



ISSUES RELATING TO COMMERCIAL LEASING

SPAIN Uría Menéndez

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1. Describe any national, state, territorial, provincial, or local transfer taxes payable on creation or assignment of a lease.

(a) Creation of a lease

Different taxes are payable on the creation of a lease, depending on whether the leased property is to be used for residential or other purposes (“**non-residential purposes**”).

(i) Residential lease:

Transfer Tax (*Impuesto de Transmisiones Patrimoniales*) accrues on the basis of the following parameters:

- Taxable event: creation of a lease exclusively for residential purposes.
- Taxpayer: tenant.
- Tax base: sum of the rents payable during the term of the lease. If the lease establishes that it can be extended an unlimited number of times, it is assumed that the extensions are for three-year periods for the purposes of fixing the tax base.

If the extended period exceeds three years, the additional extensions would be subject to Transfer Tax. If the extensions do not actually reach three years, the relevant amount should be reimbursed to the taxpayer.
- Rate: Spanish national law allows the regional authorities to determine the applicable tax rate. Where the regional authorities have not determined the applicable tax rate (which is the case in most of the regions), the amount payable is as follows (according to Spanish national law):

Tax base (Euro)	Amount to be paid (Euro)
Up to 30.05	0.09
From 30.06 to 60.10	0.18
From 60.11 to 120.20	0.39
From 120.21 to 240.40	0.78
From 240.41 to 480.81	1.68
From 480.82 to 961.62	3.37
From 961.63 to 1,923.24	7.21
From 1,923.25 to 3,846.48	14.42
From 3,846.49 to 7,692.95	30.77
From 7,692.96	0.024040 for every additional Euro 6.01

(ii) Lease for non-residential purposes:

Leases for non-residential purposes or not exclusively for residential purposes are subject to and not exempt from VAT (*Impuesto sobre el Valor Añadido*) and, therefore, they are not subject to Transfer Tax.

The following types of leases, amongst others, are not considered to be exclusively for residential purposes and are therefore not subject to Transfer Tax:

- a. the letting of premises and sites for the parking of vehicles;
- b. leases of land for warehousing or storage of goods or products, or to install elements of a business;
- c. leases of land for exhibitions or for publicity;
- d. leases of land or homes with a call option, where the supply of the land or home was subject to and not exempt from VAT;
- e. the letting of furnished apartments or homes where the landlord is obliged to provide hostelry services, such as catering, cleaning, laundry or other similar services;
- f. leases of buildings or part thereof to be subleased, with the exception of those intended solely for housing; and
- g. leases of buildings or parts of buildings assimilated to residences in accordance with the Spanish law on urban leases (i.e. Act 29/1994 of 24 November 1994, “ULA”).

Stamp Duty (*Impuesto de Actos Jurídicos Documentados*) is payable, if the lease is notarized, on the basis of the following parameters:

- Taxable event: notarization of a lease for non-residential purposes or not exclusively for residential purposes.
- Taxpayer: tenant.
- Tax base: sum of the rents payable during the term of the lease. If the lease establishes that it can be extended an unlimited number of times, it is assumed



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that the extensions are for three-year periods for the purposes of fixing the tax base.

If the extended period exceeds three years, the additional extensions would be subject to Transfer Tax. If the extensions do not actually reach three years, the relevant amount should be reimbursed to the taxpayer.

- Rate: Between 0.25% and 1% of the tax base, depending on the regulations applicable in the region where the notary public is based. Most of the regional regulations establish a 1% rate.

(b) Lease assignments

Different taxes are payable on the assignment of a lease, depending on whether the leased property is to be used for residential or other purposes:

(i) Residential lease:

1. Transfer Tax (if the lessee is an individual):

- Taxable event: lease assignment.
- Taxpayer: assignee.
- Tax base: sum of the rents payable during the term of the lease remaining after the assignment. If the lease establishes that it can be extended an unlimited number of times, it is assumed that the extensions are for three-year periods for the purposes of fixing the tax base.

If the extended period exceeds three years, the additional extensions would be subject to Transfer Tax. If the extensions do not actually reach three years, the relevant amount should be reimbursed to the taxpayer.

2. VAT (if the lessee is an entity, not very common in practice):

- Taxable event: lease assignment.
- Taxpayer: tax to be paid by the assignee to the assignor, which must then pay the tax authorities.
- Tax base: the price of the lease assignment. If the assignment is between related parties, the taxable base is the fair market value of the assignment.
- Tax rate: 16%.
- In this case, if the assignment of the lease is notarized, Stamp Duty would also be payable by the assignee under the terms described in point (ii) below.

(ii) Lease for non-residential purposes:

1. VAT:

- Taxable event: assignment for a consideration.
- Taxpayer: tax to be paid by the assignee to the assignor, which must then pay the tax authorities.
- Tax base: price of the assignment. If the assignment is between related parties, the taxable base is the fair market value of the assignment.
- Tax rate: 16%

2. Stamp Duty is payable if the assignment of the lease is notarized:

- Taxable event: notarization of a lease assignment.
 - Taxpayer: assignee.
 - Tax base: there is no clear guidance from the regional tax authorities regarding the tax base in this situation. This tax is usually calculated on the payments to be made under the lease contract that are pending at the time of the assignment. However, if the lease is not registered with the Land Registry prior to the assignment, the tax authorities consider that the Stamp Duty should be calculated on the basis of the entire amount to be paid under the lease contract.
 - Rate: between 0.25% and 1%, depending on the regional regulations applicable in the region where the notary public is based. Most of the regional regulations establish a 1% rate.
3. Finally, if the transfer of the lease involves the transfer of all a company's assets or a branch of activity, the transfer will not be subject to VAT or Transfer Tax but rather Stamp Duty (unless the Special Tax Neutrality Rules on Mergers, Demergers, Asset Contributions and Share Exchanges are applicable).

2. Describe any legal restrictions limiting the maximum term of a lease (including renewals).

As a rule, there are no legal restrictions on the term of a lease.

However, the following should be highlighted:

- (a) according to general provisions of Spanish law, contracts by virtue of which one of the parties is entitled to extend the contract indefinitely are not enforceable; and
- (b) according to the former regulations on urban leases (which are still applicable to certain old leases), the tenant is entitled to extend its lease indefinitely in certain circumstances.

3. Describe any law requiring landlords to allow a tenant to renew its lease.

According to the current ULA, a tenant who has leased a property for residential purposes for a period of less than five years is entitled to extend the lease annually for up to five years from the commencement of the lease.

In addition, according to the former regulations on urban leases (which are still applicable to certain old leases), a tenant is entitled to extend its lease indefinitely under certain circumstances.

4. Describe any restrictions on rent that may be charged for a tenant.

As a rule, there are no legal restrictions on the capacity of the parties to agree the rent for a lease.

By way of exception, the rent updates in residential leases must be in line with Consumer Price Index variations during the first five years of the term of the lease.

5. Describe any laws permitting tenants to terminate a lease prior to its started expiration date.

According to the ULA, tenants who have leased properties for residential purposes are entitled to terminate the lease within the first five years of its commencement by giving the landlord two months' notice.

In this scenario, the tenant must pay the landlord a penalty equal to one month's rent per year remaining of the lease, but only if so established in the lease.

6. Describe any laws allowing tenants to assign or sublease without landlord's consent.

According to the ULA, unless otherwise established in the lease, when a business or professional activity is carried out in a property leased for non-residential purposes, the tenant is entitled to assign the lease or to sublease all or part of the premises without the landlord's consent. In the event of any such assignment or sublease taking place:

- (a) the tenant must notify the landlord of the assignment or sublease within one month following the date on which it is agreed;
- (b) the landlord is entitled to increase the rent by (i) 20% in the event of the assignment or sublease of the entire property; or (ii) 10% in the event of the sublease of part of the property.

According to the former regulations on urban leases (which are still applicable to certain old leases), tenants who have leased properties for non-residential purposes (other than warehousing purposes) are entitled to assign the lease without the landlord's consent under certain circumstances. If such an assignment takes place:

- (a) the tenant must notify the landlord of the assignment; and
- (b) the landlord is entitled to (i) increase the rent by 15% (unless a higher increase has been agreed by contract) and (ii) be paid an amount equal to a percentage of the price of the assignment, such percentage being in the range of 10% to 30%, depending on the date the premises are occupied (unless a higher amount has been agreed by contract).

7. Describe any law allowing landlords to restrict assignments or subleases by tenants.

The ULA allows the landlord and the tenant under a lease for non-residential purposes to agree the terms governing assignments and subleases (and not necessarily follow the provisions of the ULA as explained in Section 6 above). Therefore, in principle, the landlord and tenant may establish restrictions on assignments and subleases as they deem appropriate.

8. What is the common form of eviction proceeding and what is the customary length of time for that proceeding?

Under Spanish law, special eviction proceedings (*desahucio*) can be used when there is a breach of the lease contract consisting of the non-payment the rent. The main stages of these eviction proceedings are as follows and, in principle, should not take more than six months.

- (a) Claim: Landlord files a claim before the appropriate first instance court seeking to have the tenant evicted.
- (b) Hearing: Each of the parties submits its evidence before the court. Tenant is entitled to remain in the leased property by paying all the rents owed to the landlord.
- (c) Resolution: The court then issues its ruling on the eviction.

9. Are there any legal restrictions on pledging a leasehold interest as security for financing?

Even if the law is silent on this matter, in principle a lease cannot be mortgaged (although some scholars think otherwise). However, rental income is often pledged as security for financing.

Although, strictly speaking, the “leasehold” (understood as temporary ownership) does not exist under Spanish law, the *derecho de superficie in rem* right, which is similar to a “ground lease” (which allows the holder of the right to build on a third party’s land and own the construction on a temporary basis, so that title to the construction is transferred to the land owner upon the expiration of the ground lease) may be mortgaged according to Spanish law.

10. Describe any requirements for landlords to hold security deposits in separate accounts and, if such requirements exist, describe if there can be one separate account for all tenant security deposits or whether each security deposit must be held in its own separate security deposit.

According to the ULA, upon signing the lease the tenant must deliver to the landlord an amount equal to one month of rent (in residential leases) or to two months of rent (in non-residential leases). This amount is known as the *fianza*.

The ULA allows the regional authorities to impose on the landlord the obligation to deposit the *fianza* with the regional authorities or appointed public body. Most of the Spanish regional authorities have imposed such obligation on the landlord.

Most of the regional authorities that impose this obligation on the landlords allow certain landlords (e.g., landlords of a shopping centre or an office building) to execute an agreement with the relevant authority or agency that permits the landlord to reconcile all the *fianzas* (of the leased units within the shopping centre or office building) periodically (usually, on an annual basis).

11. Describe any statutory or other legal disclosure to be made to all tenants.

There is no statutory or other legal disclosure to be made to all tenants.

12. Describe all taxes on rent or other taxes that landlord are required to collect from tenants.

Under (a) leases for non-residential purposes, and (b) residential leases in which the tenant is an entity, VAT is applicable to the rent at a 16% rate.

The ULA allows the parties to set out in the lease that the tenant must pay other taxes (e.g., the municipal tax on real estate property), if the parties so agree.

13. Describe any limitations on the ability of landlords to exercise self-help.

The Spanish Constitution forbids the exercise of self-help as a way to enforce any type of legal or contractual obligations, which includes those arising from a lease.

The courts have the exclusive power to determine whether the obligations arising from a lease contract are being fulfilled and to enforce the rights arising from a lease.

14. Describe whether remedies such as acceleration of rent must be expressly stated or whether they are implied.

Any remedies not provided for in the applicable laws (such as acceleration of rent) are not implied and therefore must be expressly set out in the lease contract. A Spanish court may not enforce (or partially enforce) any such remedies established in a contract.

A Spanish court may not enforce a contractual provision that requires a party to pay any amounts as a penalty pursuant to articles 1,152 *et seq.* of the Spanish Civil Code if the court considers that the penalty is excessive as a pre-estimate of damages and the obligations secured by the penalty have at least been partially or irregularly complied with. In this event, the court may reduce the amount of the penalty.

15. Describe whether there are any expedited remedies for tenant default and, if so, what lease provisions would be required for a landlord to see expedited remedies.

There are no legal expedited remedies for tenant default other than the eviction proceedings referred to in Section 8 above.

As a matter of practice, the landlord usually requires the tenant to provide him with a first demand bank guarantee to guarantee the tenant's obligations under the lease.

16. Describe any formal requirement for the execution of a lease.

There is no formal requirement to enter into a lease contract, unless the parties wish to have the lease registered with the Land Registry, which grants additional protection to the tenant (as explained in Section 17 below) and requires that the lease be notarized and filed with the Land Registry (in which case Stamp Duty is payable as explained in Section 1.(a).(ii) above).

According to the ULA, a party to a verbal lease is entitled to require the other party to formalize the lease contract in writing. As a matter of practice, some lease contracts include a provision according to which the tenant is entitled to require the landlord to notarize the lease contract for the purpose of having it registered with the Land Registry.

17. Describe whether a memorandum of lease or other document would need to be recorded for the lease to be enforceable against third parties.

As a general rule, in order to be enforceable against third parties, lease contracts must be notarized and registered with the Land Registry, which triggers Stamp Duty (as explained in Section 1.(a).(ii) above).

By way of exception, according to the ULA, residential leases executed after January 1, 1995 are enforceable against third parties during the first five years of the duration of the lease, even if not registered with the Land Registry.

18. Describe any restrictions on the transfer of ownership of real estate properties subject to a lease. Does such a transfer affect the tenant's rights or obligations?

If the ownership of real estate properties subject to a lease is transferred, the tenant has a pre-emption right. Therefore, the landlord intending to transfer the leased property must notify the tenant of its intention to transfer, as well as the terms and conditions of the intended transfer. The specific terms of the notice, and of the exercise of the pre-emption right, are established in the ULA and in the former regulations on leases (which still apply to certain old leases).

Although leases usually contain a general waiver by the tenant of the right to exercise its pre-emption right in respect of any future transfer, as a matter of practice it is advisable for the landlord intending to transfer the leased property to serve the tenant with the required notice and to obtain from the tenant a specific waiver of its pre-emption right, given that a Spanish court may not enforce a general waiver contained in the lease contract itself.

The transfer of ownership of real estate properties subject to a lease should not, in principle, affect the tenant's rights or obligations, provided that (a) the lease has been registered with

the Land Registry or (b) it is a residential lease executed after January 1, 1995 and the transfer takes place during their first five years of the lease (according to Section 17 above). Otherwise, the purchaser would in principle be entitled to terminate the lease early.