]

(A) Immovable property destined for farming. Immovable property and rights that are necessary for the development of an economic activity (farming included) are exempted from WT if they meet the established requirements (section 4(8) of the WTA).[107] In addition to lower tax rates, the PT sets up several tax benefits that can be applied to this immovable property (sections 62, 73 and 74 of the CTRLTAA). Inter alia, mountains where there are trees that have a slow growth and are mainly used for wood or cork are exempted. The CTRLTAA also regulates the different deductions over the PT tax liability that are compulsory or optional (to be passed by local councils), which can also affect immovable property destined for farming.[108]

The Modernising Agricultural Holdings Act, 1995 (hereinafter MAHA) establishes several incentives to foster acquisitions for no consideration of priority agricultural holdings[109] or of rural lands. These benefits are applied to both the direct taxes on the acquisition (IGT)[110] and to the indirect taxes on the transfer (Asset Transfer and Documented Legal Acts Tax or Value Added Tax, *see* section 17.2.3.).

(B) Immovable property of historical heritage – Spanish or Autonomic – and of cultural interest that have been established as such by the Spanish legislation have tax benefits in the WT, IGT and PT. Some are exempted from taxation (section 4(1) of the WTA and section 62(2)(b) of the

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which can be increased when the municipality meets any of the requirements established in section 72 of the CTRLTAA.

106. This section is dedicated to the benefits established in national regulations for the taxes analysed in this report. However, it should be remembered that in both WT and IGT the ACs can set up their own tax benefits for this type of immovable property.

107. In addition to this, in the case of *mortis causa* and inter vivos acquisitions for no consideration of this type of property and rights, a 95% reduction of the value in IGT may be applied if the requirements for WT exemptions are met (sec. 20(2)(c) and (6) of the IGTA).

108. Among the compulsory deductions for local councils there is a deduction of 95% of the PT tax liability for rural property from agricultural cooperatives and cooperatives for the community exploitation of land.

109. The majority of these deductions are applied to agricultural activities classified as priority holdings (secs. 4-6 of the MAHA). For a detailed examination of the tax benefits and deductions applicable to these holdings, *see* section 8 et seq. of the MAHA.

110. For the IGT specifically there is an additional incentive on the acquisition of forestry rural lands through a reduction in the taxable base of that tax (additional provision 4, MAHA).

CTRLTAA);[111] for others, as is the case of IGT, there is a reduction on the taxable base for acquisitions for no consideration of such immovable property, but only when they have been carried out in favour of certain people (e.g. the spouse or descendants of the deceased) and following the requirements established in section 20(2) and (7) of the IGTA.

17.2.2.4. Cross-border aspects

17.2.2.4.1. *Taxation of foreign immovable property*

Regardless of the applicable regulation, as a result of the treaties signed by Spain on the WT or IGT,[112] taxation is determined in both cases according to whether or not the taxpayers have their residence in Spain[113] (unlimited tax liability[114] and limited tax liability). For the WT, persons subject to unlimited tax liability have to be taxed according to their worldwide wealth, including immovable property and rights in rem over them, independently of where they are located, without a difference in taxation in light of the location of the property.

Residents, irrespective of where their immovable property and rights are taxed, are subject to unlimited tax liability for the IGT. However, inheritance and gifts obtained by residents can be levied with a higher tax burden if certain cross-border elements are present (specifically, and in accordance with the legislation in force until 31 December 2014)[115] when the deceased is a non-resident or the donated immovable property is located abroad). Until that date the regulation to determine the taxation of such acquisitions for no consideration was always the state one and the autonomic tax deductions cannot be applied.

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111. Likewise, immovable properties owned by non-profit organizations that are under the special scheme of the FRLNPO&TIP are exempted from PT taxation (with the exception of those assigned to activities that are not exempted from the CIT).

112. Only some rights over immovable property that is located in Spain are subject to PT (sec. 61 of the CTRLTAA).

113. However, for the WT a person who is no longer a resident in the Spanish territory is allowed to be subject to unlimited tax liability (sec. (5)(1)(a) of the WTA).

114. The means to determine habitual residency in Spain established by the PIT regulation (general criteria, specific criteria and presumption of residency) are applicable in the scope of application of these taxes. Moreover, in the unlimited tax liability scheme applicable to both taxes there is a deduction that can be made for those taxes paid abroad (secs. 32 of the WTA and 23 of the IGTA). This issue is examined again in section 17.4. of this Report.

115. As discussed in section 17.4. of this Report, with effect from 1 January 2015, the Spanish legislator has introduced new rules in the IGT, affecting the tax treatment applicable to the acquisition for no consideration of immovable property situated abroad.

17.2.2.4.2. *Tax treatment of foreign legal rights over immovable property*

As already mentioned, the concept of the Anglo-Saxon trust is not contained in the Spanish legislation; consequently, as to taxation effects, any relationships between the contributor of assets to a trust and their beneficiaries are understood as being realized between them. Regarding the IGT, the DGT[116] considers that the monetary contribution (deriving from the sale of immovable property) to a trust that was established in the United Kingdom, with a series of future beneficiaries of this trust who are residents in the United Kingdom, means a gift from the contributor to the beneficiaries, which is effective from the moment of the contribution, and is therefore classified as an inter vivos transfer and is subject to taxation under the IGT's limited tax liability if, when the contribution was made, the funds were in Spain.

17.2.2.4.3. *Differences in taxation treatment between residents and non-residents*

As regards the WT,[117] persons subject to limited tax liability must be taxed according to the part of the net wealth that belongs to immovable property located in Spain and the rights over them when they can be exercised or executed in Spain.[118] With reference to the IGT, non-residents subject to limited tax liability are taxed in accordance with the acquisition for no consideration of immovable property located in Spain and the rights over them that can be exercised or executed in Spain (net acquisition value of each person).

The state regulations of these taxes establish certain special rules regarding this type of tax liability: for the WT the deduction of the threshold of the tax due is not applicable (as a correction to progressiveness) and non-residents must appoint a legal representative in Spain when they operate through a PE[119] or when the tax administration requires them to according to the amount and characteristics of the property located in Spain (sections 31 and

116. Enquiry V1003-14 of 4 May 2014.
117. There is no difference in PT taxation on the basis of the residence of the owners of taxed rights in rem.
118. In these cases, the taxable base of the WT is calculated by deducting, from the value of the property and rights, the amount of the charges and encumbrances over them, as well as the debts for invested capital in them (sec. 9(4) of the WTA).
119. Note that the WTA does not define what has to be understood as a PE, so reference must be made to the concept established in section 13(1)(a) of the CTNRITA, unless there is an applicable treaty, when the concept establishing it will be applicable.

6 of the WTA, respectively).[120] In the case of the IGT, non-residents cannot benefit from the deductions on the taxable base established for certain inter vivos transfers for no consideration (e.g. shares in individual companies exempted from WT; section 20(4) of the IGTA).

Nevertheless, the main especial particularities applicable to the WT and IGT in the case of non-residents are related to the regulations transferring taxation from the state to the ACs, which give these administrations competences to regulate certain elements of the tax when this is only due because of unlimited tax liability (with the exceptions previously analysed). As we have seen, under current legislation in Spain until 31 December 2014, the regulatory framework to calculate the tax liability of non-residents was always national, which could give rise to a higher tax burden for these people (and an obvious tax discrimination with Spanish residents in a comparable situation), as they cannot apply autonomic legislation (such as specific deductions from each AC).[121] As a consequence of this unequal treatment in IGT, the European Commission brought an action on 7 March 2012 against Spain for failure to fulfil its obligations, which was settled with a decision from the ECJ on 3 September 2014[122] (*see* section 17.4.); comment is also made in that section on the recent amendments of the WTA and the IGTA (with effect from 1 January 2015) to adapt these acts to the requirements of the European Union).

17.2.3. Application of VAT/GST and transfer taxes to immovable property

17.2.3.1. Definition of immovable property

Within the group of taxes applicable to inter vivos onerous (i.e. for valuable consideration) transfers of immovable property two indirect taxes can be noted: Value Added Tax[123] (hereinafter VAT), which is applicable to

120. The IGTA also establishes the obligation to appoint a legal representative for persons subject to limited tax liability and for those who are subject to unlimited tax liability who are outside Spain after having made the tax event and before the tax return has to be made, unless they return to Spain before the deadline to make it has expired (sec. 18(4) of the ITGR).
121. It must be taken into account that these deductions and benefits have eliminated, almost entirely, IGT tax liability in many ACs (Cantabria, Castilla-La Mancha, Madrid, etc.).
122. ES: ECJ, 3 Sept. 2014, Case C-127/12, *Commission v. Spain*.
123. The territory of the scope of VAT is the Spanish mainland and the Balearic Islands. It does not apply to the Canary Islands nor to Ceuta or Melilla. In these places, however,

business transactions and is regulated by the VAT Act, 1992 (hereinafter VATA), amended in 2014, and the Royal Decree adopting Value Added Tax Regulation, 1992 (hereinafter VATR); and Asset Transfer and Documented Legal Acts Tax[124] (hereinafter AT&DLAT), applicable to transactions where the transfer is made by an individual (neither businessperson or professional), which is regulated by the Consolidated Text of AT&DLAT Act, 1993 (hereinafter CTAT&DLATA), and the Royal Decree adopting the AT&DLAT Regulation, 1995 (hereinafter RAT&DLAT), as well as well as section 108 of the Stock Exchange Act, 1988 (hereinafter SEA),[125] as amended in 2012.

there is a similar tax to VAT: the Indirect General Canaries Tax and the Tax on Production, Services and Imports, applicable in Ceuta and Melilla. In addition to this, and as occurs with other taxes, for the regulations established by the convention agreement with the Basque Country and Navarra, as well as those international conventions signed by Spain, must be taken into account for the application of VAT.

124. For this tax, the ACs can take on regulating competences and include tax deductions and lower tax rates for administrative concessions, transfers of property, constitution of rights in rem over immovable property (except that of security) and property leasing. They can also regulate the tax rate of the AT&DLAT (documented legal acts – notarised deeds, variable fee (*see* sec. 49 of the FSACC).

125. Paragraph (1) establishes the exclusion from exemption for securities transfers under both the AT&DLAT – onerous transfers – and VAT. However, paragraph (2) sets up the taxation of a series of transactions when these mean the indirect transfer of immovable property in order to avoid possible evasive actions of taxpayers (either VAT or the AT&DLAT – onerous transfers). Section 108 of the SEA is controversial from the perspective of its compatibility with EU legislation. In this respect, the ECJ decision of 8 March 2014 (Case C-139/12) ends the request for a preliminary ruling from the Spanish Supreme Court. The ECJ stated that Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes must be interpreted as not precluding a national provision, such as section 108 of the SEA. In any case, the ECJ had previously decided regarding section 108(2) of the SEA (6 Oct. 2010, C-487/09) upon a request for a preliminary ruling from the Spanish Supreme Court where the ECJ stated that this precept complies with articles 11(a) and 12(1)(a) of Council Directive 69/335/EEC of 17 July 1969 concerning indirect taxes on the raising of capital. As is well known, this Council Directive was repealed by Council Directive 2008/7/EC of 12 February 2008.

The AT&DLAT taxes three different concepts:[126] (i) onerous transfers;[127] (ii) corporate transactions[128] and (iii) documented legal acts,[129] under which three different types of documents are taxed (a) notarised deeds – there is both a variable and a fixed fee[130] (by copy and by sheet) where the taxable transaction is formalized; (b) commercial documents and (c) administrative documents.[131]

As a general rule, VAT and the AT&DLAT (onerous transfers) are not compatible taxes. However, there are certain exceptions applicable to property transactions not subject to or exempted from VAT that will be subject to the AT&DLAT: (i) deliveries or leases of immovable property as well as the establishment or transfer of rights in rem of enjoyment or possession on them that are exempted from VAT[132] and (ii) deliveries of properties included in the transfer of the total assets of a company when this transfer are exempted from VAT[133] (section 7(5) of the CTAT&DLATA).

126. Although there are common dispositions to the three different concepts that can be taxed under the AT&DLAT, some of which refer to applicable exemptions for immovable property transactions (secs. 45(I)(B)-58 of the CTAT&DLATA).

127. Sections 7 to 18 of the CTAT&DLAT specifically refer to the AT&DLAT – onerous transfers. According to section 7(1), the following are taxed: (i) onerous inter vivo transfers of any kind of property and rights that are part of the estate of a natural or legal person and (ii) the establishment of rights in rem (whether of use and enjoyment, security or acquisition), loans, deposits, leases, pensions and administrative concessions (unless the latter are the transfer of the right to use rain infrastructure or property or installations in ports and airports). However, it must be noted that mortgages and antichresis are only taxed as loans (i.e. they are not taxed independently; sec. 15(1) of the CTAT&DLATA).

128. Sec. 19 et seq. CTAT&DLATA. Since 2008, however, only dissolutions of companies and some reductions in shared capital are actually taxed under the AT&DLAT – corporate transactions – as the rest of transactions are not liable to AT&DLAT. This amendment was introduced in fulfilment of Council Directive 2008/7/EC.

129. Sec. 27 et seq. CTAT&DLATA.

130. The High Court of Justice of Catalonia requested a preliminary ruling to the ECJ regarding the compatibility of this variable fee with article 33 of the Sixth Directive. In the order of the Court of 27 November 2008, Case C-151/08, the ECJ established that article 33 does not exclude the establishment of a variable fee in the CTAT&DLATA (documented legal acts, notarised deeds) when it is applied to the purchase carried out by a businessperson whose activity consists of either the purchase and sale of immovable property or the purchase of immovable property for developing or letting.

131. The AT&DLAT (onerous transfers) is incompatible with corporate transactions and with the documented legal acts – notarised deeds, variable fee (sec. 31(2) of the CTAT&DLATA).

132. Regarding exemptions for immovable property for VAT, *see* section 20(1)(20° to 23°) and (2) of the VATA. Respecting the non-application of the exemption to the letting of business premises, *see* ES: ECJ, 27 Nov. 2008, Case C-11/08, in response to a request for a preliminary ruling from the Provincial Court of Palma de Mallorca, establishing that article 33(B)(b) of the Sixth Directive allows Member States to tax the letting of immovable property under VAT, only exempting the letting or immovable property destined to housing. The Spanish regulation therefore complies with EU laws.

133. In the cases established in section 7 of the VATA (amended 2008).

Regarding the definition of "immovable property", section 6 of the VATA defines the term "buildings" but it does not establish what shall be understood as "immovable property"; consequently, as regards these effects, reference is made to section 334 of the CC[134] (*see* section 17.1.1. of this Report). The CTAT&DLATA also refers to the CC, although in this regulation the term "immovable property" is in fact defined as any kind of premises established with a permanent character, even though they could be transported and the land where they are located does not belong to the owner of the said premises (section 2(2) of the CTAT&DLATA).

17.2.3.2. Taxation of immovable property

17.2.3.2.1. *Computation*

Section 78 of the VATA establishes that for internal business operations (deliveries of goods and supplies of services) the taxable base is, as a general rule, the total amount of the transaction. This act also establishes in section 79 a set of special regulations. On the other hand, the CTAT&DLATA sets up the taxable base according to the type of taxable event: (i) onerous transfers, sections 10,[135] 13 and 14; (ii) corporate transactions, section 25 and (iii) documented legal acts: notary deeds, section 30; commercial documents, section 36 and administrative documents, section 42 (preventive annotations in public registries).

134. The DGT, in Enquiry V0957-14 of 3 April 2011, argues that this definition of the term "immovable property" matches the concepts of the Advisory Committee on VAT (guideline from session 93 of 1 July 2011). In any case, Council Implementing Regulation 1042/2013, of 7 October 2013, amending Implementing Regulation (EU) 282/2011 as regards the place of supply of services, and in order to ensure the uniform tax treatment of supplies of services connected with immovable property, has established a list of things that must be considered as "immovable property" (article 13*b* of Regulation (EU) 282/2011).

135. In general, the taxable base of the AT&DLAT (onerous transfers) is made up of the real value of the property or right that is transferred, established or assigned. Charges are only deducted if they decrease the real value of the property (e.g. ground rent and easements), but debts are not deductible. There are numerous special valuation rules, some of which are applicable to rights in rem. For example, in usufructs the taxable base is a percentage of the total value of the property taking into account the duration of the usufruct if it is temporary or the age of the beneficial owner if it is for life; and in rights of use and habitation, the taxable base is the result of applying the usufruct valuation rules to 75% of the value of the property.

17.2.3.2.2. *Tax rates*

The VATA establishes lower tax rates than the general one (21%, section 90) for certain deliveries of goods and supplies of services related to immovable property. Hence, the transactions to which a reduced tax rate of 10% and those to which a super-reduced tax rate of 4% is applied are regulated in section 91(1) and (2), respectively.[136] The CTAT&DLATA establishes different types of tax rates according to what the taxable event is:[137] (i) onerous transfers, sections 11,[138] 12,[139] and 13(1);[140] (ii) corporate transactions, section 25; and (iii) documented legal acts: notary deeds, section 31; commercial documents, section 37 and administrative documents, section 44.

17.2.3.2.3. *Tax incentives for agricultural immovable property and for immovable property of cultural/historical interest*

In order to promote the development of agricultural activities, the MAHA, as already mentioned, establishes a series of exemptions and deductions to the taxable base for certain transactions, such as the acquisition or transfer of property, that apply to the tax under which each transaction falls (IGT, AT&DLAT or VAT). Among these one can find acquisitions or transfers of full control or of lifelong usufruct of agricultural lands and holdings or rustic property when they are in favour of or by the subjects that meet the requirements established in each case (i.e. owners of another land that takes priority or young farmers who will use the land as their first premises in such type of business). In addition, specifically for AT&DLAT (onerous transfers)[141] or VAT,[142] there is an exemption applicable to swaps of rustic property as long as they comply with the established regulations.

136. As an example of the different tax rates, mention can be made of the delivery of dwellings, levied with 10%, unless it is a house belonging to a social housing system or to public promotions, which is levied with 4%.

137. These rates are only applied if the ACs have not made use of their right to establish a specific rate for the cases previously mentioned.

138. In the case that the ACs have not established a different rate, the tax rate applicable to the transfer of immovable property is 6%.

139. This precept establishes a scale of tax rates that is applicable to rents.

140. Applied to administrative concessions.

141. In addition, some ACs, using their legislative competences, have established several fiscal benefits for the letting and transfer of rustic plots. These are compatible with those established in the state regulations.

142. The VATA (sec. 20(20)) also establishes an exemption for deliveries of rustic plots. However, such delivery is taxable under the AT&DLAT (onerous transfers), unless the parties renounce their right to VAT exemption following the conditions set for them.

As for tax benefits applicable to immovable property of historic or artistic heritage, it should be mentioned that there is an exemption in the CTAT&DLATA for non-lucrative organizations that are dedicated to the conservation and restoration of the Historic Heritage of Spain and the ACs under the special scheme of the FRANPO&TIP. On the other hand, the VATA establishes the exemption of some supplies of services carried out by public-sector bodies or private corporations with a social purpose (inter alia, visits to museums, art galleries or monuments) (section 20(1)(14°)).

17.2.3.3. Cross-border aspects

17.2.3.3.1. *Taxation of foreign immovable property and of foreign legal rights over immovable property*

Deliveries of immovable property abroad are not taxable under Spanish VAT as they are outside the territory of scope of the tax (which is the Spanish mainland and the Balearic Islands). This is established by the VATA when it indicates that deliveries of immovable property as well as the supply of services directly related to them (among which include leases) are carried out in the place where the immovable property is located (sections 68(2)(3°) and 70(1)(1°)). According to this regulation and the wide concept of the term "supply of services" used in the VATA (section 11), the DGT[143] establishes that the transfer of a call option over immovable property located abroad is a supply of services that takes place outside the scope of Spanish VAT and is therefore not subject to such taxation. Consequently, a right in rem generated abroad over immovable property situated in Spain constitutes a supply of services that is taxable under Spanish VAT.

Transfers of immovable property or rights located abroad, as well as the establishment of rights in rem of use and enjoyment which are applicable to such property are not taxable under the AT&DLAT (onerous transfers) (sections 6(1)(A) and 7(B) of the CTAT&DLATA). This regulation, however, establishes that all the documents that have been concluded abroad but which will have effects in Spain will be taxable in Spain under the

143. Enquiry V1747-10 of 28 July 2010. The DGT mentions certain ECJ decisions (Case C-166.05, *Heger Rudi, GMBH*) and (Case C-37/08, *RCI Europe*), which establish that only the supply of services that are closely related to immovable property are within the scope of application of article 9(2)(a) of the Sixth Directive (current article 47 of Directive 2006/112/CE). Regarding this issue, it must be highlighted that article 31*a* et al. of Implementing Regulation (EU) 282/2011 (amended in 2013) has established a list of cases of services that shall be regarded as having a sufficiently direct connection with immovable property.

AT&DLAT (documented legal acts, notary deeds) (section 6(1)(C)). Therefore, for example, the first copy of a purchase contract of new immovable property located in Spain and concluded before a foreign notary public will be subject to taxation under documented legal acts, notary deeds (section 28 of the CTAT&DLATA).

17.2.3.3.2. *Conditions for local immovable property to qualify as a PE and related consequences*

For VAT purposes, the fact that a person operates through a PE is relevant, particularly in determining whether or not this person is considered as established in the territory for application of the tax[144] and to establish where exactly the service is supplied, since the PE can act as a service supplier or recipient.[145] Regarding this, it should be remembered that as a general rule, services are understood to be supplied within the scope of the application of the tax when, inter alia, (i) the effective recipient is a businessperson or professional who has a PE in the territory of the application of the tax and (ii) the recipient is not a businessperson nor a professional but the services are provided by a businessperson or professional from a PE located in the territory of the application of the tax.

Regardless of its extraordinary importance, the term "permanent establishment" is scarcely defined in section 69(3)(2°) of the VATA. This act defines it as any fixed place of business where economic activities are carried out, although it establishes a non-exhaustive list of places that have, in any case, to be defined as PEs and that have a clear immovable property substratum.[146] This must be interpreted following the provisions of article 53(1) of Council Implementing Regulations (EU) 282/2011 of 15 March 2011, laying down the implementing measures for Directive 2006/112/EC on the common

144. So they have to comply with the obligations established in section 164 of the VATA.
145. However, section 70(1) of the VATA sets out a series of special rules. Section 70(1)(1°) determines those that refer to services related to immovable property and are applicable regardless of the condition of the recipient of the service. Accordingly, the Central Economic-Administrative Court ruling of 24 April 2012, understands that in the supply of services by a taxable person whose activity is the organization of time-sharing right exchanges among their partners, thus obtaining registration fees, annual subscription fees and exchange fees, what matters is where the immovable property over which the rights in rem exist is located. The decision of the ECJ of 3 September 2009, Case C-37/08, *RCI Europe v. Commissioners for Her Majesty's Revenue and Customs* has been considered for this ruling.
146. Inter alia, agencies or proxies acting on behalf of the taxpayer, places of exploitation of natural resources, construction works whose duration exceeds 12 months and lands for agricultural, forestry or livestock use or immovable property that is rented.

system of value added tax, where the characteristics of a PE are defined as a sufficient degree of permanence and a suitable structure in terms of human and technical resources.

Carrying out an activity in Spain through a PE also has taxation effects for AT&DLAT purposes. Indeed, non-resident organizations that carry out business traffic transactions in Spanish territory will be subject to taxation on the same concepts and in the same conditions as Spanish ones (i.e. corporates transactions established in section 19 of the CTAT&DLATA) whenever their registered place of business or centre of effective management are located in non-EU countries, but only for the part of their capital linked to their economic activities in Spain – sections 20(1) of the CTAT&DLATA and 56 of the RAT&DLAT.

Nevertheless, the content of section 20(2) of the CTAT&DLATA must be highlighted. According to it, organizations with a registered place of business and a centre of effective management located in EU countries (excluding Spain) will not be taxed on CTAT&DLATA – corporate transactions – when they carry out business traffic transactions through PEs in Spain. Organizations with a centre of effective management established in non-EU countries but with a registered place of business located in a EU country (excluding Spain) will have such tax treatment.

As regards the determination of the concept of PE in the AT&ADLAT, it should be noted that there are no international treaties signed by Spain that are directly applicable. The domestic regulation of the AT&ADLAT also does not give a definition of PE. Due this silence of the law (and regardless of the value that the treaties signed by Spain on income and on capital could have as interpretative doctrine – see Spanish Supreme Court decision of 26 December 2011), in the author´s opinion the provisions of section 13(1)(a) of the CTNRTA could be applicable to concretize the meaning of this term. However, the Spanish legislator should clarify this issue.

17.3. Taxation of immovable property under tax treaties

17.3.1. Definition of immovable property

In general terms, all treaties on income and on capital signed by Spain follow the criteria established by the OECD in the different revisions made to the OECD Model. In this sense, article 6(2) of the OECD Model indicates that the term "immovable property" shall have the meaning that it has under

the law of the contracting state in which the property in question is situated, and it lists the types of assets and rights that must be understood as immovable property regardless of what the national legislation establishes. On the other hand, both articles 13(1) and 22(1) of the OECD Model refer to article 6 of the OECD Model to concretize the term "immovable property". In the case of Spain, the reference to national legislation takes one to the definition of immovable property made in section 334 of the CC,[147] which, as analysed in section 17.1. of this Report, extends to immovable property by nature, inclusion, destination and analogy, as well as the classification into urban, rural and with special features established in the CTIPCA.

Mention is made here to purchase options over immovable property since they are only defined as immovable property in the tax treaties with Estonia,[148] Latvia[149] and Lithuania.[150] It should be highlighted that from a legal perspective, purchase options over immovable property are classified as immovable property by analogy according to Spanish jurisprudence but only if these options are registered in the Registry of Immovable Property (*see*, inter alia, judgment of 16 October 1997). Thus, a controversial issue is whether, within the scope of treaties, they should be understood as such at all times in the above cases or only when a concrete treaty so establishes.[151] The criteria of the DGT in this respect (though not from a conventional perspective but from the perspective of the NRIT) is that a purchase option over immovable property is a right in rem regulated in section 334(10) of the CC, which should be effective against third parties.[152] In any case, in the authors' opinion, a purchase option should only be considered immovable property when a treaty so establishes (since an option of this type does not, in itself, grant any direct and immediate right over any immovable property).[153]

147. It should be noted that in cases where the term is not specified in the treaty, article 3(2) of the OECD Model establishes that "unless the context otherwise requires, [any term] shall have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax law of that State prevailing over a meaning given to the term under other laws of that State."

148. Convention of 3 September 2003 (article IV of the protocol).

149. Convention of 4 September 2003 (article V of the protocol).

150. Convention of 22 July 2003 (article V of the protocol).

151. Enquiry of 30 October 2002.

152. In a swap operation carried out by a non-resident over a land located in Spain in exchange for a future building, the DGT establishes that the right of the non-resident cannot be defined as a right in rem (since a right in rem cannot be applied over something that does not yet exist), but instead as a receivable. Hence, the transfer of such a receivable cannot be understood as the disposal of immovable property (Enquiry V1536-14 of 11 June 2014).

153. In this sense, the authors agree with N. Carmona, *Rendimientos Inmobiliarios*, in *Convenios Fiscales Internacionales y Fiscalidad de la Unión Europea* p. 126 (Ciss 2014).

A particularly controversial issue can arise as the result of the different definitions of the same property (as movable or immovable) in two different countries. Given the fact that neither the OECD Model nor the Commentaries or in general tax treaties clarify the issue – regardless of any specific detail from article 6(2) of the OECD Model – the only possible solution would be to apply the mutual agreement procedure established in article 25 of the OECD Model.[154]

17.3.2. Allocation of taxing rights over immovable property

In the case of income from immovable property, almost all the tax treaties signed by Spain follow the general criterion of shared taxation established in article 6(1) of the OECD Model.[155] However, we must make the following comments: (i) Spain has traditionally expressed a reservation[156] under which it has an obligation to tax income from any kind of use or enjoyment of immovable property located in Spain when such right arises from the holding of shares in the company that owns the immovable property[157] and (ii) article 6 of the treaty between Spain and Austria provides that the only contracting state that has taxing rights is the state where the immovable property is located.[158]

154. *See* A. Ribes, *Convenios para evitar la doble imposición internacional: interpretación, procedimiento amistoso y arbitraje* pp. 284-285 (Edersa 2003).
155. This taxing right will be applied regardless of how the non-residents operate in Spain (whether or not with a PE). In any case, following paragraph 4 of the Commentary on Article 6 of the OECD Model, article 6(4) does not prevent income from immovable property when derived through a PE from being treated as income of an enterprise, but secures that income from immovable property will be taxed in the state in which the property is situated.
156. Currently, para. 7 *OECD Model: Commentary on Article 6* (2014). This reservation is based on the enormous importance that time-sharing has over immovable property in the tourist sector in Spain. According to it, Spain reserves its right to tax income from any form of use of a right to enjoyment of immovable property situated in Spain when such right derives from the holding of shares or other corporate rights in the company owning the property. Similar clauses have been introduced in other treaties, such as those with Australia, Belgium, Bolivia, France, Greece, Ireland, Iceland, Italy, Latvia, Lithuania, the United States, the United Mexican States, the United Kingdom of Great Britain and Northern Ireland and Slovenia.
157. Including those deriving from the leasing of such right.
158. Instrument of ratification of the Convention between Spain and the Republic of Austria to avoid double taxation on income tax and on capital tax, 20 December 1966.

Regarding capital gains deriving from the alienation of immovable property,[159] several comments have to be made. Firstly, the general rule in the treaties signed by Spain is shared taxation following article 13(1) of the OECD Model. However, it must be mentioned that the term "capital gain" is not defined in article 13 nor does a reference to state law exist for its definition. There is only a list of the transactions that qualify as "alienation" in paragraph 4 of the Commentary on Article 13 of the OECD Model. In any case, and following certain Spanish authors,[160] the existing relationship between taxable capital gain and the fact that it is generated by the alienation of immovable property means that in non-consideration transfers, article 13 can only be applied to the gains obtained by the donor and not by the donee. In this latter case, article 21 of the OECD Model could be applied to such gains – if obtaining the gain were a taxable event under any of the taxes that are established in the scope of a treaty and so it would only be taxable in the place of residence of the receiver – or any treaty concluded to avoid double taxation on inheritance and on gift taxes should apply, if it existed. Conversely, the criterion of the DGT is that article 13(1) of the OECD Model is applicable to capital gains obtained by a non-resident entity that is the receiver of a donation of immovable property located in Spain.[161]

Secondly, it should be noted that Spain expressed a reservation to the OECD Model (1992) where Spain retained (i) the right to tax capital gains deriving from the alienation[162] of shares or other rights over a company[163] whose assets were mainly made up by immovable property located in Spain[164] – since the introduction of a new fourth paragraph in article 13 of the OECD Model (2003), Spain currently no longer expresses this reservation and (ii) the right to tax capital gains deriving from the alienation of shares and other rights when their ownership gives, directly or indirectly, the right to enjoy

159. Regarding this issue, it should be noted that in the treaties signed with Canada, the Philippines, Italy, Morocco and Tunisia income derived from the alienation of immovable property is defined as "income from immovable property" and not as "capital gains".
160. A.J. Martín, *Ganancias de capital*, in *Convenios Fiscales Internacionales y Fiscalidad de la Unión Europea* p. 411 (Ciss 2013).
161. *See*, inter alia, Enquiry V1252-12 of 11 June 2012.
162. Regarding this issue, the DGT in Enquiry V1697-14 of 2 July 2014 emphasizes that the dissolution of a company located in the United States that is the only shareholder of a company situated in Spain and owner of immovable property on the coast of Spain means the direct alienation of the shares that it owns in such company and the indirect alienation of the immovable property located in Spain.
163. Shares in partnerships and trusts have been included in certain treaties: Canada, the Philippines, Italy, Morocco and Tunisia.
164. The treaties with Belgium, Estonia, France, Greece, Ireland, Latvia, Lithuania, Luxemburg, Portugal, Slovenia and Sweden are examples of this.

immovable property located in Spain (time-sharing)[165] – nowadays included in paragraph 33 of the Commentary on Article 13 of the OECD Model (2014). And thirdly, it should be noted that the tax treaty between Spain and Austria only grants taxing rights following the *locus rei sitae* rule.[166]

Lastly, and as far as conventional taxation on capital consisting of immovable properties is concerned, the treaties signed by Spain follow the regulations of article 22(1) of the OECD Model, with the only exception being to shared taxation of the mentioned convention between Spain and Austria. In any case, Spain has traditionally reserved the right of taxation over capital consisting of shares with assets made up by (i) mainly immovable property located in Spain or (ii) shares that procure their holder a right of enjoyment over immovable property located in Spain[167] (currently paragraph 13 of the Commentary on Article 22 of the OECD Model (2014)).

17.3.3. Relationship between treaty provisions on immovable property income, business profits and other income

In the context of the internal legislation of Spain (especially in terms of PIT), income arising from the transfer of immovable property can be classified as either capital gains or income from economic activities. For income to be classified as the latter it needs to comply with the legal requirement established in article 27(2) of the PITA.[168]

Regarding this last hypothesis, we must mention, though, that from a treaty perspective, article 7(4) of the OECD Model expressly states that, if among the profits obtained from a company, there are items of income which are dealt with separately in other articles of the OECD Model, then the provisions of those articles shall not be affected by the provisions of article 7. In other words, those other articles of the OECD Model where they are dealt with will be applicable. Hence, if an enterprise of a contracting state obtains income from the exploitation of immovable property assigned to their economic activities which are located in the other contracting state,

165. Art. 13(5) of the *Convention between Spain and the United Kingdom of Great Britain and Northern Ireland to avoid double taxation and prevent tax evasion on income tax and on capital tax*, and its Protocol, signed in London on 14 March 2013, includes a similar clause.
166. Art. 13(1).
167. This reservation can be found, inter alia, in the treaties with India, Luxembourg, the Russian Federation, Slovenia and Iceland.
168. This requirement is the ordination on their own account of means of production and human resources or of one of them in this area.

that income will not be taxed using the provisions of article 7 of the OECD Model (whereby taxation rights would be allocated exclusively to the state where the receiver of such income is residing) because there are other specific provisions that refer to the income connected to immovable property,[169] specifically article 6(1) (income from immovable property) and article 13(1) (capital gains from the alienation of immovable property) of the OECD Model.[170] The application of these articles will mean that such income can also be taxed in the state where the immovable property is located.

Related to this last issue, a possible source of controversy could be the classification of the income obtained by a property developer from the alienation of immovable property assigned to their economic activity and located in a country different from the one where he is residing. Among Spanish scholars,[171] there are views that, in such case, consider that the reference of article 7(4) of the OECD Model must be understood to be to article 6[172] and not to article 13 of the OECD Model. Nevertheless, this possible distinction will have no practical consequences regarding the rules governing allocation of taxation rights over that income.

Lastly, whether the mere ownership of urban immovable property in Spain by a non-resident should be taxable in Spain as attributed income from immovable property, should there be a treaty, has also been discussed. Note that if that income was not qualified as "income from immovable property"[173] but as "other income", this would mean that according to application of

169. Regarding the income that does not arise from immovable property, the DGT understands that the commissions charged by non-resident companies and linked to their activity as intermediaries in the transfer of immovable property located in Spain must be classified as "business profits" and so they would only be taxable in the country where these companies are a resident (Queries 0148-00, 2 Feb. 2000 and V0716-05, 28 Apr. 2005).
170. L. Ruibal, *Las rentas derivadas de los bienes inmuebles*, in *Fiscalidad Internacional*, 5th edn, vol. I, p. 466 (CEF 2013).
171. A.J. Martín, *Ganancias de capital*, in *Convenios Fiscales Internacionales y Fiscalidad de la Unión Europea*, p. 449 (Ciss 2014).
172. In this respect, article 6(4) states that the provisions of paragraphs 1 and 3 shall also apply to the income from immovable property of an enterprise. Consequently, according to paragraph 4 of the Commentary on Article 6 of the OECD Model, "the right to tax of the State of source has priority over the right to tax of the other State". This does not prevent income from immovable property, when derived through a permanent PE, from being treated as a business profit of an enterprise, but secures that income from immovable property will be taxed in the state in which the property is situated.
173. The DGT understands as "income from immovable property" the consideration paid for the exploitation of natural resources, according to the Spanish-Colombian treaty (Enquiry V1236-12 of 6 June 2012).

article 21 of the OECD Model it would only be taxable in the state of residence.[174] Regarding this, the criterion of the DGT is to consider that if there is a tax treaty, it would be "income from immovable property".[175]

17.3.4. Tax treaty issues regarding application of inheritance, estate and gift taxes to immovable property

Spain has signed only three treaties to avoid double taxation in this respect, specifically with Greece,[176] France[177] and Sweden,[178] which only cover taxes levied on *mortis causa* acquisitions. Given the date of their signatures, these treaties have not contemplated the OECD Model on Estates and Inheritance and on Gift Taxes (1982). The application of the first one has been practically null, as it does not actually constitute a treaty to avoid double taxation since it is limited to establishing a series of administrative issues regarding the deaths of Spanish and Greek people in Greece and Spain respectively. Regarding the treaties with France and Sweden, they allocate the taxing power to the state where the immovable property is located.[179] In addition, in both cases, the deduction of debts (that are guaranteed by that immovable property) to calculate the value of the property is allowed. If such a debt would be guaranteed simultaneously by immovable property located in both states, the deduction would be proportional.[180]

The existence of unilateral measures established in the Spanish IGT to avoid international double taxation (sections 23 and 46 of the IGTA and the IGTR, respectively) is, undoubtedly, not enough for Spain to stop using the treaty's way to do so in the IGT, even though Spain does not differ greatly from the rest of EU Member States in this sense.[181]

174. In this sense, *see* M.T. Soler & M. Núñez, *El impuesto sobre la renta de no residentes*, in *Fiscalidad Internacional*, 1st edn, p. 31 (CEF 2005).
175. *See*, inter alia, Enquiry V0658-14 of 4 March 2013.
176. Convention of 6 March 1919.
177. *Convention to avoid double taxation and to establish mutual aid on income tax and on inheritance tax*, of 8 January 1963. Nowadays, this treaty only regulates inheritance taxes, since there is a specific treaty on income tax and on capital tax.
178. Convention on inheritance taxation of 25 Apr. 1963.
179. Arts. 30 and 4(1), respectively.
180. Arts. 35(2) and 6, respectively.
181. *See* J. Martín & A. del Blanco, *La problemática de las sucesiones transfronterizas en Europa*, Crónica Tributaria 151, p. 125 (2014).

17.3.5. Non-discrimination tax treaty issues regarding taxation of immovable property

It is well known that article 24(1) of the OECD Model forbids non-discrimination among nationals of the contracting states whenever they are under the same circumstances and applies to all types of taxes (article 24(6)). However, in order to be able to do this it is necessary that every treaty contains this clause;[182] otherwise, this article would only be applicable to taxes that are established by the contracting state or its political subdivisions, according to what article 2 of the OECD Model establishes. The following comments will be made from a Spanish perspective:[183] (i) the term "tax" should not be constricted to the strict taxation term of "tax" as defined in section 2(2)(c) of the Spanish GTA (*impuesto*); it should also be applied to public fees (*tasas*) and special contributions (*contribuciones especiales*) (section 2(2)(a) and (b)), and (ii) in addition to this, it is necessary to determine whether the particular state has signed a treaty that can limit the scope of application of article 24 (e.g. a treaty on inheritance and on gift taxes).

The principle of non-discrimination has been interpreted in Spain in the sense that it does not look for parity in the tax treatment between the resident and the non-resident, but rather in the sense that a state does not apply an unfavourable tax treatment to nationals of other contracting states in comparison with its own nationals. Accordingly, mention is made here of, inter alia, the decision of the High Court of Justice of Madrid of 17 January 2008,[184] which established that STIPNRO is levied according to residences and not nationality, and that is why taxing a Swiss organization does not violate the regulations of the Spanish-Swiss treaty.[185] In addition, the DGT[186] understands that applying the withholding tax established in section 25(2)

182. Australia, Austria, India, Ireland and Saudi Arabia are excluded from this clause.
183. A.J. Martín, *No discriminación*, in *Convenios Fiscales Internacionales y Fiscalidad de la Unión Europea* p. 690 (Ciss 2014).
184. Cited by F.A. Prats, *La cláusula de no discriminación en los convenios para evitar la doble imposición*, in *Fiscalidad Internacional*, 5th edn, vol. 2, p. 690 (Ciss 2014).
185. *Convention to avoid double taxation on income tax and on capital tax between Spain and the Swiss Confederation* (26 Apr. 1966), amended by the protocol of 29 June 2006 and the protocol of 27 July 2011.
186. Enquiry V1834-13 of 4 June 2013. According to the DGT, the fact that the Spanish-Swiss treaty (as well as article 24 of the OECD Model) mentions the expression "in particular with respect to residence" attempts to specify that the residence of taxpayers is one of the relevant factors to determine whether taxpayers are under similar conditions, which has significant importance as it implies that residents and non-residents do not necessarily have to be treated in the same way. Therefore, given a controversial case, applying the withholding tax to all residents in Switzerland, regardless of their nationality, would not mean discrimination on the basis of the nationality of the taxpayers.

of the CTNRITA when immovable property located in Spain is transferred and the transferor is a non-resident with Swiss nationality acting without a PE is not discriminatory.

However, given its possible discriminatory nature, a controversial issue relates to application of the CIT regulation to only non-resident natural persons acting with a PE in order to calculate the taxable base (section 18 of the CTNRITA).[187] Indeed, application of this regulation makes it impossible to calculate the taxable base using the objective assessment method that the PITA establishes for certain economic activities. This different tax treatment could come into conflict with what article 24(3) of the OECD Model establishes, which forbids a contracting state from applying less favourable treatment to a company from another contracting state with a PE than it would apply to its own companies.[188]

The DGT has issued a ruling regarding this different tax treatment where it argues that the existence of a specific tax scheme to calculate the taxable base of a PE is not discriminatory on the basis of nationality, since the same treatment would be applicable to a Spanish person who resides abroad and was operating in Spain through a PE.[189]

17.4. Taxation of immovable property under EU law

17.4.1. Introduction

Adapting the Spanish legislation to EU law has meant a profound transformation of both direct and indirect taxation in Spain. The case law of the ECJ has had a significant impact on direct taxation in Spain, particularly on the principles of non-discrimination and of fundamental economic freedom. These effects are especially visible in taxes such as the PIT, CIT, WT and EGT, as they affect the taxation of investments and operations over immovable property carried out abroad by residents, as well as the taxation of residents in other EU Member States who obtain income or have immovable property in Spain. This process of adaptation to EU law is still being carried

187. Ruibal, *supra* n. 170, at 465.
188. Enquiry V-082-09 of 2 April 2009 establishes that it would be discriminatory for a PE not to be able to apply the special scheme that small-size companies have in the Spanish CIT.
189. Enquiry 0221-02 of 11 February 2002. In this controversial case natural persons residing in France (that are classified as a PE in Spain) directly exploited a business of sales of immovable property located in Spain.

out to incorporate, inter alia, the ECJ criteria arising from its decision of 3 September 2014 (Case C-127/12, *European Commission v. Kingdom of Spain*), which established that the Spanish regulation of the IGT is contrary to EU law. Hence, the Spanish legislators have recently included the necessary changes to adapt the Spanish regulations to EU law.

However, the legal reform mentioned above does not project a modification of certain regulations that, from the present authors' point of view, raise questions about the compatibility between these and EU law. As will be seen, on many occasions, there are regulations that attempt to secure the payment of taxes or to avoid tax evasion or guarantee the efficiency of tax controls. Nevertheless, the Spanish tax administration has enough tools to exchange information that can guarantee and secure the payment of taxes on the basis of Council Directives.[190] As these mechanisms to exchange information and mutual recovery assistance exist, it could be questioned whether the aforementioned objectives of the Spanish legislation are a legal imperative of general interest that can grant the existence of these regulations which obstruct immovable property investments in the European Union. However, even when these mechanisms do not operate and so the objectives mentioned before are justified, it should be examined whether the national regulations are adequate and comply with the principle of proportionality (article 5(3) of the TFEU). Accordingly, the following sections examine some of the more controversial measures on taxation of immovable property.

17.4.2. Taxation of income

As has already been seen, there are differences on personal income taxation between residents in Spain and residents in other EU Member States that can raise questions about compatibility issues with EU law.[191] Some of these have a significant impact on income from immovable property:

190. These are Council Directive 2011/16/EU of 15 February 2011 and Council Directive 2010/24/EU of 16 March 2010.
191. In other cases, the differences in treatment are a result of the location of immovable property. This occurs in the CIT special scheme for organizations that deal with tenancies. However, it must be taken into account that this scheme is established to promote tenancies in a complex housing system, like the Spanish one, so it could be understood as a justified measure in light of ECJ case law. Regarding this issue, *see* A. Martín & J. Calderón, *La jurisprudencia del TJCE: los efectos del principio de no discriminación y las libertades básicas comunitarias sobre la legislación nacional en materia de imposición directa*, in *Convenios fiscales internacionales y fiscalidad de la Unión Europea* p. 1194 (CISS 2014).

- *Reduction of income from immovable property rental:* Spanish legislation denies non-residents this tax benefit established in the PITA for residents.[192] In the authors' view, in this case, there are no objective and reasonable circumstances on which to base this different treatment on the basis of the place of residence of the recipient of income from immovable property. Therefore, those taxpayers under the protection of the ECJ who are in similar circumstances to residents in Spain can claim discrimination that is forbidden by the TFEU and the infringement of the free movement of capital (for immovable property investments not assigned to the economic activity) and the infringement of the freedom to supply services (house rental).

- *Transfer of immovable property by non-residents without a PE:* As has already been seen, the acquirer has to withhold 3% of the agreed price on account of the NRIT of the non-resident taxpayer. In the authors' opinion, the Spanish regulation goes beyond what is necessary to guarantee the objective of this measure (secure the payment of the tax liability) since, save in exempted cases,[193] this withholding tax must be carried out regardless of the economic outcome of the transaction (i.e. irrespective of whether the non-resident has capital gains or losses). In addition, given that in this case the withholding tax means a payment on account of the tax liability, the NRITR requires the non-resident to complete the tax return form according to the final tax liability (section 14(4)), unlike what happens with the rest of taxable income subject to tax withholding, where the withholding tax usually discharges the taxpayer so they do not have to complete the tax refund form (unless a refund had to be made because the withholding tax was higher than the tax due) (sections 28(3) and 31).

17.4.3. Taxation of wealth and inheritances, estates and gifts

As already mentioned in the analysis of the IGT legislation in Spain, the ECJ established in its decision of 3 September 2014 that by applying different tax treatment to donations and successions between beneficiaries and donees resident in Spain and those not resident in Spain, and between successors resident in Spain and those not resident in Spain, as well as between

192. The first preliminary Draft of the Act on the Flexibility and Promotion of the Housing Tenancy Market of 2013 included a similar tax benefit, through an exemption, for income from immovable property tenancies. However, this measure was discarded.
193. This measure shall not be taken in cases of provision of immovable property, establishment of companies or in increases of capital of companies residing in Spain.

donations and similar transfers of immovable property situated within and outside of Spain,[194] Spain has failed to fulfil its obligations under article 63 of the TFEU[195] and article 40 of the Agreement on the European Economic Area of 2 May 1992. To comply with this ruling, a new amendment has been introduced in the IGTA[196] in order to apply the regional law to taxpayers resident in a different EU/EEA Member State that would be pertinent if they were residents in Spain, including related tax benefits.[197] However, it cannot be stated that the solution adopted by the Spanish legislator is fully satisfactory. As a general rule, the taxpayers resident in a third state (non-EU residents) are excluded of the enjoyment of the regional tax benefits (i.e. reductions in the taxable base and deductions), due to the fact that, in this case, the state legislation is only applicable.[198] This issue, without question, does give rise to serious doubts as to its compatibility with EU law, in the light of the ECJ decision of 17 October 2013 in *Welte* (C-181/12).[199]

194. Judgement in an Action for a declaration of failure to fulfil obligations. Action brought on 7 March 2012 (Case C-127/12, *European Commission v. Kingdom of Spain*.
195. ECJ case law has established restrictions to the free movement of capital as all the national measures that decrease the value of the inheritance or of the gift of a resident from a different Member State to that in which the inheritance or gift are taxed, or of a resident from a different Member State to that in which the property is located that taxes their inheritance or gift (established case law by C-256/06, *Jäger* (sec. 31) and C-181/12 *Welte* (sec. 23) in terms of inheritances, and C-510/08 *Mattner* (sec. 26) in terms of gifts.
196. In particular, the additional provision 2 of the IGTA has been amended by final provision 3 of the Act of amendment of the PIT and the NRIT of 2014 (which came into force on 1 January 2015).
197. Also, new rules that affect the tax treatment of acquisitions for no consideration of immovable property located abroad have been introduced in the IGT (additional provision 2, para. 1(1) of the IGTA). Therefore: (i) in inheritances in which the deceased resides in another EU/EEA Member State, the taxation of resident taxpayers in Spain for the acquisition of assets situated abroad will be determined according to the regional legislation (nevertheless, if the deceased resides in a third state and has no assets in Spain, the Spanish state legislation shall apply in all cases); (ii) in the donations of immovable property situated in another EU/EEA Member State, the resident taxpayers may apply the legislation of the AC of their residence (however, if the immovable properties are located in a third state, the IGT is calculated under Spanish state legislation).
198. Exceptionally, in cases of inheritance, if the deceased had been resident in an EU/EEA Member State, other than Spain, all taxpayers (whether residents in Spain, EU residents or non-EU residents) are subject to the application of the legislation of the AC where the highest value of the assets and rights of the estate is located in Spain (additional provision 2, para. 1(1)(a) of the GTA).
199. *See*, in this sense, Herrera Molina, for whom the new regulation should be extended to residents in third states, both in the case of states with which Spain has signed an agreement to exchange information on the IGT, as other states (excluding tax havens), considering that the necessary information to implement successfully the regional elements to calculate the tax due (with the exception of the coefficients on existing assets) is accessible to the Spanish tax authorities. P.M. Herrera, *Las enmiendas parlamentarias al Impuesto sobre Sucesiones y Donaciones siguen quebrantando el Derecho de la Unión*

On the other hand, it should be highlighted that this amendment only affects the IGTA. Therefore, even though that amendment resolves the problem of the different tax treatment that existed regarding the residents in other EU/EEA Member States, it does not resolve it completely; the same problem will arise, at least potentially, as long as sections 32 and 48 of the FCCSAC, as IGTA and regional regulations derive from them, are not modified.

In addition, and to avoid a new decision of the ECJ against Spain on discriminatory regulations of the WTA, an amendment has also been introduced reforming this act in order to allow taxpayers subject to limited tax liability who are residents of another EU/EEA Member State to apply the regulations of the AC where the property or right in rem with the highest value is located to be taxed under WT.[200]

Nevertheless, there are still some pending issues with IGT. Without doubt, the Spanish legislator should modify section 23 of the IGTA (deduction on international double taxation) if it wishes to comply with the European Commission Recommendation regarding the measures to relieve double taxation of inheritances.[201] This is because the ordinary imputation method established to correct double taxation does not allow the final taxable amount to not exceed that which would be applicable if only Spain had taxing rights over it.[202]

Lastly, there are other controversial issues that affect the regulation of different Spanish taxes: we refer to the case of non-residents having to appoint a tax representative in Spain following the requirements and terms established in the NRIT,[203] WT and IGT, which undoubtedly means several extra expenses that act as deterrent elements in terms of investment in immovable property in Spain.

Europea; available at: https://ecjleadingcases.wordpress.com/2014/10/06/las-enmiendas-parlamentarias-al-impuesto-sobre-sucesiones-siguen-quebrantando-el-derecho-de-la-union-europea/ (accessed 7 Oct. 2014).

200. *See* a new additional provision 4 of the WTA that has been introduced by the Act of amendment of the PIT and the NRIT of 2014 – final provision 4 – (which came into force on 1 January 2015).

201. Commission Recommendation of 15 December 2011 regarding relief for double taxation of inheritances (2011/856/EU).

202. J. Cuesta & P. Carmona, *La eliminación de la doble imposición internacional en materia de sucesiones: un camino aún por recorrer*, Revista Aranzadi Doctrinal 11 (2012); available at: http://aranzadi.aranzadidigital.es/.

203. It should be noted that non-residents are obliged to appoint a representative in Spain when they operate through a PE, they carry out economic activities in the country or when they are required to do so by the Spanish tax authorities according to the amount or characteristics of the income.

As is well known, the decision of the ECJ of 5 May 2011 in *European Commission v. Portuguese Republic* (C-267/09) established that the obligation of non-residents to appoint a tax representative in Portugal could mean a restriction to the free movement of capital and, as might be expected, the ECJ decision of 11 December 2014 in *Comisión Europea v. Reino de España* (C-678/11) has established that Spain has failed to fulfil its obligations under article 56 of the TFEU (freedom to provide services) for requiring the pension funds established in Member States other than Spain and offering occupational pension schemes in Spain itself, as well as the insurance companies operating in Spain under that freedom, to appoint a tax representative, who also had to reside in this Member State, according to the legislation in force in 2011.[204]

204. This requirement was suppressed by section 6 of the Sustainable Economy Act, 2011, which amended section 86(1) of the Consolidated Text of the Organisation and Supervision of Private Insurance Act, 2004.

Chapter 18

United Kingdom

by Justin Hamer[1]

18.1. England and Wales

18.1.1. Legal rights over immovable property

18.1.1.1. Non-tax law definition of immovable property

In England and Wales the term "land" includes any ground, soil or earth, such as meadows, pastures, woods, moors, waters, marshes and heath; houses and other buildings upon it; the air space above it; and all mines and minerals beneath it. It also includes anything fixed to the land, such as buildings, as well as growing trees and crops, except those which, broadly speaking, are produced in the year by the labour of the year.

A grant of all the "profits" of land passes the whole land, herbage, trees, mines and whatever is parcel of the land, but a grant of a particular profit of or right in the land does not extend beyond such profit or right. For the purposes of ownership, land may be divided horizontally, vertically or otherwise, and either below or above the ground. Thus, separate ownership may exist in strata of minerals, the space occupied by a tunnel or in different storeys of a building.

Under statutory definitions, the word "land" is usually extended to include not only land in the physical sense, with all that is above or underneath it, but also all rights in the land and a right to share in the proceeds of sale of land under a trust for sale.[2] In statutes generally, passed on and after 1 January 1979, "land" includes buildings and other structures, land covered with water and any estate, interest, easement, servitude or right in or over land.[3]

1. Solicitor of the Senior Courts of England and Wales.
2. *Halsbury's Laws of England*, 5th edn, vol. 87 (2012), paras. 6-7.
3. UK: Interpretation Act 1978, Schedule 1.