

Nomadic lifestyle

León Fernando del Canto considers the application of Spanish residency rules to citizens of other countries by making reference to Shakira's tax evasion investigation.

In the UK, a day for tax residency purposes is counted if the individual is in the UK at the end of the day (that is, midnight).

Spain is different. A day in Spain can be any length. As we shall explain, it is not counted as 24 hours nor does it include an overnight stay.

International tax advisors must be aware of the Spanish tax residency rules, especially if, according to the latest data, almost one-third of the UK population spends at least one day a year in Spain.

In September 2022, the Spanish tax authorities referred Shakira to the public prosecutor claiming income and wealth tax evasion for years ending 2012 to 2014 as she did not report earnings of €34.9m with allegations of tax evasion totaling €14.5m, more than €23m in fines, and an eight-year prison sentence based purely on a residence in Spain, which she was unaware of.

The Spanish Criminal Code considers any tax evasion over €120,000 a criminal offence, and she has been charged with six tax offences. The matter has brought the issue of tax evasion in Spain to the fore and has sparked a broader conversation about tax nomads.

Shakira, Shakira

Shakira thought herself to be a tax nomad. She took advice from a Big Four firm but was not warned of the sporadic absences rule nor how tax days are calculated in Spain.

She maintains that she did not live in Spain, that her legal tax residence was in The Bahamas and that she did not live

Key points

- The UK and Spain define the unit of one day differently.
- Shakira thought she had a nomadic lifestyle but she was not warned of the specific rules applying in Spain.
- Spain is not a country for tax nomads and the investigation into Shakira's tax affairs illustrates the point.
- The Spanish tax agency interprets the residency rules broadly – beware of 'sporadic absences'.
- Where a person is classed as a dual tax resident in Spain and another double tax treaty country, a tie-breaker test will be applied.



factually anywhere in particular; she was on the move and was a 'nomad without roots'. Like Shakira, hundreds of international citizens, including some UK nationals, intend to live as nomads without roots.

Spain is not a country for tax nomads. In addition to staying in the country less than 184 days, a double tax treaty certificate and evidence of residence abroad must always be provided to contest Spanish tax residence. Tax nomadism may equally be tax evasion in Spain, and Shakira has become the perfect scapegoat to illustrate the point.

No doubt, the Spanish tax agency's targeting and monitoring of Shakira surpassed even that of the most ardent entertainment journalist or devoted fan. The agency assembled a detailed profile of the singer's life to probe her residence in Spain, forcing the singer to provide evidence of her absence, which the Spanish tax agency understood as an absence of evidence. With the excuse of residence, the inspector looked through Shakira's image rights structure, including BVI, Luxemburg and Cayman Islands companies.

Would the UK take a similar approach to non-residents? The answer is no. The statutory residence test (SRT) determines the UK's tax residence rules. However, despite being deemed as UK tax residents, UK nationals often end up as residents in Spain. Although a double tax treaty with Spain was signed on 14 March 2013 to cover those cases of double tax residence in some instances, once an individual moves to Spain and ceases to be a UK tax resident, the double tax treaty rules and protection do not apply. Shakira's case illustrates the importance for international tax experts to be familiar with the peculiarities of the Spanish residency rules.

The Spanish tax residency rules

The Spanish tax residency rules are set out in articles 9 and 10 of the Spanish Income Tax Act (*Ley 35/2006, de 28 Noviembre 2006, LIRPF*). Article 9.1 establishes that a person may be deemed to have his habitual residence in Spanish territory when any of the following circumstances apply:

- a) That he/she spends more than 183 days in Spanish territory during the calendar year. To determine this period of residence in Spanish territory, sporadic absences will be considered unless the taxpayer proves their tax

residence in another country. In the case of countries or territories considered tax havens, the tax authorities may require proof of residence there for 183 days during the calendar year. To determine the period of stay referred to in the previous paragraph, temporary stays in Spain that result from obligations contracted in cultural or humanitarian collaboration agreements, free of charge, with the Spanish public administrations, shall not be considered.

- b) That the main core or base of its activities or economic interests are located in Spain, either directly or indirectly.

If no evidence is presented, the taxpayer shall be presumed to be habitually resident in Spanish territory when following the above criteria; the non-legally separated spouse and dependent minor children are habitually resident in Spain.'

When interpreted broadly, which the Spanish tax agency has a reputation of doing, even the smartest person may be deemed to have a tax residency without necessarily exceeding the 183-day residency allowance based on the concept of 'sporadic absences' or by raising suspicions that Spain is 'directly or indirectly' the centre or base of their activities or economic interests or by giving the appearance that they and their family are Spanish residents.

Spanish tax law does not recognise tax nomadism, ie a person is not a resident in any country to pay tax. Under the double tax treaties, Spanish authorities require a tax resident certificate to be issued by the tax authorities where the person is a tax resident.

How the Spanish tax authorities interpret residence

On 25 April 2023, the Central Economic-Administrative Court (TEAC) provided a ruling (RG 04812/2020), which determined the calculation of the number of days required to be spent in Spanish territory to determine tax residence in Spain in a specific calendar year. The days do not have to be consecutive and can be interrupted by continuous entries into and exits from Spanish territory.

“ The days do not have to be consecutive and can be interrupted by continuous entries into and exits from Spanish territory.”

The ruling clarifies that 'permanence' comprises the aggregate computation of three stages: certified presence; presumed days; and sporadic absences. The court then redefines each stage:

- A) A **certified presence**: a presence sufficiently accredited by unquestionable means of proof. Once the relevant evidence attests to a day's presence, the day is counted as a whole without establishing the need for an overnight stay or no minimum number of hours required. This has several implications:
- a) A day of stay is counted as any day there was a physical presence in Spanish territory during any part of the day.

- b) If the taxpayer proves a stay abroad on the same day on which it is known that there has been a certified presence in Spain, the calculation of that day of stay in Spain is still intact. Still, a 1-1 calculation is made (day of stay in Spain and day of stay in the other country); consequently, it is the same day that computes twice. These days of entry and exit must be counted in both jurisdictions: the one of arrival and the one of departure.
- c) The days on which the taxpayer starts or ends a journey from a Spanish airport, ie the days ‘in transit’ through Spanish territory to go to the airport because the country of residence does not have an airport, are days of stay if they involve crossing the customs or immigration barrier.

“ Sporadic absences are an element to be added to the days of effective presence to determine whether the aggregate stay in Spain exceeds 183 days.”

- B) **Presumed days:** those reasonably elapsing between two certified presences. Even if it is not known by certified proof that the interested party was in Spain, they can be counted as days of stay as they are a reasonable number of consecutive days and are between days of certified presence; unless certified presence outside Spanish territory is proven.
- C) **Sporadic absences:** as is clear from the wording of article 9.1 a) LIRPF, sporadic absences are an element to be added to the days of effective presence (made up of the addition of the days of certified presence and the presumed days) to determine whether the aggregate stay in Spain exceeds 183 days, in short, a reinforcement to establish a residence in Spanish territory or abroad, but, of course, not strictly essential when with the days of effective presence the minimum threshold required by the Law of 184 days has already been reached.

In addition to the above rule, determined on a case-by-case basis, the Spanish tax agency has included days spent in Spain because of Covid-19 travel restrictions when counting Spanish tax days.

A person’s centre of vital interests is not only their assets but also the jurisdiction where their income and expenditure are located. This was a key element the Spanish tax agency used in Shakira’s case.

Finally, it is important to be aware of decisions that could indicate Spanish residency to the authorities, such as putting a Spanish address on tax and other official documentation. Individuals should also be aware of how much time their family spend in Spain; the tax authorities can and do use social media data to verify residency claims.

Where a person is classed as a dual tax resident in Spain and another double tax treaty country, a tie-breaker test will be applied to ascertain which country has the right to tax them. A problem arises when the country of presumed residence does not have a double tax treaty.

Why not The Bahamas?

In Shakira’s case, the inspector did not accept The Bahamas department of inland revenue certificate of residence and reiterated that there is no evidence that she did not live in Spain (an allegation that is impossible to prove otherwise). Shakira’s claims to live in Nassau and the utility bills provided were rejected, and the inspector criticised the fact that the only requirement to obtain a certificate in The Bahamas was to buy a house.

Shakira could not prove that she did not visit The Bahamas during the investigation. Nor could she provide any evidence (such as plane tickets) of having done so. The inspector said she had ‘no professional, family, personal, or social ties’ with The Bahamas. The inspector accepted that she travelled worldwide to give concerts, shoot commercials and take holidays. However, as long some of these trips might have been – she recorded *The Voice* in the United States for several weeks a year – the tax office regards them as ‘sporadic absences’. Because when her work (and leisure) ended, and it was time to return home, her destination was Barcelona.

Despite the above allegations, the tax inspector has faced the challenge of proving that Shakira spends more than half the year and one day in Spain, and, more importantly, Shakira has not been able to confirm her absences. The prosecutor, not Shakira, must provide now sufficient evidence of her residence position. Otherwise, Shakira is under a *Probatio Diabolica* or impossible defence.

Concluding words

The high-profile case of Shakira highlights the importance for those living part-time in Spain to understand the residency rules for tax purposes, particularly counting days and the ‘sporadic absence’ rule. As we can see in Shakira’s case, the Spanish tax office can easily convert the absence of evidence into evidence of absence, as in the famous 1891 *Live Stock Journal* of London (tinyurl.com/LSJBull). The journal published letters between two people who sharply disagreed about the movements and location of a bull. The letter from William Housman contended that there was an important difference between absence of evidence and evidence of absence, ie, the two were not logically equivalent. ●

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