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LEGAL DEVELOPMENTS

LEGISLATION

1. BELGIUM

Belgian Parliament adopts new Bill on tax free cross border mergers

Introduction

The Belgian Chamber of Representatives has approved on 20 November 2008, a Bill that introduces into Belgian legislation various new tax rules on cross border mergers. These new rules modify the present Belgian tax regime applicable on merger operations in order to respect various provisions of the European Merger Directive (Directive 90/434/EC of 23 July 1990) that Belgium so far failed to comply with. Also, the new tax rules allow for tax neutral merger operations between qualifying EU-companies.

Basic rules for a tax free merger

In order to benefit from the tax free regime of article 211 Income Tax Code (ITC), the merger operation needs to meet with the following conditions:

- The acquiring or receiving company needs to be a Belgian company or an "intra-European" company; and,
- The merger operation needs to be carried out in accordance with the provisions of the Belgian Code of Companies, or in accordance with similar rules applying on an acquiring or receiving intra-European company; and,
- The merger operation may not be inspired by tax fraud or tax evasion.

With respect to the last condition, the absence of business motives which motivate the merger operation is a legal assumption that tax fraud or tax evasion is an important motive for the merger operation, although the taxpayer still remains entitled to deliver the proof of the opposite.

Outbound merger operations

In case an intra-European company acquires by way of a merger a Belgian company, the new tax rules only apply if the assets of the merged Belgian company remain present in a Belgian establishment and are taken into account to determine the taxable results of this establishment (article 211 & 229 ITC). If the merger however would result in an exit of these assets outside Belgium, the capital gains realized on the assets of the Belgian company merged into the intra-European company, in principle will be taxed. This condition also, and at the same time, represents an option for the acquiring company to elect for a taxable merger by not leaving the acquired assets present in a Belgian establishment, or simply by no longer keeping an establishment in Belgium...

Inbound merger operations

The new Bill also includes several rules on the entire or partial acquisition of an intra-European company by a Belgian company, as well as on the acquisition of foreign assets by a Belgian company by virtue of the contribution by a foreign company of a business branch into the Belgian company. In such a case, the net equity value of these assets or business branch contributed will be considered as fiscal paid-in capital of the Belgian company.

Transfer of fiscal corporate residence to Belgium

The Bill also includes new rules on the transfer of the fiscal residence of a foreign company to Belgium. As a general rule, the fiscal paid-in capital is considered to be the sum of the statutory capital, the share premiums and the amounts contributed in exchange for profit certificates. The other elements of the equity of the transferred company are considered as taxed reserves.

New recapture rule on the deduction of taxable losses of a foreign branch

The deduction of taxable losses by a Belgian company that were incurred in a foreign establishment of this Belgian company and which establishment is located in a country with which Belgium has concluded a Tax Treaty, will only be allowed if the Belgian company establishes that these losses have not yet been deducted from the profits of the foreign establishment.

New deduction rules on the transfer of losses by Belgian company involved in cross border merger

The Bill envisages that if a Belgian company acquires an intra-European company, the losses earlier incurred by the Belgian company remain deductible after the merger operation in accordance with a pro-rata rule, which implies that the concerned losses remain deductible to the extent that the net fiscal value of the acquiring company is represented in the total balance of the net fiscal value of this acquiring company and the net fiscal value of all assets obtained from the merged-in company.

Losses incurred by an intra-European company merged into a Belgian company, as a general rule, cannot be deducted by the Belgian company from any of its existing or future profits.

2. CANADA

New Functional Currency Tax Reporting Rules

On 10 November 2008, the Government of Canada released legislative proposals relating to functional currency tax reporting. If the requisite legislative conditions are met, a Canadian corporation will be permitted to elect to determine its Canadian tax results in the corporation's functional currency.

In simple terms, the election would be available to a Canadian corporation that uses the USD, the EUR, the GBP or the AUD as its primary currency for financial reporting purposes. As a result of the election, the tax balance sheet of an electing taxpayer would be converted from CAD to the taxpayer's elected functional currency using the relevant spot rate for the last day of the taxpayer's last Canadian currency year. The election would apply to each taxation year of the taxpayer that ends on or after the day that is six months after the day on which the election is filed with the Government.

The option to elect into functional currency reporting was first proposed in 2006 and was meant to both ease compliance and to promote more representative financial reporting. The initial bill which included the implementation of the current functional currency tax reporting rules received Royal Assent on 14 December 2007. The November proposals aim at fixing various technical issues arising in the current legislation.

The November proposals will apply in respect of taxation years that begin after 13 December 2007, which is generally the period of application of the current rules.

3. CHILE

Tax exemption on certain capital gains: new definitions of foreign institutional investors

On 29 November 2008, the Chilean Ministry of Finance issued Decree N° 1.354 which contains regulations for article 18bis of the Chilean Income Tax Law. Basically the mentioned regulations provide a definition of foreign institutional investors that would be eligible for tax exemption on capital gains obtained from the sale of Chilean open stock corporations with stock exchange presence, bonds issued by the Chilean Central Bank or by the Chilean state or by companies constituted in Chile, sold in the Exchange market or in a tender offer, provided by the referred to Article 18bis. Article 18bis was introduced in the Chilean Income Tax Law in year 2001 and the enactment of the regulations was pending since that year.

The definition of foreign institutional investors contained in Decree N° 1.354 includes (i) insurance companies that meet certain requirements; (ii) foreign governments, autonomous territorial divisions in case of federal states or other, regarding the investment of their international reserves; (iii) foreign governments, autonomous territorial divisions in case of federal states or other, regarding the investment of their sovereign funds through their governments or treasury, as well as others such as investment authorities, investment agencies, investment corporations, and (iv) endowment funds investing directly or through companies controlled by them, meeting certain requirements.

It is worth mentioning that in relation to the requirements that the regulations impose to the foreign institutional investors indicated above, the provision states that the investor has to be acting on its own benefit or has to be the beneficial owner of the investments. This is one of the few Chilean provisions that mention the concept of beneficial ownership.

4. CHINA

China issued new provisional Indirect Tax Regulations

On 14 Nov 2008, the State of Council issued the provisional regulation of Value-Added Tax ("VAT") which completes the transformation of the production-oriented VAT system to consumption-oriented VAT system effective on 1 January 2009.

Highlights of the new provisional VAT regulations are summarized as follows:

1. All general VAT taxpayers can claim input VAT for the new equipment purchased, unused input VAT can be carried forward to offset the future output VAT. Cars, motorcycles and yachts that should be subject to Consumption Tax ("CT") and could be used for private purposes are excluded from the scope. VAT exemption on equipment import and VAT refund on foreign enterprise purchasing domestically-manufactured equipment will be canceled.
2. The VAT rate for general taxpayers remains at 17%; the tax rate for small-scale taxpayers is reduced to 3% and the tax rate on mineral products is shifted back from 13% to 17%.

Meanwhile, the State Council also issued the provisional regulations of CT and Business Tax ("BT") to coordinate the transformation of VAT. The amended provisional regulation of CT updated relevant circulars and regulations issued after 1994, i.e. complex taxation method for cigarettes and alcohol, adjustments on CT items and rates, etc. The amended provisional regulation of BT deleted the item regarding the tax basis for lending business, which means that the tax basis shall be the interest on lending, without deduction of the interest on borrowing. The location for BT payment should be the place where the business establishment is located or resident. Both provisional regulations also amended the payment deadline similar to VAT.

Our comments

The VAT transformation reform will reduce the tax burden of enterprises on fixed asset investment. There is no distinguishing between industry and business for small-scale taxpayers and the reduced tax rate of 3% is adopted for all small-scale taxpayers. These measures will facilitate the development of industries especially manufacturing industries.

5. CYPRUS

Ratification of the double tax treaty (DTT) between the Republic of Cyprus and the Republic of Moldova

The Governments of the Republic of Cyprus and the Republic of Moldova have initialed the text of the first-time income tax treaty between the two countries on 20 November 2006. The treaty was subsequently signed by the representatives of the Governments of both contracting states on 28 January 2008.

Moldova, proceeded with the ratification of the treaty with the passing of Law no. 91-XVI on 25 April 2008, which was in turn published in the Official Gazette of the Republic of Moldova no. 88-89 dated 20 May 2008. Equally, upon ratification, it was published in the Official Gazette of the Republic of Cyprus no. 4098, on 29 August 2008, in accordance with the provisions of Article 169(3) of the Constitution of the Republic of Cyprus.

6. DENMARK

Amendments to the Nordic tax treaties

Payments from pension schemes

According to the rules currently in force pension payments may only be taxed in the country of source. Thus if an individual resident in Denmark receives pension payments from a Swedish, Finnish or Norwegian pension scheme, the payments may only be taxed in the relevant country of source. Consequently, in Denmark the payment may only be counted in connection with the computation of the tax rate for the recipients other taxable incomes (exemption with progression). According to the Bill, pension payments may still be taxed in the country of source. However, the country of residence may also tax the payments and must allow a credit relief for the smallest amount of:

- The tax paid in the country of source
- The tax computed in the country of residence.

According to a special transitional rule the Bill will not affect individuals already resident in Denmark on 8 October 2008 and who receive pension payments before 1 February 2009. These individuals will obtain exemption with progression in connection with their Danish tax computation, as long as they remain fully tax liable to Denmark

Work on board airplanes

According to the present rules, individuals resident in one Nordic state who are working on board airplanes on domestic traffic flights in another Nordic state are taxed in the latter state. However SAS employees are taxed in the state of residence. According to the amended rules salary for working on board airplanes on domestic flights in one Nordic country performed by employees resident in another Nordic country is taxed in the country where the individual is resident just like SAS personnel is taxed today.

Effective date

According to the Bill the effective date will be 15 December 2009. The amendments will be effective as of 1 January 2010.

Denmark and the US have entered into a social security agreement

On 13 June 2007, Denmark and the US signed a social security agreement between the two countries. The agreement, which is the first of its kind between the two countries, came into force on 1 October 2008.

The main consequence of the agreement is that the old-age pensioner must have been living in Denmark for at least 3 years between the age of 15 and 65 in order to be eligible for a pension. Before, the pensioner had to live in Denmark for 30 years to be eligible. In relation to Denmark the agreement comprises old-age pension, ATP and early retirement pension. This agreement does not cover health insurance which is common in agreements that Denmark has entered into with other countries. This implies that the individuals will have to take out a specific health insurance during their stay in the US. With regard to the US, the agreement covers the US Federal Insurance Contributions ACT regarding old-age pension, survivors' pension and social security disability benefit (FICA or Medicare tax)

The new agreement implies that US individuals working in Denmark for up to five years will only have to pay U.S. Social Security taxes. After five years, such US individuals can swap to pay only the Danish Social Security tax. For Danish individuals going to work in the US, a three years rule will apply. This involves that a Danish individual going to the US for up to three years does not have to pay contributions to the US Federal Insurance ACT regarding old-age pension, survivors' pension and social security disability pension.

Certain gaps in social security coverage have been closed. As an example, if a taxpayer has not worked long enough in one or the other country to accrue sufficient social security seniority to be covered after retirement, the seniority that they earned in each country will be combined to enable coverage, but on a prorated basis. There are specific entitlement provisions for Medicare coverage, retirement and disability benefits, as well as those for survivors and dependents.

Prior to the agreement, US individual workers who paid Danish Social Security taxes during their stay in Denmark could not take coverage seniority with them when they left. The agreement has enabled those payments to be factored into the worker's ultimate, combined social security coverage. The new agreement does not cover the rules for taxation of pension payments. The principle in the tax treaty between Denmark and the US is that old-age pension is only taxable in the state of source.

7. FINLAND

Amendments to Taxation of Dividends Received by Nonresidents

On 12 November 2008 the Finnish Parliament approved a Bill amending the Act on the Taxation of Nonresidents' Income. According to the Bill the taxation of Finnish source dividends paid to nonresidents should be amended to correspond to the taxation of dividends paid to residents in order to conform to EC Law.

As intercompany dividends are in general tax exempt in Finland, the new provisions stipulate that no tax should be withheld on dividends paid to nonresident shareholders in case the dividends from the same source to a comparable Finnish entity would be tax exempt in Finland and the Finnish withholding tax cannot be credited in the residence country of the entity receiving the dividend. In practice the amendment means that dividends from Finnish non-listed companies will be tax exempt in Finland without any participation requirement, if the same dividends are tax exempt to the entity receiving the dividends in its residence country.

In addition to the taxation of companies, the Bill amends the taxation of nonresident individuals by introducing a possibility to opt in for taxation by assessment, which enables the receipt of tax exempt dividends from non-listed companies. However, the exemption is subject to certain conditions.

The new provisions apply to dividends paid on or after 1 January 2009 to entities and individuals resident in the EEA member countries (with the exception of Liechtenstein). However, in case an unjustified withholding tax on nonresidents' dividends has been levied during the past five fiscal years, a possibility for refund exists. The preconditions for a refund should be examined case by case.

Amendments to CFC Act Enacted

The proposed Finnish CFC amendments were presented in Taxand Quarterly No 11 (July, 2008). The Bill amending the Finnish CFC legislation was approved as proposed by the Finnish Parliament in October 2008. The Bill applies to fiscal years starting on or after 1 January 2009.

Government Bill for Amending the Finnish Business Income Tax Act

On 17 October 2008 the Finnish Government issued a Bill to amend the current Business Income Tax Act in accordance with international financial reporting standards and recent development in bookkeeping legislation. The Bill proposes amendments to the current Business Income Tax Act regarding e.g. taxation of unrealized changes in the values of certain financial instruments and exchange rates, determination of acquisition costs of goods, valuation of inventories and income spreading in taxation. The Bill also proposes to renounce the schematic credit loss reserve system.

In addition, the Bill contains several amendments in relation to the use of own shares. Consideration for sale of a company's own shares would, according to the Bill, be tax exempt income for the company. Correspondingly, the acquisition cost of own shares would be a non-deductible cost for the company. However, acquisition cost for own shares that are transferred based on employment relationship would, under certain conditions, be a deductible cost.

The use of own shares in the possession of the company as considered in corporate rearrangements such as mergers, divisions and transfers of business would now also be allowed in taxation, making the implementation of the transactions more flexible than earlier.

The amendments would be applicable in the taxation for year 2009 with certain transitional provisions.

8. FRANCE

The supplementary budget act for 2008 and the budget act for 2009 provide for:

- Several measures in favor of companies, and more precisely as regards the Annual Fixed Tax ("Imposition Forfaitaire Annuelle"), the business tax and the refunding of certain tax credits;
- A new definition of the abuse of law;
- An adjustment of the real estate investment trusts regime;
- The leveling off of the severance packages' deductibility fixed at EUR 200.000.

Furthermore, the 2009 finance law on French social security provides for the enforcement of a new "social flat rate" of 2% on the sums paid to the salaried employees in conformance with the employee profit sharing, and is subject to social security charges on the entire severance packages exceeding EUR 1 million.

Progressive abolition of the Annual Fixed Tax (IFA) over a 3-year period, as from 2009.

The IFA is due by legal entities subject to corporate income tax. The IFA scale being secured on the business volume, taxation is thus due even in the absence of corporate profits.

Will be exempt from the Annual Fixed Tax:

- As from 2009, the companies liable to corporate income tax the business volume of which raised by financial products remains lower than EUR 1,5 million (abolition of the first two tax brackets of the current IFA scale as from 2009);
- In 2010, the companies the business volume of which raised by financial products remains lower than EUR 15 million (abolition of the two following tax brackets in 2010);
- As from 2011, all the companies (abolition of the last three tax brackets in 2011).

Business tax (TP): exemption of new investments

The companies that have acquired new tangible fixed assets non liable to property tax or which have created such fixed assets between 23 October 2008 and 31 December 2009 may benefit from a total and final exemption of the business tax on these fixed assets.

The amount of the reduction will either be equal to the product (i) of the rental value of the fixed assets concerned by (ii) the global rate of the business tax for the taxation year, or the global rate recorded in the municipality on the grounds of 2008, if it is lower.

The companies eligible for having their business tax capped at 3.5% of the added value will be entitled to an additional tax cut in on the grounds of the investments realized between 23 October 2008 and 31 December 2009.

This additional tax cut will be equal to the product (i) of the straight line depreciation endowment or the rents relative to the eligible fixed assets acquired new or created between 23 October 2008 and 31 December 2009 with (ii) the rate applied to the added value on the taxation year for the leveling off of the business tax on the added value (3.5%).

Taking into account the two-year gap between investment and business tax taxation, this system will come into full effect in 2011. It will apply however:

- As from 2009, for investments carried out between 23 October 2008 and 31 December 2008 and linked to an establishment founded in 2008;
- As from 2010, for investments carried out between 23 October 2008 and 31 December 2008 and linked to an already existing establishment in 2008.

Measures for reviving the economy: accelerated refunding of certain tax credits.

The economy recovery package provides for accelerated refunding measures of certain tax credits, in order to reduce the cash balances of the companies. The tax credits debt for research may thus now be refunded immediately (instead of a 3-year wait), as well as the carry back debt, stemmed from the carry backs (instead of a 5-year wait).

Dispute: abuse of law - new definition

Article L64 of the French Book of Tax Procedures ("Livres des Procédures Fiscales") was rewritten in order to simplify as well as enclose the recent jurisprudences (the "Janfin" and "Halifax" court decisions). Now comes under the abuse of law definition, regardless of the tax examined:

- Situations of law fictitiousness (already present in the Bill in force)
- But also operations carried out in an exclusively tax aim by taxpayers and considered by the jurisprudence as tax fraud carriers.

The inclusion of such tax fraud cases thus enlarges the abuse of law definition.

Real Estate Investment Trusts (SIIC): raising of the reduced rate of corporate income tax

The reduced rate of corporate income tax – of which some real estate capital gains benefit from – is raised from 16.5% to 19%. This raising is backed up with a deadline carried forward to 31.12.2009, during which the real estate investment trusts must honor the legal obligation imposed on them of being held, directly or indirectly, up to 60% or more by shareholders taking concerted action. Regulations are provided for and adjusted should there be a change of regime.

"Golden parachutes": The deductibility of severance packages for executives is tax-deductible up to EUR 200.000.

Deductibility of severance packages will have its upper limit fixed at EUR 200.000. The area of application of this

measure is very broad since it not only concerns the "golden parachutes" but also the sums paid for the remuneration of non-competition clauses as well as "golden handshakes".

New social flat rate – 2% on employee profit-sharing

The "social flat rate" has been set up in order to fight against tax loopholes. This 2% flat rate concerns the whole of the remuneration elements subject to the Welfare Contribution levied on all tax payers ("Contribution Sociale Généralisée"), while excluded from the social security charges tax base. However, stock options and the granting of free shares are excluded from this measure since they are already liable to a specific 2.5% payroll contribution.

Severance packages: the entire severance packages exceeding EUR 1 million are subject to payroll taxes.

- Severance packages exceeding EUR 1 million will be entirely liable to payroll tax, assessed including compensations due to breaches in the employment contract and compensations due to the forced discontinuation of functions. The golden parachutes which exceed EUR 1 million are thus from now on liable to payroll taxes, as of the first euro. The tax relief exemption for social security charges up to EUR 200.000 remains effective when the total amount of severance packages does not exceed EUR 1 million.

The tax relief exemption for income taxes relative to the part of severance packages inferior to EUR 200.000 remains effective whatever the total amount of compensation perceived.

9. GERMANY

Annual Tax Act 2009 – Main proposed new rules

On 28 November 2008, the German Bundestag (Parliament) adopted the Annual Tax Act 2009. Discussions in the German Bundesrat (Federal Council) will take place on 19 December 2009. However, due to the current political situation no major changes are expected. In the following we have highlighted the main changes relevant for corporate investors.

1. Third-country related losses

The European Commission is running an infringement proceeding against Germany restricting the utilization of cross-border losses from passive investments abroad. In order to be in compliance with EU law investments in EU / EEA countries investments would, under the new rules, not be subject to limitations anymore provided that effective exchange of information is given. The old rules will apply for third country investments even after the change.

These rules, however, do not have an influence on losses incurred in a permanent establishment if the double taxation is prevented by the exemption method. The new rules may especially be relevant for corporations and individuals having a permanent establishment in an EU / EEA country which is taxed under the credit method.

2. Interest payments and treaty override

The German Federal Tax Court recently decided that Germany is not entitled to tax the interest income of US partners on a loan to a German partnership.

Under the proposed new rules interest paid to the partners by the partnership or other remuneration the partnership pays to its partners will have to be treated as business income under the respective tax treaty. This new provision overrules the decision of the Court dealing with foreign partners in partnerships receiving a business in Germany. It applies to outbound scenarios correspondingly. However, the German subject-to-tax rule would still apply to avoid that income due to classification conflicts is subject to tax in none of the countries involved.

3. Withholding tax and dividends to foreign shareholders

From 2009 onwards the general German WHT rate on dividends will be 26.375%. Based on the current law it should have been possible to apply for a lower rate of 15.825% in case of distributions to a foreign corporate investor. However, according to that Bill and under German domestic law, only a reduction up to 15.825% is possible if the receiving nonresident foreign shareholder fulfills the strict substantive requirements introduced in 2007. Therefore, dividends to foreign shareholders without substance would be subject to a WHT of 26.375%.

4. Lease of movable assets and withholding tax

From 2009 onwards, there shall no longer be the obligation to withhold taxes on lease payments made to nonresident movable assets leases. In non-treaty cases, the remuneration paid for movable assets used in Germany would still be subject to German taxation. However, the tax should be assessed and there should be no obligation to withhold the taxes.

5. Partnerships and loss-trafficking rules

The loss-trafficking rules introduced in 2008 shall be broadened in order to both cover a direct or indirect change in the corporate partners of a partnership. The transfer of a direct or indirect interest in a partnership of more than 25% to one acquirer would also result in a proportionate forfeiture of the trade tax loss carried forwards and trade tax losses incurred during the current year until the transfer. In the event more than 50% are transferred, all losses would be lost for tax purposes. The same applies for interests carried forward under the earning stripping rules.

6. Bookkeeping in the EU

Under the current regulations bookkeeping has to be carried out in Germany for German businesses. Furthermore, the relevant documents have to be kept in Germany. Under the proposed new rules German residents may transfer the electronic (not paper) bookkeeping to other EU countries. The same applies to non EU but EEA countries, if the respective country has an official agreement with regard to the exchange of information with Germany.

The taxpayer will have to inform German authorities about the physical location of the IT and grant them electronic access to the system. Furthermore, the other country needs to consent to the access by German tax authorities to data stored in this other country.

In case the requirements described above are not fulfilled a penalty of up to EUR 250,000 could be assessed should the bookkeeping not be kept in Germany.

7. Nonresidents and rental income from real estate

Currently, the rental income from real estate held by nonresidents is treated as passive income (asset management income). Only capital gains from the sale qualify as business income.

Under the proposed new rules rental income from real estate shall qualify as business income for nonresident corporations. As a result the taxable income has to be determined on an accrual basis rather than on a cash basis. Further, depreciation of 3% rather than 2% could be deductible from taxable income (provided that real estate is not used for residential purposes).

8. Real estate companies and trade tax exemption

Only entities the income of which results from passive real estate administration may, in general, benefit from the trade tax exemption. Under the proposed new rules certain payments to a partner of a real estate managing partnership which do not result from the use of real estate (e.g. interests the partner receives on loans granted to the partnership) would no longer be exempt from trade tax. The intention of this rule is to prevent tax saving structures.

9. Declining balance depreciation

Under another tax reform act the purpose of which is to strengthen the economy in the crisis declining balance depreciation, at 2.5 times the straight line depreciation (maximum 25 %) for movable fixed assets, has been introduced for the period from 1 January, 2009 through 31 December 2010.

10. Participation Exemption

The plan to abolish the participation exemption for shareholding of less than 10 % in a corporation has not been set in force. Capital gains and dividends from shares below 10 % are still exempt from corporate income tax and trade tax (except for trade tax on dividends, if the shareholding is below 15 %).

10. GREECE

Gradual reduction of corporate income tax rate

The new law provides for a reduction of the corporate income tax rate for all types of legal entities, with the exception of general partnerships, limited partnerships and co-ownerships. In specific, the currently applicable 25% corporate income tax rate will be reduced to 20%.

The new reduced rate shall apply as from fiscal year 2014, whereas a transitional period shall apply, starting from fiscal year 2010, in the course of which the applicable corporate income tax rate shall be reduced by one point, on an annual basis. Therefore, the applicable corporate income tax rate shall be 24% for fiscal year 2010, 23% for fiscal year 2011, 22% for fiscal year 2012, 21% for fiscal year 2013 and 20%, as from fiscal year 2014.

10% withholding tax introduced on profits distributed by Greek corporations

Pursuant to the new tax law, a 10% withholding tax is introduced on profit distributions to be made by Greek corporations having the legal form of SAs, on the basis of approvals granted by General Meetings of Shareholders that shall take place as of 1 January 2009. The new 10% tax, which shall be imposed on profits already taxed at the level of the distributing corporation, is to be withheld on (a) profits distributed to members of the Board of Directors, and directors, in excess of their salary, and (b) dividends and pre-dividends distributed to resident or nonresident individuals or legal entities, in cash or in the form of shares.

The 10% tax shall exhaust the respective income tax liability of the recipient of the profits and shall be withheld by the distributing SA upon payment or credit of the profits under distribution, and in any case no later than one month following approval of the distributing SA's financial statements by the General Meeting of Shareholders.

Finally, the new law provides for the imposition of the new withholding tax on profits distributed by SA's only, whereas it does not apply with respect to profits distributed by other types of legal entities (e.g. EPEs, partnerships etc.).

10% withholding income tax on capital gains from the sale of listed shares

The new law introduces a 10% withholding income tax on capital gains from the sale of shares listed in the Athens Stock Exchange or foreign markets that will be purchased as from 1 January 2009. To be noted that as per a recent announcement of the Greek Ministry of Finance, the effect of the aforesaid tax has been postponed until April 1, 2009, due to technical reasons. The new law does not however amend the tax treatment of listed shares that are purchased up until 31 December 2008. The tax treatment of capital gains from the sale of listed shares pursuant to the new provisions varies depending on the tax residence of the seller. If the seller is a foreign tax resident, the 10% withholding income tax on capital gains tax is applied on shares acquired on / or after 1 April 2009, unless a Treaty for the Avoidance of double taxation provides for a tax exemption. In this respect, a matter to be examined is whether Greek tax authorities shall treat the capital gain realized from the sale of listed shares as business income, or as capital gain, for Greek tax purposes. The said classification shall be of particular importance as regards Tax Treaties entered into by Greece, which do not provide for an exemption from taxation of capital gains at the state of source.

For the purposes of the new 10% tax, the taxable capital gain realized upon the sale of listed shares shall be equal to the sale price thereof, minus their acquisition cost, whereas the acquisition cost shall be equal to the average purchase price of each type of shares.

Finally to be noted, the 10% tax shall be withheld by the Athens Stock Exchange, the latter being liable to remit such tax to the competent Greek tax offices. In this context, practical complications may arise, particularly with respect to sales performed by foreign tax residents (e.g. upon determining, who shall be responsible to receive the tax residence certificate of nonresident sellers etc.).

11. INDONESIA

Indonesia amended its Income Tax Law

In an attempt to attract foreign as well as domestic direct investments, and to increase the number of taxpayers, the Indonesian government recently enacted Law No. 36/2008 amending Law No. 17/2000 on Income Tax. The new law will take effect on 1 January 1 2009.

Below are some of the important amendments to the Income Tax Law:

1. Reduction of income tax rates for individual taxpayers from a maximum rate of 35% to 30%. The taxable income level subject to the maximum tax rate is also increased from INR 200,000,000 to INR 500,000,000.
2. Reduction of corporate income tax from a maximum of 30% to a flat rate of 28% in 2009 and 25% in 2010.
3. Publicly listed companies that have 40% of their stocks traded on the Indonesian stock exchange and that fulfill other requirements to be set out a latter date in a government regulation will obtain an additional tax rate reduction of 5%.
4. Small- and medium-sized enterprises will be eligible for a corporate income tax rate reduction of 50% on their taxable income from revenue up through INR 4,800,000.
5. Another unique feature of the amended law designed to force taxpayers to obtain a taxpayer identification number is to increase the withholding tax rates for those taxpayers who do not possess such a number. The tax rate would be 20% higher for employees and 100% higher for service providers.
6. Individual taxpayers who have a taxpayer identification number and their families will no longer have to pay the exit tax of INR 1,000,000.
7. Donations are currently nondeductible for corporate income tax purposes. The amendment defines certain kind of donations as deductible expenses including donations for national disasters, donations for research and development performed in Indonesia, development costs of social infrastructures, donations for educational facilities, donations for sports development and scholarships.

8. Provisions for bad debts that have hitherto only been applicable to banks and leasing companies will be extended to all finance companies.

The amendments also included some anti-tax avoidance rules, as follows:

1. The Director General of Taxation is authorized to determine the actual taxpayer who buys or sells shares or other assets through a special purpose vehicle that has a special relationship or where there is an unrealistic transaction.
2. The Director General of Taxation is entitled to determine a transfer of share between a conduit company domiciled in a tax haven country that has a special relationship with a company domiciled in Indonesia or a permanent establishment in Indonesia, as a transfer of shares of a company domiciled in Indonesia.
3. The Director General of Taxation is entitled to recalculate the amount of income received by a domestic individual taxpayer from an employer which has a special relationship with another company, in the event the employer redirects all or a part of the individual taxpayer's income through another channel.
4. The tax residency of the foreign taxpayer is considered to be the country that actually receives the benefit of the income ("beneficial owner").

12. JAPAN

FSA's Tax Reform Requests for FY 2009

On 28 August 2008, the Financial Service Agency ("FSA") published FSA's Tax Reform Requests for FY 2009 ("Requests"). In the Requests, the FSA pursues necessary tax reforms to (1) accelerate the trend "from savings to investment"; and (2) to improve investment activities, with the main objective of enhancing the competitiveness of Japanese financial and capital markets.

In order to accelerate the trend "from saving to investment", the FSA recommends: (1) establishing a Japanese ISA ("Individual Saving Account"); (2) adopting special tax treatment for securities investment by the elderly; (3) enhancing the defined contribution pension (Japanese 401K); and, (4) extending the scope of calculation for the total amount of losses and profits for financial instruments, etc.

In order to improve investment activities, especially for incoming foreign investments, the FSA offered to take necessary measures in order to revitalize and promote offshore investments into Japan because of PE risk.

Measures to the PE risks

Japan introduced provisions in the domestic law, Tax Reform FY 2008, in order to exclude an independent agent from the scope of a permanently established agent ("PE"), and bring domestic treatment more in line with the OECD model tax treaty. This reform helps to minimize the PE risk, in particular, the risk of double taxation that offshore funds could face for the fund management business if they engage transactions in Japan through

domestic fund managers. In order to facilitate the domestic fund managers' business with offshore funds, these funds are now regarded as not having a PE in Japan, as long as their fund managers in Japan are sufficiently independent from them. Recently, the FSA published guidance in this regard. Please refer to the FSA website for further details. <http://www.fsa.go.jp/en/news/2008/20080627-3.html>

In the Requests, the FSA put forward an additional tax amendment to address another PE risk. At present, an offshore investor could face the risk of double taxation if he invests in a fund established as a partnership in Japan, since such offshore investors shall be deemed to do business jointly with the fund manager in Japan. To address this risk, the FSA proposed that such a partnership-type fund should not be considered as a permanent establishment of the offshore investors. If this amendment is enacted, offshore investors who faced the PE risks through certain hedge fund-type arrangements, such as private equity and real estate funds, which are not protected by the PE risk in the 2008 Reform, will benefit from it. Such an amendment will help to vitalize the financial services industry and promote competition throughout the business sectors.

13. LUXEMBOURG

Positive changes for companies as from 2009

Two laws of December 19th, 2008 have introduced some positive changes for companies:

- Capital duty and other registration taxes

The 0,5% capital duty is abolished as from January 1st, 2009.

The same applies to the fixed capital duty applicable to UCIs within the meaning of the law of December 20, 2002 that also relates to SIFs, SICARs, ASSEPs, SEPCAVs and securitization vehicles.

The commentaries to the law and a circular issued by the indirect tax authorities on December 31, 2008, specifically mention that the 5 year claw-back period does no longer apply in 2009 to transactions based on article 4-2, even if the said transactions took place before January 1st, 2009.

Indeed, article 4-2 deals with the so-called share for share merger exemption. Based on this article, a company that received a contribution in kind of shares in another EU company, against the issuance of new shares in its own capital, would be exempt from capital duty under certain conditions. One of the conditions is to hold the shares received for at least 5 years. Otherwise the capital duty becomes due. Based on the commentaries to the draft law, as from 2009, it will no longer be required for companies that have benefited from this capital duty exemption in the past, to keep the shares after January 1st, 2009.

A fixed registration duty of EURO 75 is introduced and covers several transactions pertaining to Luxembourg companies: incorporation, transfer of seat from a foreign country to Luxembourg and amendment of the bylaws.

Contributions of real estate assets situated in Luxembourg are now subject to the following regime:

- Contributions remunerated by shares are subject to a 0,6% registration duty + a 0,5% transcription tax;
- Contributions remunerated by other means than shares are subject to a 6% registration duty + a 1% transcription tax (4% for Luxembourg town);
- Transfers made in the context of a corporate restructuring (i.e. contributions of all assets and liabilities, contributions of one or more branches of activities as well as contributions of all assets and liabilities of the 100% held subsidiary) are exempt from proportional duties. The transfers have however to be mainly remunerated (i.e. with more than 50%) with securities that represent share capital of the companies involved.

- 0% withholding tax on dividends to entities resident in a tax treaty country

The exemption of dividend withholding tax, as provided by article 147 income tax law (ITL), is extended to distributions made to fully taxable entities that are resident in a country with which Luxembourg has concluded a double tax treaty.

These non-resident entities have to be fully taxable entities, i.e. subject to a corporate income tax similar to the Luxembourg corporate income tax (CIT). Based on the commentaries to the draft law, a corporate income tax is similar to the Luxembourg CIT if it is mandatory (i.e. not optional) and if the effective tax rate is at least half of the Luxembourg corporate income tax rate (i.e. 10.5% as from 2009) and applied on a taxable basis that is determined following rules which are similar to the ones applicable in Luxembourg.

- Corporate income tax rate decreased by one percent

In May 2008, the government announced a decrease, in two steps, of the global corporate income tax rate (i.e. CIT + municipal business tax, (MBT) from the rate of 29.63% to 25.5%. The law foresees, as a first step, a decrease of the corporate income tax rate from 22 to 21%, which will bring, as from 2009, the global corporate income tax rate from 29.63 to 28.59% (21% + 4% solidarity tax + 6.75% MBT).

- Exemption of certain IP rights for net Wealth Tax purposes

Following the introduction in 2008 of an 80% exemption of income generated on certain IP rights, (i.e. income received as a consideration for the use of any copyright on software, any patent, trade mark, design or model), and on capital gains realised on the sale of such IP rights, the law amends article 50 bis ITL such as to clarify that domain names are within the scope of the partial exemption.

In addition, the law introduces an exemption of these IP rights for net wealth tax purposes.

Regarding the IP exemption regime more generally, the EU Code of Conduct Group which was reviewing

the measure from a Code of Conduct point of view together with other measures introduced recently in other EU Member States, came to the conclusion that the Luxembourg IP measure does not need to be assessed against the Code of Conduct criteria. This should encourage investors to make use of this measure and the tax authorities to restart the process of drafting a circular describing in more details how this measure is to be applied in practice.

- Tax credit for hiring unemployed workers

Based on the law, the measure introducing a tax credit for hiring unemployed workers, which was limited in time, is extended for three more years until December 31 2011 and the tax credit is raised from its current rate of 10% to 15%.

14. MALAYSIA

Ministry of International Trade & Industry (MITI)

MITI announced several measures to revitalize the economy including the following tax measures:

- To support domestic manufacturers, import duty exemptions will be given on raw materials and intermediate goods used in domestic manufacturing activities
- Regional Distribution Centers (which currently enjoy a 10-year tax holiday on qualifying income) will be given the flexibility to source raw materials, parts and components from any party for distribution to related and unrelated companies within and outside Malaysia, and not merely those produced by its related companies for its own brand
- Regional Distribution Centers and International Procurement Centers will be allowed to increase the proportion of drop shipment sales to total annual sales turnover up to 50% in order to enjoy the tax exemption on income from drop-shipment sales

Earlier, the Minister of Finance also announced a MYR 7 billion stimulus package. However, it does not include tax measures.

Transfer Pricing and Thin Capitalization

The 2009 Budget proposals and Finance Bill 2008 seek to introduce transfer pricing and thin capitalization provisions via the proposed Section 140A of the Income Tax Act 1967 (ITA). The Ministry of Finance is in the process of drafting Transfer Pricing Rules setting out the scope and application of Section 140A.

New Withholding Tax – Section 109F

A new withholding tax was announced in the 2009 Budget and will be enacted via a new provision of the ITA, the proposed Section 109F. It is understood that the tax authorities will be issuing a public ruling on the proposed Section 109F to explain the scope of this section. Section 109F will impose a withholding tax of 10% on payments to nonresidents as regards income falling within Section 4(f) of the ITA. Section 4(f) of the ITA covers income which falls out of the other classes of taxable income covered in Section 4(a) to (e), i.e. business profits, employment income, dividends, interest, royalties, discounts, etc. The application of Section 109F is expected to be confined to casual income that would typically not be recurrent in nature, such as one-off commission income, introducer's fees, or guarantee fees, etc, which would not comprise business profits, or other taxable income within Section 4(a) to (e) of the non-resident. Section 109F is expected to be effective from 1 January 2009.

Labuan

Election by Labuan Offshore Companies to be taxed under the Income Tax Act (ITA)

The tax authorities issued guidelines on the tax treatment of Labuan offshore companies (LOCs) which elected to be taxed under the ITA (following the 2008 Budget proposals and the ensuing changes in the ITA and the Labuan Offshore Business Activity Tax Act, 1990). The guidelines set out the relevant definitions, election procedure, compliance requirements, scope of taxation, residence status, etc.

Double Tax Agreements (DTAs)

The following DTAs which Malaysia has entered into have recently come into effect:

- a) Chile
- b) Myanmar

15. PERU

Proposed regulations on Peruvian source income items

On 2 December 2008, proposed items on Peruvian source income regulations were presented before the Peruvian Congress.

The proposed regulations modify the Peruvian Income Tax Law to include as a taxable Peruvian source income the capital gain realized by any individual or legal entity domiciled in Peru from the sale or exchange of stock of a foreign legal entity, when such an operation allows the purchaser to share - directly or indirectly - in the ownership or in the profits of a legal entity incorporated in Peru. The proposed regulations are based on the fact that in the past years, the ownership of many successful Peruvian corporations was transferred through the sale of the stock of the foreign parent corporation. Under the actual regulations, this transaction does not generate any tax impact in Peru.

However, it should be noticed that these regulations have not established what is considered as "sharing in the ownership of the company" (minimum percentage of owned shares required) or if the whole capital gain obtained will be considered as Peruvian source income or just part of it. This issue is of dramatic importance in order to determine the real tax impact of these proposed regulations for investors in foreign holdings that are parents to Peruvian corporations.

According to the Peruvian Income Tax Law only the capital gain obtained by the sale or exchange of stock of a legal entity incorporated in Peru is currently considered as Peruvian source income.

These modifications of the Income Tax Law are yet to be discussed and voted by the Peruvian Congress.

16. PORTUGAL

2009 Budget Law enters into force

The most significant amendments of the 2009 Budget Law (Law 64-A/2008) which entered into force on 1st January 2009, are summarized below.

1. Corporate Income Tax (IRC)

(i) Introduction of a new progressive rate

The Budget Law introduces a new progressive rate schedule, according to which a reduced rate of 12.5% will be charged on the first EUR 12,500 of taxable income obtained by resident entities. The current 25% basic corporate income tax rate will still apply to income exceeding EUR 12,500. The effects of this rate reduction would be minor for medium-sized or large enterprises operating in Portugal. The measure is supplemented by specific anti-abuse rules in order to prevent enterprises fragmenting their activities into smaller entities (through, for example, demergers).

(ii) Advance corporate income tax payments

The Budget Law increases advance corporate income tax payments for taxpayers with a turnover above EUR 500,000 to an amount equal to 90% of the corporate income tax paid in the previous tax period (currently 85%). Corporate income taxpayers with a turnover below EUR 500,000 will see their advance payments reduced from 75% to 70% of the tax paid in the previous period.

(iii) Withholding tax on Portuguese-source income derived by EU/EEA residents

Portugal has been one of the main countries in the sights of the European Commission as it takes action on discriminatory direct taxation provisions. One of the areas under scrutiny concerns the levying of withholding tax on gross payments to nonresidents, whilst resident entities may benefit in some cases from an exemption from withholding tax. On this point, the Budget Law enables corporate income taxpayers' - resident in the EU or in EEA countries (with exchange-of-information provisions) that derive Portuguese-source income, the gross amount of which is liable

to withholding tax - to claim a refund of the tax levied in excess of what would be applicable to resident entities. Nonresidents may include deductible expenses directly connected with the income earned in Portugal. Under the proposal in the Bill, the nonresident would have to claim the tax refund within two years from the end of the fiscal year in which the withholding tax was levied. Any refund claim will trigger an automatic exchange of information with his State of residence concerning the details and amount of any such refund. This option is also available to individuals deriving business income and income from sports activities in Portugal.

(iv) Repeal of the simplified tax regime

The Budget Law provides for the repeal of the simplified tax regime effective 1 January 2009. Under a transitional regime, companies subject to the simplified regime may continue to be taxed under it until the 3-year election to enforce it has elapsed.

2. Tax incentive statute (EBF)

(i) Urban rehabilitation tax incentive

The Budget Law amends last year's tax incentive applicable to "qualifying urban rehabilitation projects" by introducing a raft of new measures including the following: (i) a corporate income tax (IRC) exemption for Investment funds established between 1 January 2008 and 31 December 2012, where at least 75% of the assets are allocated to qualifying rehabilitation projects; (ii) a reduced 10% withholding tax rate on income derived from participation units by individuals or legal entities; (iii) a reduced 10% tax rate on gains from the sale of participation units by nonresident or resident individuals (excluding business income); and (iv) exemption during a renewable five-year period from real estate transfer tax (IMT) and real estate property tax (IMI) on the acquisition of qualifying property for permanent residence located in so-called "Urban Rehabilitation Areas."

(ii) Real estate letting tax incentive

In order to tackle the existing difficulties in obtaining credit to buy a main residence, the Budget Law introduces a special regime that would be available through 31 December 2020, for real estate letting investment funds and investment companies (FIIAHs and SIIAHs, respectively) provided that a number of requirements are fulfilled, including the condition that at least 75% of their assets consist of real estate located in Portugal and intended to be leased out for permanent residence purposes. The regime provides for a whole range of incentives, including: (i) corporate income tax exemption for income derived by FIIAHs and SIIAHs formed between 1 January 2009 and 31 December 2014; (ii) corporate and personal income tax exemption for income derived from units in FIIAHs and SIIAHs (excluding income from the sale of such units); (iii)

real estate transfer tax exemption for the acquisition of a qualifying property by a FIIAH or SIIAH and by the tenants where they exercise an option to purchase the property held by the FIIAH or SIIAH; and (iv) tax credit for the rents paid by leasehold tenants, upon conversion of the freehold to leasehold.

(iii) Repeal of 2008 amendment on tax treatment of financial derivatives

The Budget Law for 2009 repeals a controversial amendment which since 1 January 2008 had assimilated to interest income for domestic purposes "gains derived from exchange rate swaps, interest rate swaps, combined interest and exchange rate swaps and forward exchange agreements. This repeal paves the way for qualifying financial derivatives income paid to a non-resident counterparties as "business profits" or "other income" under Portugal's tax treaties (and not under the "interest income" definition).

3. Stamp Tax (IS)

(i) Transfer of registered office or place of effective management to Portugal

In the wake of a number of recent decisions taken by the European Court of Justice, the Budget Law repeals the stamp tax relative to transfers of the place of effective management and/or registered office of a capital company which is not subject to a similar tax in its country of origin, or where the Member State in which the company was formed did not claim that tax (unless the case qualifies as an abuse).

(ii) Restructuring operations

The Budget Law transposes Article 4 of Directive 2008/7/EC, which excludes restructuring operations from the scope of capital contributions subject to stamp tax. "Restructuring Operations" include contributions of assets involving a branch of activity or exchange of shares.

4. Personal Income Tax (IRS)

(i) Exemption for capital gains derived from the sale of an owner-occupied dwelling

Under the current rules, capital gains from transfers of owner-occupied permanent residences may be tax exempt. To qualify for this relief, the entire proceeds should be reinvested in the acquisition or refurbishment of another residence or residential building lot 24 months after / or 12 months prior to, the transfer. The Budget Law extends these time periods to 36 and 24 months, respectively.

(ii) Optional regime for residents of EU Member States or of EEA States

The Budget Law establishes an optional regime for nonresident taxpayers to be taxed as resident taxpayers where at least 90% of their worldwide income is Portuguese-source income.

(iii) Tax rate schedule

The Bill proposes making an upward adjustment of 2.5% to taxable income for the purposes of the progressive rate table. Tax rates ranging from 10.5% to 42% would remain unchanged. In addition, it is proposed to adjust several existing tax credits for certain expenses upwards by between 2.5% and 3.2%.

5. Other relevant changes

(i) Binding private rulings

The Budget Law includes the possibility of requesting a binding ruling on an urgent basis, which means that the ruling will be received by the taxpayer within a maximum of 60 days. Nevertheless, according to the proposal such urgent requests may only be requested in relation to transactions already underway and would be subject to fees ranging from EUR 2,400 to EUR 9,600 depending on the complexity of the matter. Any failure by the tax authorities to rule on urgent requests within the applicable time limits will be deemed to constitute a tacit approval of the taxpayer's request. This tacit approval will, however, only apply to requests for rulings lodged after 1 September 2009. As regards ordinary requests for rulings, such requests must be submitted electronically and the tax authorities will have 90 days in which to make their ruling (no tacit approval applies in this case).

(ii) Authorized amendments

The 2009 Budget Law also includes references to three major authorized amendments that will need further legislation from the Government before they become law. The first concerns bringing the corporate income tax code into line with the IAS. The second relates to amendments to the contractual tax incentive regime, with a view to, inter alia, extending the period of validity through 1 December 2020, reviewing the scope of the economic activities covered and the applicable requirements, and including a specific scheme to encourage R&D. Lastly, the Government will be authorized to legislate for a specific tax regime for inbound expatriates.

Recent tax treaty developments

Three new tax treaties with Chile, Israel and South Africa which recently entered into force will become effective as from 1 January 2009. The Portuguese Government also signed a first-time tax treaty with the Republic of Guinea Bissau (although a copy of the treaty is not yet available).

The new tax treaties with Chile, Israel and South Africa generally follow the OECD Model Convention.

17. ROMANIA

Amendments to the Romanian Fiscal Code

The Romanian Fiscal Code was amended by two Emergency Government Ordinances ("EGO"), EGO 127 of 8 October 2008 and EGO 200 of 4 December 2008. The amendments will come into force as from 1 January 2009.

General provisions

Undertakings for collective investments in securities, which are not registered in Romania, according to the law, are also deemed as **Romanian taxes for nonresidents**, along with foreign legal entities and nonresident individuals.

Income obtained from the disposal of securities qualified as such by the Romanian National Securities Commission, including derivatives and social parts is deemed as Romanian source income.

Corporate income tax

Income obtained by Romanian corporate income tax payers by trading in participation titles on a market authorized and supervised by the National Securities Commission during the period 1 January 2009 – 31 December 2009 is deemed as non-taxable income, for corporate income tax purposes. The expenses related to this kind of income will be deemed as non-deductible when assessing the corporate income tax liability, resulting thus in a neutral effect over the corporate income tax liability.

The yearly threshold of the deductible expenses incurred by employers with employees' contributions to optional pension schemes and with employees' contributions for voluntary health insurance were respectively increased at EUR 400 (previously at EUR 200) and EUR 250 (previously at EUR 200).

With effect from 1 January 2009, the following tax incentives were introduced for research and development activities:

- an additional 20% deduction for corporate income tax computation purposes of eligible expenses;
- application of the accelerated depreciation method to equipment and machinery dedicated to research and development activities.

Such tax incentives apply on condition that the Ministry of Education, Research and Youth elaborates a state aid scheme the aim of which is research, development and innovation.

Income tax

By way of derogation to the current taxation regime, capital gains realized by individuals from trading in securities, other than shares and securities held in closed-ended entities and social parts during the period 1 January 2009 – 31 December 2009 will be deemed as non-taxable income. Similar yearly capital losses may not be carried forward in the next fiscal periods, except for those realized as from 1 January 2010 which may be carried forward solely in the following tax year.

Interest income related to term deposits and/or savings instruments realized by Romanian individuals and starting 1 January 2009 is non-taxable.

Capital gains obtained by non-residents

Profits obtained by non-resident legal entities from trading in securities held in a Romanian legal entity on a Romanian capital market authorized and supervised by the Romanian NSC during the period 1 January 2009 – 31 December 2009 are not subject to tax (i.e. corporate income tax).

Capital gains realized by nonresident individuals from trading in the same type of securities during the period 1 January 2009 – 31 December 2009 will be deemed as non-taxable income.

The following types of income obtained starting 1 January 2009 shall not be considered as Romanian taxable income:

- income from trading in securities and participation titles directly or indirectly held in a Romanian legal entity obtained by nonresident undertakings for collective investments in securities without legal personality;
- income obtained by nonresidents from transferring derivatives;
- income obtained by nonresidents from trading in participation titles held in a Romanian legal entity, as well as income from trading in securities issued by Romanian tax residents, if such income is obtained further to a transfer performed on a foreign capital market.

Withholding tax on nonresidents income

Income obtained by nonresidents from a partnership incorporated in Romania is subject to corporate income tax, individual income tax or tax on micro businesses, as the case may be, rather than being subject to Romanian withholding tax.

Interest income on term deposits and/or savings instruments realized by nonresident individuals, other than European Union residents, starting 1 January 2009 are exempt from Romanian withholding tax.

VAT

A new VAT reduced rate of 5% is to be applied for the delivery of houses - as part of the social policy, under certain conditions. The new 5% reduced VAT rate applies starting 15 December 2008.

Importers bearing a single authorization for simplified procedures, issued by another member state, must also file an import statement for VAT and excise duties, in order to exercise the deduction right for VAT related to importation, in the event VAT is paid, and in the event VAT is postponed for payment based on the relevant certificate obtained by the importer.

Excises and other special taxes

Movement of an excisable product under a suspense regime after such a product was released for free circulation under a simplified customs' procedure is conditioned by the fulfillment of specific conditions.

In the case of products resulting from import operations performed by an importer holding a single authorization for simplified customs procedures issued by another EU Member State, such an importer must file the import statement for VAT and excise duties to the competent customs' authority. The excise duty becomes chargeable upon submission of the VAT and excise import statement.

Amendments to the Romanian Fiscal Procedure Code

Payments with at least 10 days advance of the tax liabilities due to budget under the administration of the National Agency for Tax Administration, with the exception of withholding taxes and contributions, as well as excise duties, is rewarded with a 5% indemnity.

Tax statements related to withholding taxes and contributions may be rectified by the deadline for submission of the annual financial statements or by the 30 June of the following year in case the taxpayer is not liable to file annual financial statements.

The annual corporate income tax return as well as the annual informative statements may be rectified by 30 June of the year following the deadline for filing such returns.

The rectification of tax statements which were filed on three different deadlines during a fiscal year or on three consecutive deadlines represents an infringement and the related fine is of 4 to 5% of any additional tax liability declared.

Incentives for employers creating new jobs

Employers creating new jobs for unemployed persons benefit, under certain conditions, of a subsidy representing 8 times the value of the reference social indicator in force at the employment date, but are required to maintain the employee at least 3 years. Such a subsidy is granted by the unemployment social security budget.

Employers, who benefit from such job subsidies and who terminate the employment of such personnel before the end of the contract according to the terms stipulated by the law, are not eligible for a new subsidy before a period of 2 years.

Dividend tax-exemption

Dividends that are reinvested as from 2009 with the purpose of maintaining and creating new jobs within the legal entity are exempt of tax payment. Similarly, an exemption is granted for the payment of dividends tax on dividends invested into the share capital of another Romanian legal entity, with a view to create new jobs.

The procedure for the application of the dividends tax-exemption in the above-mentioned situation is to be approved by Order of the Minister of Economy and Finance and of the president of the National Agency for Tax Administration.

The NBR's reference interest rate for December 2008

The NBR's reference interest rate valid for December 2008 is set at 10.25% per annum. This interest rate shall be applied for assessing the deductible interest expenses related to loans denominated in RON borrowed from entities, other than specific credit institutions.

Vehicle pollution tax

Until 31 December 2009, the vehicle pollution tax is no longer levied for vehicles which have a cylinder capacity not exceeding 2000 cc. and which are registered for the first time in Romania or in another EU Member States after 15 December 2008.

For the rest of motor vehicles, starting 8 December 2008, the vehicle pollution tax is three times higher than the one owed until this date.

18. RUSSIA

Recent Amendments to the Russian Tax Code Mostly Entering into Legal Force as from 1 January 2009

The Russian Parliament passed several amendments targeted at supporting taxpayers in difficult economic circumstances, but the amendments significantly affect the entire Russian tax system. Most of the amendments will be enacted as from 1 January 2009 (but not all):

- 1) tax laws improving tax treatment in favor of taxpayers can be enacted from the date of their official publication, if this is expressly provided for in the law;
- 2) the tax audit procedure was also changed, in particular, tax authorities are not allowed to use evidence obtained in violation of the Russian Tax Code (for instance, evidence obtained beyond the term for a tax audit);
- 3) tax authority decisions will become subject to obligatory preliminary appeal to a superior tax authority before being appealed in an arbitration court;
- 4) until 1 January 2010, the Russian Minister of Finance is entitled to grant a tax deferral of up to five years on the payment of federal taxes if a taxpayer's debt to the budget exceeds RUR 10 billions (EUR 270,270,270.27 approximately) and lump sum payment thereof might have adverse social and economic consequences;
- 5) for the first time, if a tax authority misses the term for revoking its resolution on suspension of operations on a taxpayer's bank accounts, interest based on Russian Central Bank's refinancing rate will be charged in favor of the taxpayer for each day beyond the term (please note that this amendment enters into legal force on 1 January 2010);
- 6) the general tax rate with regard to Russian CIT has been reduced from 24 % to 20 %;
- 7) the fixed asset depreciation procedure for CIT purposes has also been changed, in particular, the amount of bonus depreciation with regard to fixed assets with a service life of 3 to 20 years has been

increased from 10 % to 30 %, but this deduction has to be retrieved if fixed assets started up from 1 January 2008 onwards - are sold within 5 years;

- 8) *per diem* allowances become fully deductible for CIT purposes, i.e., previously stipulated limits for deduction of *per diem* allowances are abolished;
- 9) it is expressly stipulated in the Russian Tax Code that remunerations and other payments in favor of members of a company's Board of Directors are not deductible for its CIT purposes;
- 10) arm's length rules with regard to interest deduction for CIT purposes have been changed for the period starting 1 September 2008 to 31 December 2009 – the maximum amount of deductible interest has been increased from Russian Central Bank's refinancing rate, multiplied by 1.1 to the same rate multiplied by 1.5 (with regard to loans denominated in RUB), and from 15 % to 22 % (with regard to foreign currency loans);
- 11) VAT-invoices have to be issued by the seller even if an advance payment is made; the purchaser, in turn, is entitled to offset the VAT with the VAT paid to the seller from advance payments given a contract stipulating an advance payment (when receiving goods paid for in advance or if the contract is cancelled and the advance payment is returned, previously offset VAT has to be retrieved and paid to the budget);
- 12) Russian tax authorities become entitled to render decisions on partial VAT refund;
- 13) several tax rebates with respect to individual income tax have been increased.

19. SPAIN

Implementation of transfer pricing legislation

After nearly two years' wait, the regulations implementing the transfer pricing legislation were finally approved on 31 October 2008, in Royal Decree 1793/2008 amending the Corporate Income Tax Regulations.

The current Spanish rules on transactions between related parties (i.e., controlled transactions) were introduced by Law 36/2006, as an integral part of the Corporate Income Tax Law. Law 36/2006, which introduced the obligation on taxpayers to value their transactions with related entities at arm's-length prices, entered into force on 1 December 2006.

In this regard, the Royal Decree introduces various provisions implementing the Revised Corporate Income Tax Law:

First of all, the Royal Decree lays down guidelines for performing the comparability analysis for the purpose of establishing "normal market value," which reflect the guidelines set by the OECD.

Second, the new legislation regulates the deductibility requirements for related-party cost contribution arrangements.

A third section is devoted to the documentation which the taxpayer must provide at the request of the tax authorities to support the arm's-length nature of the prices used in its related-party transactions. In this regard, the Royal Decree requires taxpayers to provide two sets of data/documentation:

- On the one hand, data on the group to which the taxpayer belongs, describing its structure; the various entities making it up; the nature, amounts and flows of related-party transactions; and, in general, the group's transfer pricing policy.
- On the other hand, the appropriate supporting documentation, identifying the entities related to it and including a comparability analysis, as well as justification for the valuation method chosen, and any documentation supporting the valuation of its transactions.

A further section seeks to regulate secondary adjustments, in line with the definition given to them in the Corporate Income Tax Law, by indicating that secondary adjustments will relate to the difference between the agreed price and the arm's-length value and that such difference will be re-characterized according to the appropriate type of income.

Lastly, the Royal Decree establishes the documentation obligations for taxpayers that perform transactions with entities or persons resident in tax havens, and regulates the procedure for advance pricing arrangements.

Mutual agreement procedures

Although mutual agreement procedures are a mechanism for resolving disputes between two States where the conduct of one of them has led, or may lead, to taxation contrary to the tax treaty signed by both of them, and while their use has become widespread in recent years, the fact is that Spanish tax legislation has not expressly regulated such procedures until now.

Against this backdrop, Royal Decree 1794/2008 implementing procedures of this kind was published on 18 November 2008.

The Regulations implement treaty mutual agreement procedures into Spanish law, and most notably seek to set time limits to expedite the resolution of the procedure, insofar as the procedural steps are dependent on the Spanish tax authorities.

Apart from treaty mutual agreement procedures, the Regulations also implement into Spanish law the procedures regulated by the EU Arbitration Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises.

Lastly, the Regulations provide for a stay of payment of the debt where one of the above procedures has been applied for.

Economic reform bill other measures approved

The Government approved legislation in December to reform various corporate income tax provisions, abolish wealth tax, and amend the VAT Regulations with a view to reducing the financial cost caused by the lag between VAT payments and VAT refunds.

As regards the new VAT provisions, companies can now elect to receive VAT refunds on a monthly basis.

In the corporate income tax area, note the changes made to the Corporate Income Tax Law as regards R&D&I tax credits with a view to placing investments made in other EU Member States on an equal footing with those made in Spain and the new wording in several anti-tax haven provisions of the law, now not affecting investments in entities resident in the EU (mainly Cyprus and Gibraltar) where the investment is based on valid economic reasons and the entity carries out business activities.

The new legislation also introduces another set of provisions aimed at bringing corporate income tax into line with the new Spanish national chart of accounts and, in particular, as regards the first-time application of the new chart of accounts this year.

Lastly, as regards wealth tax, the new legislation provides for a 100% reduction in the gross wealth tax payable; that is, it reduces the wealth tax payable to zero and eliminates the obligation to file wealth tax returns.

20. THE NETHERLANDS

Dutch Fiscal Measures to counter the effects of the financial crisis

Hereunder is a short summary of the latest news from the Netherlands regarding tax (related) measures taken by the Dutch Government in connection with the financial crisis:

VAT

The previously contemplated increase, as from 1 January 2009, of the standard VAT rate, from 19 to 20% will not take place.

Unemployment insurance

Even though in most countries unemployment insurance premiums are not a tax "*stricto sensu*", in the Netherlands they form part of the basic bracket of approximately 32% on the first € 32,000. In this mixed basket of mixed taxes and social charges, is a 3.5% unemployment insurance payable by the employee. This charge will no longer apply, as from 1 January 2009.

Stock Appreciation Rights

Under current law, the costs of stock appreciation rights ("SARS") are deductible expenses for the company, basically since they are –unlike stock options, the costs of which are not deductible- considered similar to a profit related bonus. In combination with other legislation, limiting the tax benefits of equity related remuneration and golden handcuffs, the costs of SARS will no longer be deductible if they exceed –on an annual basis- EUR 500,000.

Corporate Income Tax

In Taxand Quarterly 12, it was reported that the corporate income tax would –with retroactive effect as per 1 January 2008 –be applied proportionally for the so-called broken book years- be altered. For 2008, originally the rates were 20% for income up to EUR 40,000, 23% for income between EUR 40,001 and EUR 200,000 and

25.5% for the excess. In Taxand Quartely 12, we informed you that the 23% rate was abolished and that the 20% rate would apply on the first EUR 250,000. Meanwhile, it has been decided that the 20% rate will apply to profits up to EUR 275,000. For taxable profits in excess thereof the rate will remain at 25.5%. It is likely that for the years 2009 and 2010 the 20% rate will remain applicable to profits up to EUR 200,000.

Accelerated Depreciation

In order to stimulate the economy, and especially new investments, The Netherlands re-introduces a system of accelerated depreciation for a period of one year only for investments made between 1 January 2009 and 31 December 2009. Contrary to the normal rules, which only allow for standard depreciation of non real estate investments over 5 years (10 years for goodwill), a taxpayer will be allowed to amortize 50% of the investments in the year of investment. Exact details are not yet known at the moment of writing this note. This rule offers specific opportunities for those companies contemplating new investments. One could postpone them until after 1 January 2009. One can consider sale-lease back constructions even for existing assets whereby the advantage obtained by the lesser is passed back to the lessee. Obviously, when such sale-lease-back constructions are used within the group special issues (e.g. in the field of transfer pricing) will arise.

Other issues

Though still subject to severe discussions, there may be some fiscal incentives related to durable energy, hybrid vehicles etc, all in relation to the fact that this current state of affairs might be a perfect moment to implement "green" rules, while also saving the economy.

Ukraine narrows tax exemption for dividends payable to Dutch corporate investors

The Netherlands is the third country in terms of volume of direct foreign investments into Ukraine's economy.

Many Dutch investors rely on availability of an exemption from Ukrainian dividend withholding tax under the Ukraine-Netherlands double tax treaty (Treaty). Exemption from the domestic 15% tax is available in case a Dutch company holds at least 50 % of the Ukrainian company's capital and provided that an investment of at least USD 300,000 (or its equivalent) has been made in the capital of the Ukrainian subsidiary.

In the recent letter the State Tax Administration of Ukraine (STAU) offers a highly disputable interpretation of the minimum investment requirement (article 10.3 (i) of the Treaty), which is as follows:

Zero withholding tax applies under the condition that the (qualifying) investment of USD 300,000 (or equivalent) has been made by way of remitting cash in a single payment by the same entity that receives the dividends.

From that statement, it implies that Dutch companies will not be entitled to the exemption should the minimum USD 300,000 investment have been made.

- in-kind (e.g. by way of contribution of equipment, IP rights, real property etc.);

or

- by way of cash contributions in several installments (rather than one lump sum payment);

or

- in case the Dutch company receiving the dividends is not the same as the one that made the original investment.

This means for instance that a Dutch company, which has –e.g. as a consequence of a corporate restructuring - received (in itself qualifying) the shareholding in a Ukrainian subsidiary from a Dutch parent company would no longer be entitled to the zero rate.

According to the general principles of tax treaty interpretation in the Netherlands regarding this type of article in tax treaties (which can be found in many treaties with former Soviet States), the interpretation of the Ukrainian administration is far too strict. From a Dutch perspective, contributions in kind and contributions in installments should certainly qualify.

Furthermore, the minimum investment amount of USD 300,000 has been included in the treaty to promote investments into Ukraine. Therefore, the Netherlands can understand that the USD 300,000 threshold should perhaps not be acquired from Ukrainian investors, but should really be new foreign invested capital into the Ukraine. However, once it is clear that such new foreign investment has been made, a change of ownership should not be an impediment for applying the zero withholding rate.

The Dutch Ministry of Finance (international division) has been informed by the Ukrainian Tax administration of this interpretation and it will respond, expressing its disagreement with this interpretation. The Ministry would appreciate being informed of current existing situations in which the recent statement of the Ukrainian tax administration would lead to a denial of the zero rate.

In case you might be concerned, you are requested to contact your Taxand advisor (or: Vladimir Didenko: vdidenko@magisters.com, Jimmie van der Zwaan: vanderzwaan@vmw.nl).

If the zero rate does not apply, and provided that the Dutch company owns at least 20% of the Ukrainian subsidiary, the withholding tax rate will be 5%. However, assuming that the Dutch company is entitled to the participation exemption on the dividends received, this withholding tax will not be creditable and will therefore constitute an actual tax cost.

It should be noted that the statement from the Ukrainian tax authorities' letter is not legally binding, but the local tax authorities tend to apply opinions stated in letters issued by the superior bodies. Moreover, the position stated in the letter from STAU is likely to be applied retrospectively.

The Government of the Netherlands announces a Bill which aims to radically reform the existing anti-base erosion rules and improve the attractiveness of the Netherlands as a location for international headquarters

The Ministry of Finance sent a letter to Parliament on 16 December 2008 in which it states that it is assessing various measures with respect to the corporate tax treatment of interest on intragroup loans and interest related to financing qualifying participations in other companies. Representatives of the business community, tax practitioners and academics will be involved in this assessment. The results of the assessment will culminate in a Bill which the Government expects to submit to Parliament in the first half of next year.

In Taxand Quarterly No. 12 we reported that three prominent professors launched a plan to reform anti-base erosion rules and reinstate the Netherlands as a location of choice for international headquarters. Although their plans did not have an official status, we decided that they were worth discussing, because the professors are highly regarded academics and they had already received outspoken support from government decision-makers. The aforementioned letter shows that the Government is taking the professors' plan very seriously, because this plan is considered the most promising means of solving the problem of base erosion by multinational groups. The plan contains measures restricting the deductibility of intragroup interest expenses, the imposition of intragroup interest income and the deductibility of interest expenses linked to the acquisition of qualifying participations.

The Government is also studying another measure, namely a mandatory "Interest Box". At present, the Corporate Tax Act 1969 contains an optional Interest Box, a concession for group financing activities the coming into force of which has been postponed pending a request to the EC for confirmation that it does not constitute incompatible State aid, a request which the EC is largely expected to reject. By switching from an optional to a mandatory Interest Box, the Government expects to overcome the EC's objections against the group financing concession. The Government has rejected other measures to address the base erosion problem. These other measures include the scrapping of the deduction of all interest expenses and exemption of all interest income instead of just intragroup interest expenses and income, and the introduction of a CBIT (Comprehensive Business Income Tax).

Pursuant to the letter of 16 December 2008, the Ministry expects the measures to raise tax revenues and it aims to channel these revenues back to the business community. How the Ministry is going to do this is not yet clear. Lowering the highest corporate tax rate (25.5%) may jeopardize the presence of Japanese multinationals headquarters in the Netherlands, given that corporate tax rates lower than 25% trigger Japanese CFC rules. The aforementioned professors have proposed to use the increased corporate tax revenues to compensate for the scrapping of the dividend tax, a withholding tax on profit distributions (15%). The Ministry is reluctant to take this step, however. It indicated that it would prefer to introduce / increase a general profit exemption. It also

cannot be ruled out that the corporate tax bracket, in which profits are subject at a lower rate (20%), is increased.

21. UNITED KINGDOM

2008 Pre-Budget Report

Indirect Taxes

- VAT rate reduced to 15% for 13 months from 1 December.
- The standard rate of VAT will be reduced from 17.5% to 15% from Monday 1 December 2008 and this rate will continue in force until 31 December 2009. There will be no change in the reduced rate of VAT (5%).
- The government will introduce anti-forestalling measures details of which will be outlined in a Written Ministerial Statement on 25 November 2008. These are primarily designed to prevent abuse of the change of rate provisions when the rate reverts back to 17.5% on 1 January 2010. The change in rate will mostly benefit the retail sector and we will now have to see how this reduction in rate feeds through in to consumer prices and increased spending on the high street. Banks, insurance companies and the private healthcare sector will also benefit as their irrecoverable VAT costs will reduce albeit at the margin.
- As always changes in rate come with a host of compliance housekeeping issues which can easily be overlooked around, inter alia, invoices and credit notes, VAT and duty deferment costs, fuel scale charges, self-billing arrangements to name but a few. Elections can be made to treat the taxpoint as occurring after the change in rate on 1 December where payments have already been received or VAT invoices issued but crucially the goods or services to which these invoices and payments relate have not been provided in their totality. There will be an extension of the time limits for effecting this to 14 January 2009.

The Business Payment Support Service

- This was announced by the Chancellor as a way of helping small businesses manage their VAT and indeed other tax payments, both direct and indirect. There is very little detail about how it will operate but crucially it goes beyond some of the original proposals to extend payment times for VAT by up to 6 months. This is in effect a tax debtors' helpline and advisory service and judgements about extensions of time to pay look as if they will be taken on an individual company-by-company basis. One benefit of making early contact appears to be that HMRC will not seek to charge additional late payment surcharges on payments included in any arrangements. Again there is no specific discussion as to whether this will apply to VAT and other indirect tax penalties.

VAT Retail Schemes

- Currently the 5 published VAT retail schemes can only be used if the business has a retail turnover of less than £100m. This threshold will be increased to £130m with effect from 1 April 2009.

VAT Flat Rate Schemes

- This is more support for small businesses and will come into effect early in 2009. In essence non-qualification for the scheme will now arise when a company's annual income exceeds £225k

Excise duties

- The chancellor announced that excise duties will be adjusted upwards to compensate for the impact of the reducing VAT rate on the duty calculations. These changes will be effective immediately on tobacco, alcohol and hydrocarbon oils.

Air Passenger Duty („APD“)

- This is a significant change in approach. APD will now be calculated by reference to the class of travel and the distance travelled defined largely by country and the location of the capital city and its distance from London. Four geographical categories (Bands A-D) will be created with Band D covering travel in excess of 6000 miles. The new APD on a standard class flight to the USA will be £45 (currently £40) and from 2010 this will rise to £60. For business class travel the cost will be £90 (currently £80) and will rise to £120 from 2010.

The Government will introduce a participation exemption in respect of foreign dividends received from large and medium sized groups in Finance Bill 2009. This will be of benefit to UK companies that are looking to repatriate profits from overseas.

This is a welcome measure that was conspicuously absent from the Budget 2008. This could be highly valuable for UK companies that are seeking to repatriate profits. A recent US enactment along similar lines, the American Jobs Creation Act ultimately led to a repatriation on \$265bn back to the US. The government may hope for a similar rush to repatriate profits back to the UK, particularly given the current economic circumstances. However, this will only be of benefit if the profits repatriated are invested back in the UK.

The participation exemption will be balanced by a revenue raising measure in relation to capping deductions for interest for UK companies to levels of worldwide debt. Unfortunately there will also be the introduction of further anti-avoidance legislation around the participation exemption and also for deductions of interest. This was expected but will inevitably further complicate the system.

Changes to the existing controlled foreign company regime have also been announced in so far as they relate to the participation exemption. There will be a period of continued consultation on the future of these rules throughout 2009. This may mean a period of further uncertainty for UK companies. We will need to see the details of the consultation before we can determine the impact upon the recent trend upon "inversion" transaction.

Reform of the Treasury Consent regime has also been announced and draft clauses will be available in December for consultation. We will need to see the detail of these rules to determine whether there has been a valuable reduction in „red tape“.

All businesses

- Loan relationship rules
 - Legislation will be introduced in Finance Bill 2009 to amend the loan relationship rules affecting connected companies. The changes will have effect for company accounting periods beginning on or after 1 April 2009.
 - The first change will amend the rules on the release of trade debts between connected companies. Currently the creditor obtains no tax relief on the amount waived, whilst the debtor is taxed on the corresponding amount in these circumstances. Going forward the debtor will no longer be taxable.
 - The second change will amend the rules which impose a paid basis rather than accruals basis to interest paid to a connected creditor who is not within the charge to UK corporation tax. The background to the proposed change relates to the existing "paid basis" rule being contrary to EU law. The change is expected to provide for accruals based relief in a wider range of circumstances than is presently available; further proposals are expected later on this year.
- HMRC Business Payment Support Service
 - This is in place to help businesses with credit constraints.
 - Under this Support Service, businesses that are in temporary financial difficulty are allowed to pay ALL their HMRC tax bills on a timetable they can afford.
- Empty Property Rate Relief
 - The threshold at which an empty property becomes liable for business rates has been increased temporarily. For financial year 2009 -10 empty properties with a rateable value of less than £15,000 will be exempt from business rates.

- Capital allowances

- current rules for “expensive cars” are replaced with an environmentally based pooling system.
- The rate of writing-down allowance will be based on the CO2 emissions of the car. The new rules will have effect on and after 1 April 2009 for businesses in the charge to corporation tax, and on and after 6 April 2009 for businesses in the charge to income tax.
- Under the new rules, expenditure on cars with CO2 emissions over 160g/km will be in the special rate pool and attract writing down allowances at 10%.
- Expenditure incurred before April 2009 will continue to be subject to the old “expensive” car rules for a transitional period of around 5 years. After this transitional period, any expenditure remaining in a single asset pool (unless there is any non-business use of the car) will be transferred to the main capital allowances pool.
- The restriction on allowable lease rentals for businesses that lease or hire cars will also be based on the CO2 emissions of the car.
- The restriction on relief on lease payments for expensive leased cars will be at a flat rate disallowance of 15% of relevant payments and apply only in respect of cars with CO2 emissions above 160g/km.

- Disabled company car drivers

- Legislation will be introduced to extend the special treatment to allow disabled company car drivers driving an automatic car to use the lower list price of an equivalent manual car to work out the benefit charge.

Small Business Taxation

- The proposed increase of small companies’ rate of corporation tax from 21% to 22% has been deferred until 1 April 2010.
- Trading losses from businesses can be carried back against previous profits to a period of three years with losses being carried back against later years first.
- The amount of losses than can be carried back to the preceding year remains unlimited. After carry back to the preceding year, a maximum of £50,000 of the balance of unused losses is then available to carry back to the earlier two years.
- Companies may make a loss relief claim under the new rules if their accounting periods ended between 24 November 2008 and 23 November 2009.
- Unincorporated businesses may make a loss claim under the new rules as soon as they have calculated their losses for their basis period for tax year 2008-09.
- HMRC will make repayments arising from loss relief claims under the new rules on or after Budget Day 2009.

Personal allowances

- From April 2010 workers with incomes over £140,000 will no longer be entitled to the personal allowance and those with incomes over £100,000 will have a restricted personal allowance, it will be restricted to half its current value so that it is worth the same as to a basic rate tax payer.
- The basic personal allowance will be increased for 2009-2010 from £6,035 to £6,475.

Income Tax

- From April 2011 an additional rate of income tax of 45% will be applied to incomes over £150,000.
- The basic rate limit for 2010 -11 will be increased by £800 above indexation from £34,800 to £37,400.

NIC

- From April 2011 a 0.5% increase in the employer, employee and self employed national insurance payments.
- The upper earnings limit for class 1 Primary NIC will be brought in line with the Higher Rate Tax income levels.

There have been changes to the operation of the Finance Act 2004 Disclosure of Tax Avoidance Scheme („DOTAS”) rules. The major change relates to timing of notification of a scheme reference number („SRN”) from scheme promoters to end users:

- Under the current system, promoters provide information concerning a scheme to HMRC who may subsequently issue a SRN. The promoter must pass this SRN to end users who are required to report this in the tax return in the period the SRN is issued.
- Under the new system, notification of the SRN must occur in the period of implementation.

This is an administrative change to how the system will operate in practice.

Finance Bill 2009 has simplified anti-avoidance rules concerning employment related securities („ERS”) acquired by employees for less than market value. There are three changes:

- Removal of the tax charge that arises where an employee receives shares to be paid for in instalments (and sells before all instalments are paid) unless the employee is released from the requirement to pay instalments.
- Removal of the tax charge that can arise on nil or partly-paid shares (even where no profit has been made).
- Where an employee receives shares under a scrip or onus issue, a tax charge may have occurred in relation to a drop in the value of shares (by way of dilution). The new measure seeks to ensure that a tax

charge of nil where there has been no increase in value.

Employment related securities have been applied by many groups over the years in UK tax planning (particularly with respect to nil and partly paid shares). The changes may assist groups and employees with compliance and the changes are timely with securities falling in value in the current economic climate.

Leasing of plant and machinery

- Anti-avoidance rules were introduced to close loopholes in the legislation covering sale of lessor companies and sale and leaseback transactions.

Authorised Investment Funds

- There are minor changes in relation to avoidance through Authorised Investment Funds to prevent corporate streaming.

Real Estate Investment Trust („REIT“)

- There are proposals to amend the definition of economic group as defined for REIT purposes. Changes to the regime will result in the conditions and tests of the regime being more widely applied to the whole economic group. Changes to the legislation will exclude all owner-occupied property from the tax-exempt business. Changes will also be made to the balance of business tests so that the tests are applied to more companies within a REIT group.

Assembly Material “Material de Ensamblaje Importado para Vehículos” regime, under the scope of the Public Transport Program “Programa Transporte Público de Personas”, were exonerated from VAT. This exoneration will be in force up to 1 August 2013.

22. UKRAINE

Tax Treaties

New Treaties with Iceland and Jordan

On September 3, 2008, the Ukrainian Parliament ratified income tax treaties with Iceland and Jordan. The Iceland-Ukraine Treaty entered into force on 9 October 2008. The Jordan-Ukraine Treaty shall enter into force upon completion of the exchange of ratification instruments.

Interest Rate Restrictions on Foreign Loans

By its Resolution No 294 dated 5 September 2008, the National Bank of Ukraine removed maximum interest rate restrictions for foreign loans (loans from foreign lenders) with maturities exceeding one year (previously it was 10% for loans with maturities from one to three years; and 11% for maturities exceeding three years).

For foreign loans with less than one year maturity, the maximum allowed interest rate is increased to 11% (previously it was 9.8%).

The new rules became effective as from 27 October 2008, and were aimed against deepening financial crisis in Ukraine and increased threats to the liquidity of the Ukrainian banking system.

23. VENEZUELA

As per Decree No. 6,368 published in the Official Gazette of 2 September 2008, the internal sale of public transport units assembled or built in the country and the import of parts and components under the Imported Vehicle

RULINGS

1. CHINA

China issued circulars to clarify the recognition of High/New Technology Enterprises

China's new EIT Law includes certain benefits for enterprises that qualify for High/New Technology Enterprises ("HNTEs"). The principal incentive for HNTEs is a reduced 15% tax rate in contrast to the normal 25% tax rate.

The Ministry of Science and Technology, the Ministry of Finance and the State Administration of Taxation ("SAT") jointly issued circulars (GKFH [2008] No.172 and GKFH [2008] No.362) to set forth the key requirements and relevant administrative procedures of recognition of the HNTEs.

The requirements for the HNTEs include the following points:

- to be established within China (excluding Hong Kong, Macau or Taiwan);
- to have existed for over a year;
- to continuously conduct R&D activities and transform IP, developed into products and/or services;
- to have its own IP rights; and
- to carry out business in "State-Encouraged High Technology Areas", etc.

The IP rights can be obtained through the following means: conduct of independent R&D activities; transfer; acquisition through a corporate merger and acquisition transaction; donation or gift; exclusive license rights for more than five years. The exclusive license right must be the worldwide rights and not merely the right to exploit the relevant IP in China.

Our comments

The worldwide exclusive license right seems to create an obstacle for subsidiaries of foreign-based multinationals to successfully qualify for HNTEs status. From a commercial perspective, the multinationals will be very reluctant to license the worldwide exclusive license right to their subsidiaries in China.

China issued a circular to clarify EIT implications of service fees charged from a parent company to its subsidiaries in China

On 25 Sep 2008, the SAT issued a circular (GSF [2008] No. 86) to clarify the EIT implications of service fees charged from a parent company to its subsidiaries in China, including:

- The service fee should be charged based on arm's length principle; otherwise, tax authorities have the right to make adjustments;
- Service provided by a parent company to its subsidiaries should be supported with a contract or an agreement which specify the service scope, fee quota and total charges;

- When a parent company providing similar services to its several subsidiaries, the service fee may be charged based on a cost sharing agreement, i.e. the service fee is allocated in the subsidiaries based on the actual cost incurred plus certain profit;
- The management fee charged by a parent company cannot be deducted for its subsidiaries' EIT purpose.
- When the subsidiaries deduct the service fee to the parent company for EIT purpose, the subsidiaries should provide service contract or agreement and other supporting documents to the tax authorities.

Our comments

Parent companies that provide services to their subsidiaries in China should review their service arrangements and pricing methods to confirm that they comply with the requirements set up in the circular. The transactions between a parent company and its subsidiaries should meet relevant transfer pricing requirements.

China issued a circular to clarify thin capitalization ratios

On 23 Sept 2008, the Ministry of Finance and the SAT jointly issued a circular (CS [2008] No.121) to specify the debt-to-equity ratio and other requirements for deduction of interest expenses incurred on loans from related parties for EIT purposes.

- Interest expenses incurred on loans from related parties could be deductible for EIT purposes if they met the following debt-to-equity ratio standards: 5:1 for financial enterprises and 2:1 for other enterprises. Excess interest expenses are not deductible for the current and following tax year.
- Actual interests paid to the resident related parties could be deductible for EIT purposes if the enterprise can provide relevant documents and substantiate relevant transactions in accordance with the arm's length principle.
- Enterprises should portion the actual interest expenses for financial business and other business if they are simultaneously engaged in both services. Otherwise, ratio for other business should be applicable for the interest expenses incurred from both services.

2. INDONESIA

Additional Tax Facilities for Investors in Indonesia

Government Regulation No. 62 of 2008 was issued to amend Government Regulation No. 1 of 2007 on Income Tax Facilities for Capital Investment in Specific Sectors and/or Regions. The new regulation entered into effect on 23 September 2008.

This new regulation is intended to improve Indonesia's business climate so as to encourage both foreign and domestic investment. Under the regulation, the government has increased the number of sectors that are eligible for income tax incentives from 15 to 23, while the number of regions eligible for incentives has been increased from 9 to 15.

Among the facilities extended are: (i) a reduction from net profits of 30% of the investment spread out over a period of six years at 5% per year; (ii) accelerated depreciation and amortization; and (iii) a reduction of 10% on the tax on dividends paid to overseas tax subjects. In addition, losses may also be set off against tax for between 5 and 10 years.

Those who are entitled to the said tax facilities are taxpayers operating in industries such as:

- a. Small and large-scale animal husbandry industry
- b. Milk and dairy products industry
- c. Tissue paper and special papers industry
- d. Cosmetic materials and cosmetics industry

In addition, all-year horticultural enterprises in Nanggroe Aceh Darussalam, East Kalimantan Provinces, and seasonal pineapple enterprises in Lampung and mango enterprises in East Java are also included.

Investors who are interested in these tax facilities may submit their application to the tax office; they will then have to undergo audit by the government. The audit is required to ensure that the investor meets the criteria set out in Government Regulation No. 62/2008.

3. PERU

Bankruptcy of foreign companies does not limit the tax authorities' right to assess tax liabilities to their branches in Peru

Pursuant to the Peruvian Bankruptcy Law, when a legal entity incorporated or established in Peru enters into a bankruptcy procedure, the enforceability of its entire existing liabilities, including taxes, is suspended in order to protect the company's remaining equity. According to an opinion issued by the National Institute of Defense of the Competition and of the Intellectual Property (INDECOP), this protection would only be applicable to a branch in Peru of a foreign company when the bankruptcy of the branch has been declared by the Peruvian authorities or if a "secondary bankruptcy procedure" has been initiated, after the recognition in Peru of the bankruptcy sentence of the foreign parent company. Hence, according to the INDECOP the bankruptcy of the foreign parent company itself does not imply the suspension of the enforceability of the branch's obligations.

For corporate purposes a branch is any secondary establishment of a domestic or foreign corporation through which it develops its activities out of its domicile. Although it lacks of a legal personality of its own, for tax purposes a foreign corporation's branch established in Peru is considered a domiciled independent legal entity and is taxable for its Peruvian source income. Hence, such a branch is considered a taxpayer in Peru and is subject to the applicable laws and regulations.

Taking into account the INDECOP's opinion and the regulations of the Corporate and Tax Laws, the Peruvian Tax Administration (SUNAT) has recently expressed that tax liabilities of Peruvian branches can be assessed in Peru even if their foreign parent companies are under

bankruptcy procedures carried on abroad. The enforceability of its tax liabilities will only be suspended once the branch's bankruptcy is also declared by the competent Peruvian authorities by any procedure included in the Peruvian Bankruptcy Law. Before such declaration, the SUNAT is quite able to carry out any act tending to obtain the payment of the pending taxes from the branch.

4. SPAIN

Tax residence in tax havens and the Spanish participation exemption

Spanish corporate income tax legislation establishes an exemption for dividends and gains obtained on transfers of participations in entities not resident in Spain. This exemption is basically subject to the fulfillment of the following requirements:

- The percentage holding must be higher than 5% and must have been owned for at least one year.
- The investee must have been charged a tax of a nature analogous or identical to Spanish corporate income tax, a requirement which is deemed not to be met where the entity is resident in a tax haven. On the contrary, if the non resident entity is resident in a country with which Spain has a treaty to avoid international double taxation and such treaty contains an exchange of international clause, it is considered that the non resident entity is subject to a tax of identical or analogous nature to the Spanish corporate income tax
- The income from the investee must come from business activities abroad.

With respect to the second requirement, it is interesting to note the binding ruling made on 31 July 2008, by the DGT.

In the case analyzed by the Directorate General for Taxes ("DGT"), a foreign-securities holding entity that was resident in Spain requested a ruling on the possibility of claiming the above-mentioned exemption for a transfer of participations, where the entity whose participations were being transferred had been formed under the commercial legislation of the Bahamas (a territory considered to be a tax haven under Spanish law), its place of effective management was in the United States, and it had changed its tax residence to the Netherlands.

The DGT considered that since under Spanish Law, a company is resident *inter alia* where it is formed and the company had been formed under the laws of the Bahamas, it was resident for tax purposes therein. The fact that its place of effective management was in a third country was not important for Spanish purposes.

However, the DGT expressly recognized that if the entity could produce a certificate of tax residence in a third country not considered to be a tax haven, then the commented second requirement of the Spanish participation exemption would indeed be met

The definition of royalties as applied to software

Spain has traditionally defined royalties more broadly than the OECD in its Model Tax Conventions. Indeed, Spain considers that practically any payment related to computer software falls within the concept of 'royalty', with some exceptions relating to final users and standard software.

The OECD has recently made certain changes to the paragraphs on the right to use software in the Model Convention and related Commentary, considering that payments by intermediaries, whose rights are limited to those necessary to distribute the product, do not constitute payments for royalties and should be treated as business profits.

Although Spain has made an observation on the Commentary on Article 12 of the Model Convention on this specific point, the fact is that the observation represents a certain relaxing of Spain's traditional position on software distributors, in that it accepts that where the software is standard and is not customized by the distributor in any way, payments to nonresidents will be treated as business profits.

Indeed, as regards to this change in the Model Convention, the DGT has just made public a binding ruling dated 7 November 2008, in response to a request from a taxpayer whose business consisted of selling standard software which he imported from Ireland, without thereby obtaining any license to use or copy such software.

In the ruling, the DGT took the view that, based on the dynamic interpretation that should be made of tax treaties, and in light of the change introduced by the OECD, payments under the transaction between the producer and the distributor of the software does not fall within the concept of royalties, but rather within that of business profits, but only with effect from the publication of the change to the OECD Model Convention, which is seemingly accorded a sort of legislative status, as if it were yet another legal text.

5. VENEZUELA

The SENIAT issued Administrative Ruling No. SNAT/2008-0257 dated 19 August 2008, establishing the general rules on issuance of invoices and other documents, which repeals Administrative Ruling No. 0591, dated 28 August 2007, that regulated the same matter.

The Official Gazette of 22 October 2008 contains an Administrative Ruling of the SENIAT which sets forth the formalities to enjoy the benefit of VAT exoneration established as per Decree No. 6,368 published in the Official Gazette of 2 September 2008, under the scope of the Public Transport Program "Programa Transporte Público de Personas".

COURT CASES

1. EUROPEAN UNION

European VAT Judgment of interest for holding companies

On 6 November 2008, the European Court of Justice (ECJ) released its judgment in a case relating to the place of taxation of services provided to a Swedish foundation performing both an activity within the scope of VAT (the provision of assistance and advice) and an activity outside the scope of VAT (essentially the promotion of measures to facilitate employment) – Case C-291/07 “Kollektivavtalsstiftelsen TRR Trygghetsrådet”.

The verdict of the ECJ in this peculiar case is of notable interest for holding companies established in the EU contracting with service suppliers established in another Member State or outside the EU.

ECJ judgment

As a rule, the place where taxation of services is due is the place where the supplier has established his business or has a fixed establishment from which the services are supplied (i.e. taxation where the supplier is established). A notable exception however applies in the case of “intangible” services rendered in an international context (e.g. services of consultants, lawyers, accountants, etc.). The place of taxation of “intangible” services provided to customers established outside the EU, or to taxable persons established in the EU but not in the same country as the supplier, is the place where the customer has established his business or has a fixed establishment for which the services are supplied (i.e. taxation where the customer is established).

The key question in this recent court case was essentially the following: is a customer (the Swedish foundation) carrying out both an economic activity and an activity outside the scope of VAT to be regarded as a taxable person when it receives consultant services from abroad which are used solely for the purposes of its activity outside the scope of VAT?

The court clarified the matter by answering positively.

Practical implications for holding companies

General background

Based on a constant jurisprudence of the ECJ, the mere acquisition and holding of shares in a company is not an economic activity within the scope of VAT. Pure holding companies are therefore not taxable persons for VAT purposes. It is only when holding companies also carry out transactions which are within the scope of VAT, such as the supply of services, that they are taxable persons for VAT purposes.

Impact of case C-291/07 for holding companies

The impact of this judgment is better illustrated by a short example.

When a European consultant provides services to a holding company established in another EU country, which also performs an economic activity such as the supply of services for a consideration, the consultant must invoice his services without VAT, even if these consultant services are used solely by the holding company for its activity outside the scope of VAT (passive holding of shares). The holding company established in another EU Member State should then self-assess its local VAT on these services under the so-called reverse charge mechanism. Consequently, VAT obligations may need to be fulfilled by the holding company in its local country, such as requesting for a VAT number and filing VAT returns. These potential administrative obligations may also apply when similar services are provided by suppliers established outside the EU to holding companies established in the EU.

Finally, it is worth noting that rules determining the right of holding companies to deduct input VAT are not affected by this recent ECJ judgment. As a rule, holding companies cannot recover input VAT. The recovery of input VAT for holding companies is only possible in specific situations. The application of rules determining the capacity of holding companies to recover input VAT is not always straightforward and should therefore not be underestimated.

The integration of sub-subsidiaries held via foreign subsidiary companies authorized by the ECJ - Case (Papillon vs France – 27 November 2008, case c418/07)

In a long-awaited court decision, the European Court of Justice (ECJ) judged that the condition laid by Article 223 A of the French Tax Code (“**Code Général des Impôts**”) according to which a parent company can only include in its tax group the companies of which it holds at least 95% of the capital, directly or indirectly via companies belonging to the said group constitutes a restriction to the Freedom of Establishment prohibited by Article 43 of the EC treaty.

Indeed, this condition generates an inequality of treatment owing to the place where the head office of the subsidiary is located and through which the parent company holds resident sub-subsidiaries.

According to a constant jurisprudence of the ECJ, a restriction relative to the Freedom of Establishment is only acceptable if it is justified by imperious reasons of general interest, and furthermore this restriction must specifically guarantee the achievement of the objective pursued and must not go beyond what is necessary to achieve this objective.

The ECJ has, in this respect, rejected the argumentation of the German and Dutch tax authorities according to which this restriction would be justified by the need for preserving the distribution of tax competence between the member states (both these tax authorities were referring to the two following court decisions: Marks & Spencer on 13 December 2005 and Oy AA on 18 July 2007).

The Court also rejected the argumentation of the French tax authorities according to which this restriction would be justified by the necessity of preserving the coherence of the tax regime with regard to tax integration.

According to the French tax authorities, in the event that a sub-subsidiary is held via a nonresident company, the inclusion of this sub-subsidiary in the tax group would entail a risk of twice taking into account the losses of the latter, firstly in the form of a direct apprehension of these losses and secondly in the form of a provision for equity securities belonging to the intermediate subsidiary, provision which would not be neutralized insofar as the nonresident subsidiary would not be part of the tax group.

The ECJ estimated that the French tax authorities have other means of making sure of the absence of double deduction of losses undergone by the sub-subsidiary, notably the Community Regulation relative to the mutual assistance of the competent authorities of the member states in terms of direct taxes, which makes it possible for the member states to request all information deemed necessary from the competent authorities of the other member states for the corporation tax assessment.

It should be noted moreover that since the accounting period starting 1 January 2007, the provisions for depreciation for equity securities are no longer deductible. The argumentation developed by the French tax authorities lost all relevance since this date.

This decision constitutes an additional contribution towards the well advanced edifice of the ECJ jurisprudence as regards to the restrictions on the freedom of establishment in the direct taxes field.

2. COUNTRIES

2.1 CANADA

New Jurisprudence on Permanent Establishment

On 16 May 2008, the Tax Court of Canada released two important decisions dealing with the concept of permanent establishment ("PE") under treaty law: *American Income Life Insurance Co. v. R.*, 2008 D.T.C. 3631 and *Knights of Columbus v. R.*, 2008 D.T.C. 3648. In both cases, the Canada Revenue Agency ("CRA") had assessed insurance companies based in the US on the basis that the companies (1) had a fixed place of business in Canada and (2) were using dependent agents in Canada pursuant to paragraphs V(1), (5) and (7) of the Canada-US tax treaty.

Facts

American Income Life Co. ("AIL") and Knight of Columbus ("KC") are both insurance companies headquartered in the US. Both AIL and KC conducted business in Canada through a sophisticated network of agents. Their business was legally structured in a way that the agents could be viewed as independent contractors (as opposed to employees). The underwriting process was performed in the US and the agents had no authority to alter the insurance agreements proposed to clients. The agents were commission agents without exclusivity and were

free to develop their own business as a distinct cell from AIL and KC.

Both cases were heard by the same judge, C.J. Miller J., and were released on the same day. In each of these cases the CRA assessment was vacated on the basis that the taxpayer in question, AIL or KC, did not carry on business in Canada through a PE either on the basis of the fixed place of business concept or through a dependent agent.

Fixed Place of Business

On the issue of whether an agent's place of business (generally the agent's home office) was "at the disposal" of AIL and KC, the Court simply concluded that AIL and KC could not be considered to have geographical fixed places of business at their disposal in Canada through the offices of the agents. The Court came to that conclusion on the basis that the agents' business was distinct from the business of AIL and KC. In other words, because the facts demonstrated that the agents were independent contractors bearing the associated entrepreneurial risk, an agent's place of business could not be considered to be "at the disposal" of AIL and KC.

Dependent Agents

On the issue of whether AIL and KC had a dependent agent PE, the Court concluded that the agents had no authority to contract on behalf of AIL and KC. The Court found that the directing mind behind the acceptance or refusal of the insurance agreements entered into did not lie with the agents but with the principals in the US. Accordingly, the agents could not be considered to be PEs of AIL or KC in Canada.

The Court, arguably by way of *obiter dictum*, provided a complete analysis on whether the agents were dependent from AIL and KC. In effect, the Court hypothesized that if it were to be found that the agents would have had the authority to bind the principals, then the relevant question to consider would have been to determine whether the agents were independent from AIL and KC. Relying mostly on the inherent principles found in *Taisei Fire and Marine Insurance Co., Ltd. v. Commissioner of Internal Revenue*, (1995), 104 T.C. 535 (*Taisei*), a US Tax Court decision dealing with insurance underwriters, the Court concluded that the agents were both legally and economically independent from AIL and KC.

Take-Away

The PE concept is one of the most important concepts covered in treaty law. These decisions are therefore very important as they provide valuable insight in establishing the existence of a PE. At the very least, these cases certainly will be essential references to be considered when dealing with Canadian PE issues.

However, an important area of the AIL decision should be considered. Referring to the arguments presented on the issue of economic dependency in the *Taisei* case, the Court explicitly concluded that the agents were economically independent of AIL. In doing so, the Court found that the fact that the agents dealt only with AIL products was not determinative of economic dependency.

In fact, the Court found that the dependence was one of AIL on the agents rather than vice versa. The question of economic dependency is a thorny one. If, as in the case of the AIL agents, an agent decides to act strictly for one principal rather than for several given that doing so would prove to be more profitable, the intuitively attractive view would be that the agent would be economically dependent on the principal with respect to such activity. However, it would seem that the Court decided otherwise and, therefore, to the advantage of the principals.

Although these two cases are very welcomed news in the tax community, a clear-cut definition of the agency type PE, especially the concept of economic dependency, is still very questionable. Structuring one's affairs in Canada through the use of agents still requires a very thorough understanding of the treaty provisions and their interpretation and most importantly the awareness of judicial interpretation and precedence within the relevant jurisdiction. This endeavor will certainly be necessary and vital in avoiding undesired surprises.

2.2 FINLAND

KHO: 2008:77 (24.10.2008)

The Supreme Administrative Court confirmed that interim dividends (i.e. dividends distributed based on interim accounts) may be treated similarly to dividends distributed based on year-end financial accounts.

KHO: 2008:73 (8.10.2008)

The Supreme Administrative Court approved the transfer of three mutual real estate companies by a Finnish holding company to a newly established company as a tax neutral partial division. The holding company owned hundreds of real estate and housing companies in Finland. The transferred mutual real estate companies owned certain premises within the same city, which could be deemed to form a functional and geographical entity for rental purposes and thus fulfill the requirement for a sufficient "branch of activity".

KVL: 2008/57 (1.10.2008)

The Central Tax Board ruled that a group contribution as meant in the Swedish tax legislation granted by a Swedish company to a branch located in Sweden of Finnish Group Company was to be regarded as taxable income for the Finnish recipient company. The ruling has been appealed to the Supreme Administrative Court (case pending).

2.3 INDIA

Vodafone International Holdings BV vs UOI, ADIT (Mumbai High Court)

In a landmark Ruling, the Mumbai High Court (Court) has laid down important principles relating to the taxability of off-shore transactions between non-residents involving transfer of significant "economic interest" of a business in India. The appellant, Vodafone International BV (Vodafone), acquired interest of Hutchinson Telecommunications International Limited (Hutch) held in CGP Investments (Holdings) Limited (CGP Investments), both of which were incorporated in Cayman Islands. CGP

Investments indirectly held 67 percent equity stake in an Indian telecom company, Hutchison Essar Limited (HEL).

The Revenue authorities issued a show cause notice to Vodafone, holding that it failed to discharge the withholding tax obligations on the gains made by Hutch from the above sale of shares. Vodafone contended that the transfer related to the ownership of shares in a foreign entity and not a capital asset in India. Further, change in the controlling interest in the Indian entity was only incidental to the change in foreign shareholding. Also, a non-resident having no presence in India was not required to withhold taxes on payments made outside India.

The Court observed that Hutch earned income on account of transfer of "economic interest" in a business in India. The sale transaction was not a mere transfer of shares of an entity incorporated outside India but transfer of underlying interest in an Indian company, which was also evident from the filings made before the various Indian regulatory authorities. The transaction thus, resulted in transfer of an "underlying asset" in India. Accordingly, the Court upheld the validity of the issue of show-cause notice to Vodafone for default in withholding taxes.

Fugro Engineers BV vs ACIT (Delhi Tribunal)

In a significant Ruling, the Delhi tax Tribunal has held that carrying on business activities from a fixed place in India would constitute a Permanent Establishment (PE), irrespective of the time period for which such place of business was in existence during a financial year.

Fugro Engineers (taxpayer), a Netherlands entity, entered into two contracts for undertaking Geo-technical investigation for a period of 13 days and 37 days respectively. Another contract for undertaking Geo-physical and Geo-technical investigation was entered into for a period of 41 days. Before the Revenue authorities, it was contended that the time spent for execution of the above contracts in India individually and on a consolidated basis did not exceed the threshold limit of 183 days as per the India – Netherlands tax treaty. Therefore, no PE was constituted.

The Revenue authorities at the initial level held that as per Article 5 of the India-Netherlands treaty, "place of business" would include premises or facilities at the disposal of the taxpayer for carrying out its business, even though such place may not be used exclusively for such business. A moving vessel mobilized and brought into the territorial waters of India would constitute a fixed place of business. Accordingly, a PE was held to exist.

On appeal, the tax Tribunal made the following observations:

- Services rendered did not involve use of installation or structure used for exploration / exploitation of natural resources. Accordingly, the threshold period of 183 days provided under the India-Netherlands would not apply in the instant case.
- Operations were carried out on Indian soil and territorial waters onboard an Indian ship / vessel, which would constitute a fixed place of business.

- Business operations were undertaken on an on-going basis and activities were not isolated in nature. The taxpayer, therefore, constituted a fixed place of business in the form of vessel and work sites since it could complete the “work” out of these places.
- OECD Model Tax Convention does not prescribe any specified length of time for a fixed place of business to be in operation for constituting a PE. Accordingly, the place of business in operation, even for a short duration, would constitute a PE, if “independent activities” are completed during such period.

Based on the above specific observations, the Tribunal held that the taxpayer constituted a fixed place PE in India under the India – Netherlands tax treaty.

2.4 JAPAN

Tokyo high court gave a decision on the remarkable TP litigation on 30 October 2008 in which the taxpayer prevailed.

The taxpayer group company in Ireland sells the software products to a third party distributor in Japan. The taxpayer group company in Japan provides the marketing support services pursuant to an inter-company agreement between the Japanese company and the Irish company. The Japanese tax authorities challenged the inter-company charges.

The taxpayer applied the Cost Plus method and selected the service provider companies as the comparable, although they are not in the software business. The tax authorities argued that function and risk undertaken by the taxpayer group company in Japan are comparable with those undertaken by a buy & sell distributor (a custom selling distributor which does not carry the inventory) in the software business and applied the Resale Price method accordingly.

Another argument was a legitimacy of the secret comparable used by the tax authorities.

In Tokyo district court on 7 December 2007, the tax authorities prevailed. The legitimacy of the secret comparables was questioned by the court but it was not regarded as wrongdoing enough to cancel the tax assessment.

In Tokyo high court, the comparability between the taxpayer and a buy & sell distributor was disapproved. The tax assessment was canceled on the ground of this disapproval of the comparability, and because the tax assessment was canceled, the legality or illegality of the secret comparables was not mentioned in the court decision.

2.5 PERU

“Payment means” are required to prove cost for cost certificate purposes

The Tax Court has recently ruled that in order to issue a Cost Certificate, the non domiciled petitioner must prove before the Tax Administration (SUNAT) that the payment claimed as cost of the goods or rights to be transferred was done using the “Payment Means” established by the Law Against Tax Evasion.

According to the aforementioned law, any payment for amounts exceeding PEN.5,000 or USD 1,500 must be done using the “Payment Means” established therein, which include payments through bank deposits, fund transfers, debit and credit cards issued in Peru and non negotiable checks, among others. Payments done not complying with this formality will not be deductible or creditable for tax purposes.

Pursuant to the Peruvian Income Tax Law, the taxable net income of non domiciled individuals or entities derived from the sale of goods or rights must be determined by deducting from the total income received, the cost approved by the SUNAT in the corresponding Cost Certificate. Such cost must be proved by the petitioner.

In the case under commentary, the SUNAT denied a non domiciled person the approval of the cost declared for purposes of the Cost Certificate of a real property located in Lima. According to the SUNAT, even though it was duly proved through the contracts and the Notary Public documentation presented that the seller had paid the amount declared for the acquisition of the property, it was also true that no “Payment Means” had been used in the transaction. Therefore, no cost deduction could be recognized for tax purposes.

The Cost Certificate petitioner appealed the SUNAT’s resolution and the Tax Court confirmed this legal criterion by stating that due to the lack of use of “Payment Means” the price paid by the petitioner could not be considered as cost for tax purposes and hence, no cost could be recognized or proved.

2.6 SWEDEN

Cross-border transactions between a branch and its head office where either party is in a VAT group

Sweden is one of the EC Member States which has adopted the concept of a single taxable person (VAT group). The members of a VAT group are treated as one single taxable person for VAT purposes¹. Branches outside Sweden cannot be part of a Swedish VAT group.

Since all members of a VAT group are treated as one single taxable person and intra-entity activities are generally disregarded for VAT, the Swedish view has in the past been that cross-border supplies between a branch and its head office, where either the branch or the head office is part of a VAT group, are not subject to VAT. The same applied for supplies between such branch/head office and other members of the VAT group.

¹ A Swedish VAT group may under certain circumstances be formed by one of the following taxable persons:

- companies under supervision of the Financial Supervisory Board (Swe: *Finansinspektionen*) rendering exempt financial and insurance services, and companies which mainly supply goods or render services to those companies;
- companies acting as commissionaire or principal under such commissionaire structure referred to in Chapter 36 of the Swedish Income Tax Act.

Recently, the Administrative Court of Appeal in Stockholm ruled in an interesting case in this respect. The case concerned Skandia Informationsteknologi Aktiebolag (Skandia) which is part of a Swedish VAT group and has a branch in Norway.

Within the Skandia group a Norwegian entity acted as a central purchasing company which procured IT-services from third party service providers. The Norwegian purchasing company re-charged the IT-costs to the branch in Norway which in its turn re-charged the costs to the final users in Sweden. The final users included inter alia members of the Swedish VAT group.

The court ruled that the Swedish head office was liable to report Swedish VAT for supplies of IT-services provided by its branch in Norway to members in the VAT group as well as other purchasers in Sweden. The view of the Administrative Court of Appeal shown in the Skandia-case is thus that services provided from a branch/head office abroad of a Swedish VAT group member to other members of the VAT group and vice versa can be regarded as supplies for VAT purposes.

The conclusion which could be drawn from this case is that once the head office or branch becomes part of a VAT group it effectively becomes a different entity for VAT purposes.

The set-up in the Skandia-case was in our view rather aggressive. It is not unlikely that the court would have ruled differently if the IT-services were produced by the Norwegian branch and supplied to the head-office in the VAT group as opposed to other members of the VAT group.

Our view of the current Swedish VAT position is therefore that the fact that a branch/head office is part of a VAT group does not automatically have the effect that intra-entity supplies should be deemed subject to VAT. It is however possible that the Swedish Tax Agency will argue for such treatment.

It should also be mentioned that in the past the Swedish Tax Agency only required one single VAT return for the entire VAT group. Now, a bizarre result of the Skandia-case is that although a company is part of a VAT group, it may still need to file its own VAT returns (i.e. a separate VAT returns in addition to the one for the VAT group).

2.7 VENEZUELA

On 18 September 2008, the Political-Administrative Chamber of the Supreme Tribunal of Justice, through decision N° 00991, case: Emiro Alberto Pirela Cerrada, pronounced judgment on the joint and several liability of directors, managers or representatives of legal persons in tax matters.

The Chamber studied the provision contained in article 26 of the 1992 and 1994 Master Tax Codes (MTC) in effect for the case involved. In this connection, the Chamber determined said joint and several liability in tax matters, ratifying the criterion that it has already sustained: "the jointly and severally obligated party is obligated 'beside' or 'together' with the taxpayer; then, the Tax Administration may lawfully demand the performance of the tax obligation from one or the other in an alternative

ways, or as well, indistinctly from any of the two obligors."

The Chamber also established that in order to determine the joint and several liabilities, no previous administrative proceeding is required, since it is the law itself that establishes said joints and several liabilities.

Although the analysis of the Chamber refers to provisions contained in the 1992 and 1994 MTCs, we consider that because of the fact that the wording of article 28 of the 2001 MTC is almost exact compared to the two provisions analyzed, the Chamber will surely ratify this criterion upon analyzing the joint and several liability of the 2001 MTC.

OTHER NEWS

1. COUNTRIES

1.1 CANADA

Report of the Advisory Panel on Canada's System of International Taxation

On 10 December 2008 the Report (the "Report") of the Advisory Panel on Canada's System of International Taxation (the "Panel") was released. It is fair to say that the Report is balanced, practical and reasonable.

Background

The creation of the Panel was announced in May of 2007 in response to a fire-storm of criticism from business and tax professionals of an ill-conceived proposal included in the 2007 Federal Budget of Minister of Finance Jim Flaherty to significantly restrict the deductibility for Canadian tax purposes of interest on funds borrowed by a Canadian corporation to finance a "foreign affiliate", and as part of the Minister's rapid back-pedaling from that proposal. This proposal was a good example of how tax policy should not be made. It is interesting to note that one of the Panel's recommendations is that this very proposal be repealed.

The members of the Panel were a combination of business people and tax experts, and included as Chair Peter Godsoe, former CEO and Chairman of the Bank of Nova Scotia, and Vice-Chair Kevin Dancey, President and CEO of the Canadian Institute of Chartered Accountants and former CEO and Canadian Senior Partner of PricewaterhouseCoopers. Mr. Dancey is also a former Assistant Deputy Minister of the Department of Finance and worked with the author at the Department in the 1980s, and from the author's experience is an insightful and contemplative individual.

The Panel's mandate was "to recommend ways to improve the competitiveness, efficiency and fairness of Canada's system of international taxation, minimize compliance costs, and facilitate administration and enforcement by the Canada Revenue Agency". The Panel reviewed Canadian tax rules applicable to both outbound and inbound investments and has recommended a number of broad ranging proposals, and has not been shy in this regard. The Panel consulted widely, conducted its own research (including a review of the tax systems of Canada's major economic competitors), and interviewed foreign tax officials.

The result is a set of recommendations for specific changes and of matters for further consideration and review. Following is a general overview of some of the more important or interesting recommendations.

Recommendations

While the Panel's report contains many recommendations, the Panel itself identified what it described as "two key directives" behind the recommendations, being:

- The federal government should maintain the existing system for the taxation of foreign-source income of Canadian companies and extend the existing exemption system to all active business income earned outside of Canada by foreign affiliates.
- The federal government should maintain the existing system for the taxation inbound investment and adopt targeted measures to ensure that Canadian-source income is properly measured and taxed.

Accordingly, the Report does not recommend radical changes to the Canadian tax system. Following are some of the more important or interesting recommendations.

Broaden the existing exemption system to cover all foreign active business income earned by foreign affiliates – Canada's tax treatment of foreign-source income combines elements of the three basic approaches to such taxation, being the accrual or worldwide basis of taxation (applied to foreign accrual property income or "FAPI", and to foreign business income earned through a branch), the credit method (applied to so-called "taxable earnings" of a foreign affiliate) and the full exemption method (applied to so-called "exempt earnings" of a foreign affiliate). Currently, in general terms, Canadian tax rule distinguishes between active business income earned by a foreign affiliate in a country with which Canada has concluded a tax convention or a tax information exchange agreement.

Extend the exemption system to capital gains and losses realized on the disposition of shares of a foreign affiliate where the shares derive all or substantially all of their value from active business assets – this would be consistent with the recommendation above and a significant change to the existing treatment which taxes such gains when realized directly by a Canadian corporation, but defers such taxation when realized indirectly, thereby inducing corporations to create corporate structures that allow such gains to be realized and the proceeds maintained outside Canada, but which also result in the deferral of the remittance of such proceeds to Canada.

The current rules applicable to re-characterizing inter-affiliate payments and certain other items as "income from an active business" should be retained – The Panel saw this component of Canada's foreign affiliate taxation regime as important in maintaining international competitiveness of Canadian multi-national corporations.

The government should undertake a fresh review to coordinate the foreign accrual property income, foreign investment entity and non-resident trust regimes – The latter two still to be enacted regimes have been the subject of considerable criticism, since their original proposal in 1999, as being complex, convoluted and impossible to comply with.

Impose no additional rules to restrict the deductibility of interest expense of Canadian companies where the borrowed funds are used to invest in foreign affiliates and repeal the current rule – This is, perhaps, the most “interesting” recommendation, as it recommends a reversal of the very proposal that generated the fire-storm of criticism described above and that gave birth to the Panel.

Retain the current thin capitalization system, and reduce the maximum debt-to-equity ratio under the current thin capitalization rules from 2:1 to 1.5:1. As well, extend the scope of the thin capitalization rules to partnerships, trusts and Canadian branches on non-resident corporations. However, these rules should not be extended to third party debts that are guaranteed by related non-residents. The Panel was sensitive in its recommendations to basis erosion concerns. In this regard and interestingly, the Panel considered but rejected applying so-called earnings stripping rules to protect Canada’s tax base. It is also interesting to see the Panel’s recommendation that these rules be extended to partnerships, trusts and branches, something considered but rejected when the Canadian thin-capitalization rules were tightened in 2000.

Curtail tax-motivated debt-dumping transactions within related corporate groups involving the acquisition, directly or indirectly, by a foreign-controlled Canadian company of an equity interest in a related foreign corporation while ensuring bona fide business transactions are not affected – These types of transactions, probably the real source of concern at the Department of Finance behind the ill-conceived proposals that gave birth to the Panel, have been the subject of comment and concern for some time, including back in 1996 when commented on in the Auditor General’s Report for that year. The significant challenge here will be in identifying transactions considered to be “bona fide business transactions”, and coming up with a practical and workable set of rules.

Eliminate tax withholding requirements related to services performed and employment functions carried on in Canada where the non-resident certifies the income is exempt from Canadian tax because of a treaty – This recommendation addresses problems that arise from Canada’s so-called “Reg 102” and “Reg 105” tax withholding requirements for services provided by non-residents. The Panel seems to have been influenced by legitimate concerns raised by Canadian business in respect of the compliance burden these rules impose and by the simpler US process applicable in similar circumstances.

Conclusion

The Report is a well crafted, considered document that takes a balanced approach to various competing concerns including competitive factors for Canadian business, economic efficiency, compliance burdens for taxpayers, similar burdens for the Canada Revenue Agency, and protection of Canada’s tax base. In addition to the recommendations above are other also interesting recommendations for changes to the Canadian tax system, or simply for further review and study. One can only hope that the work of the Panel does not turn out to

have been a purely political process intended to give the Minister of Finance an “out” from the poorly crafted proposals that gave rise to the creation of the Panel. Both the Report and the Panel deserve a better fate than that.

1.2 INDIA

Liberalization of External Commercial Borrowing policy

The Reserve Bank of India (RBI) has modified the existing policy on External Commercial Borrowings (ECB) to provide the following:

- Quantum of ECB per borrower per financial year for rupee expenditure and / or foreign currency expenditure has been enhanced up to USD 500 million under the automatic route.
- Requirement of minimum average maturity period of seven years for ECB more than USD 100 million for rupee capital expenditure by the borrowers in the infrastructure sector has been dispensed with.
- The borrowers have been provided the following options for temporary parking of ECBs:
 - Keep the funds offshore as per the existing guidelines
 - Keep the funds with the overseas branches / subsidiaries of Indian banks abroad or
 - Remit funds to India for credit to their rupee accounts with AD Category I banks in India, pending utilization

However, the rupee funds will not be permitted to be used for investment in capital markets, real estate or for inter-corporate lending.

- All-in-cost ceilings have been modified in view of the tight liquidity conditions in the international financial markets. The revised all-in cost ceilings for ECB would be as follows:

Average Maturity Period	All-in-Cost ceilings over six months LIBOR	
	Existing	Revised
Three years and up to five years	200 basis points	300 basis points
More than five years and up to seven years	350 basis points	500 basis points
More than seven years	450 basis points	

RBI AP (DIR Series) Circular No 26 dated 22 October 2008

The revised all-in-cost ceilings for trade credits are as under:

Maturity Period	All-in-cost ceilings over six months LIBOR	
	Existing	Revised
Up to one year	75 basis points	200 basis points
More than one year and up to three years	125 basis points	

RBI AP (DIR Series) Circular No 27 dated 27 October 2008

1.3 THE NETHERLANDS

Multifunctional IT-products – duty free access to the European Union

The United States, Japan and Taiwan have requested the World Trade Organization to settle their dispute with the European Union, on duty free access of certain IT products. The parties argue whether three specific categories of multi-functional products fall under the duty free arrangements for information technology products. Basically, the argument is about whether a computer monitor, is still a computer monitor, when it also allows you to plug in a camcorder and play the video directly on the screen? Is a printer, which also has the ability of photocopying in black and white, still a printer, or is it a photocopier?

The information Technology Agreement (“ITA”) provides for duty free access of information technology products. The question is what are information technology products? According to the European Commission, flat panel displays that are capable of reproducing video images from other sources than computers, are not flat panel computer monitors, as they are not of a kind solely or principally used in an automatic data processing system, in view of its capabilities to display signals from various sources. As a result, these monitors would not be covered by the ITA and 14% import duties are payable upon import of such flat panel displays in the EU. The same applies for set-top-boxes (STB). According to the European Commission, a STB that has a recording function, or has a built in device that has the same function as a modem, but which does not modulate and demodulate signals (such as WLAN or Ethernet devices), does not fall under the ITA agreement. As a result, 13,9% import duty is payable upon import of those STB’s in the EU. The third category that is being disputed, are the above mentioned multifunctional printers. If a printer is also capable of photocopying (more than 12 pages per minute), the European Commission is of the opinion that the machine is no longer a printer, but a photocopying machine (which can also print). These photocopying machines carry an import duty of 6%. The United States, Japan and Taiwan say that the EU is breaching its obligations under the ITA. In order to solve the dispute, a WTO panel will examine the evidence and prepare a report for the Dispute Settlement Body. If the panel

decides that the EU has indeed breached its obligations under the ITA, it may recommend which measures could be used to confirm with the agreement.

With respect to the classification of multifunctional products we should also refer to three very interesting cases that are currently before the European Court of Justice (“ECJ”). It concerns the joint cases of Kip Europe and Hewlett Packard about the classification of multifunctional printers, and the case of Kamino Int. Logistics about the classification of flat panel LCD monitors. Advocate General Mengozzi already delivered opinions in these cases. It is interesting that the Advocate General clearly states that the fact that a monitor is able to display signals from other sources than a computer does not automatically exclude it from being classified as a computer monitor. Currently the decision of the ECJ’s is anticipated and it is hoped that the Court will provide some clear guidance on which criteria must be applied to determine whether such a multifunctional product is a unit of the sort that is solely or principally used in an automatic data-processing system.

The ITA dispute (DS 375) and the cases before the ECJ (C-362/07 and C-376/07) are being followed with great interest. In anticipation of the Dispute Settlement Body’s decision and or the ECJ’s decisions, traders may want to consider objecting to the current classification in order to reserve right on duty free import of these specific products.

The European Commission has decided to refer the Netherlands to the ECJ for its VAT exemption for the provision of personnel.

In the Netherlands, certain supplies of goods and services in the socio-cultural, health and the education sector are exempt from Value Added Tax. It concerns situations in which the personnel is de facto employed by the social, cultural or health care institution, but is still formally employed by the company or institution who is providing the personnel. The European Commission is of the opinion that this is not permitted by the VAT directive. The Commission argues that the Court of Justice has made clear, on several occasions, that the exemptions in the VAT Directive are to be interpreted strictly and sent a reasoned opinion to the Netherlands in June 2008, asking the Netherlands to amend its legislation. As the Netherlands has not amended it, the Commission has decided to refer the matter to the Court of Justice. The case has been assigned No. 2006/4674 by the Commission.

1.4 VENEZUELA

Exchange Control

The Ministries of the Popular Power for Light Industries and Commerce and for Telecommunications and Data Processing issued a joint resolution that establishes the telecom services that are not rendered in Venezuela for purposes of obtaining foreign currency from the Foreign Currency Management Commission - Comisión de Administración de Divisas (CADIVI). Some of the telecom services mentioned in this resolution are (i) telephone services; (ii) national and international long distance telephone services; (iii) mobile telephone services; (iv) switching services; and (v) satellite services and systems.

CADIVI issued a new Administrative Ruling No. 092 to regulate the requirements and procedures for export operations (Official Gazette of 30 September 2008). This rule applies only to private companies that export from Venezuela. The rule regulates among other issues, the verification of the sale of foreign currency derived from exports; the consignment of goods and sample sending, and the stipulated time for the sale of the foreign currency obtained.

The Ministry of the Popular Power for Economy and Finances published in the Official Gazette of 4 September 2008 the list of products – with their respective tariff code-requiring or not the Non-Production Certificate in Venezuela in order to be included on the required documents for the foreign currency acquisition through CADIVI to purchase products abroad and include them as productive imports in Venezuela.

Investment Protection Treaties

The Bilateral Investment Treaty (BIT) executed between Venezuela and the Netherlands was not renewed by Venezuela and as a result, it ended on 1 November 2008. This means that investments made in Venezuela by entities considered as nationals of the Netherlands as of 1 November 2008 will continue to be protected for an additional 15-year period, until 2023, as set forth in the BIT. Investments made after 1 November 2008 which are connected to the original investment will have to be analyzed carefully to determine whether or not they are protected by the BIT.

2. EUROPEAN UNION

Reform of the savings directive

The Savings Directive, in force since 1 July 2005, was implemented with the goal of enabling savings income, in the form of interest payments made in one Member State to individuals who are resident for tax purposes in another Member State, to be made subject to taxation in accordance with the laws of the latter Member State.

The Directive initially focused on interest-yielding financial investments as a whole, and excluded a number of products such as insurance and pensions, or interest paid to legal entities. The Directive provided for a common system (the exchange of information) and a system of derogation (the possibility of establishing a withholding tax at source).

After just three years, the Directive's limited scope of application to certain transactions has led the Commission to submit (in November 2008) a proposal to overhaul the Directive with the objective of limiting the use of investment structures that circumvent the Directive by using interposed companies. The proposed reform also seeks to widen the Directive's scope of application to products and securities that yield income equivalent to debt claims, and to income derived from certain life insurance contracts.

The proposed changes are grouped under four heads: identification of beneficial owner; definition of 'paying agent'; treatment of instruments equivalent to those

expressly covered; and procedural issues, above all relating to the exchange of information.

However, some sections of the business community have come out against the reform or, at least, against the increase in the information to be reported, which would lead to higher management costs for operators.

SPECIAL FEATURES

USING TRANSFER PRICING AS A REPATRIATION TOOL DURING ECONOMIC DOWNTURNS

During economic downturns, US-based multinationals may find themselves wanting to repatriate cash from foreign subsidiaries. Under such circumstances, your transfer pricing may provide a useful mechanism to achieve this in a tax-efficient manner. Transfer pricing can provide multiple avenues for repatriating cash. Some of these approaches have an immediate impact, while others provide cash to the US parent over a longer period of time. Approaches that can be used for repatriation include:

- Implementing or increasing royalty collections;
- Prepaying royalties;
- Implementing or increasing headquarter-service fee charges;
- Implementing or adjusting performance or financial guarantee fees; and
- Increasing outbound product prices to related parties.

Determining whether any of these will be of use in a particular set of circumstances involves considering US and foreign tax positions, foreign cash reserves, your existing transfer pricing policies, US and foreign tax audits, and the supportability of any approaches considered. While it may prove challenging to navigate through such complexities, the benefits derived from doing so may prove to be worth the effort.

One approach that merits consideration relates to royalties collected by the US parent company for non-US use of parent-owned intangible property. Although the parent may already routinely collect royalties from its non-US operations, prepayments of future royalties can be considered to accelerate cash flow to the parent. Such prepayments would necessarily be structured so as to be advantageous to the payer by determining the present value of the future royalty payments, taking into consideration projected non-US revenues subject to the royalty.

Another possibility that merits consideration relates to cross-border charge-outs of US.-based service support provided to non-US operations. While companies may already have such charge-outs in place, Treasury Regulation Section 1.482-9T requires taxpayers to include the cost of stock-based compensation in such charges. Layering this into your existing charge-outs or reviewing your current charge-outs to identify service costs that have not previously been cross charged are two options for increasing cash flow to the US parent.

The accompanying table provides a brief overview of various transfer pricing tools available for the repatriation of foreign earnings. It offers a set of items to consider as

opposed to identifying any best or even viable option for a particular set of circumstances.

Transfer Pricing Tool	Pros	Cons
Increase or implement royalties	Steady stream of cash to the US Generate foreign-source income in the US (overall foreign loss, foreign tax credits) No impact on APB 23 (Accounting Principles Board Opinion No. 23)	No immediate cash acceleration Potential additional tax liability on tax rate arbitrage between the US and foreign jurisdiction Potential withholding tax
Prepay existing royalties or buy-in payments	Acceleration of cash in the US Possible foreign-source income in the US No impact on APB 23	Potential tax hit in the US Takes time to implement Potential for changes in coordinated paper
Increase or implement headquarter service fee charge-outs	Becoming compliant with local rules Flexibility with methodology No impact on APB 23	No immediate cash acceleration Potential deductibility issues in foreign jurisdiction
Increase or implement performance or financial guarantees fees	Becoming compliant with local rules Possible foreign source income in the US No impact on APB 23	No immediate cash acceleration Potential additional tax liability on tax rate arbitrage between the US and foreign jurisdiction Potential withholding tax
Increase outbound product prices	Steady stream of cash No impact on APB 23 Possible foreign-source income in the US	No immediate cash acceleration Potential additional tax liability

Alvarez & Marsal Taxand Says

Companies experiencing global impacts of the current economic downturn may find it challenging to support increases in outbound product prices and royalty rates collected from affiliates. Prepayments of existing royalties may prove less difficult in this regard. Cleaning up your existing headquarter or other service fee charge-outs — in order to include costs that could be charged but haven't previously been charged — or implementing charges for financial or performance guarantees may also prove less challenging to deal with.

TAXAND NEWS

TAXAND EXPANDS GLOBAL NETWORK IN EMERGING MARKETS

Taxand is delighted to announce another new member to its dynamic network of independent tax firms. To mirror our multinational clients' expansion patterns, we are increasing our coverage in emerging markets. By welcoming HNP Taxand, (formerly known as HNP Legal Counsellors Limited), as our Thai member firm, we now have twelve territories covering Asia Pacific alone and approaching 50 jurisdictions, worldwide. With strong members in Australia, China, India, Indonesia, Japan, Korea, Malaysia, Mauritius, Pakistan, Philippines, Singapore and now Thailand, Taxand is more capable than ever to deliver high quality, integrated tax advisory services in Asia and worldwide.

HNP Counsellors Limited (formerly known as HNP Legal Counsellors Limited) is an independent firm set up in 2002 by former international partners and senior associates of Baker & McKenzie. The tax practice of HNP will be known as HNP Taxand and has an ambitious growth strategy in place to extend its team. Its range of tax advice will continue to cover corporate income tax, withholding income tax, the international tax implications of double taxation agreements, transfer pricing services, value added tax (VAT), customs duty, excises tax, personal income tax and tax issues relating to mergers & acquisitions and debt restructuring. HNP Taxand matches its clients and people to deliver practical solutions and develop strong working relationships.

For further information please visit www.taxand.com/member_firms/thailand

TAXAND GAINS GLOBAL RECOGNITION BY INTERNATIONAL TAX REVIEW

Taxand has just won its third award this year. The International Tax Review presented Taxand with the "Best Newcomer Award 2008" at its Asian awards ceremony in Singapore this week. The win means Taxand has won all three awards available in this category worldwide succeeding in Europe, the Americas and Asia. Commanding success across all regions is a mark of the impact Taxand is having across the globe.

The International Tax Review introduced its Best Newcomer category this year to recognize best-in-class cross-border advice achieved by entrants to the market within the last five years. Taxand was chosen for each award by a panel from the ITR's editorial team following initial research into the perspectives of tax executives, in-

house counsel, tax advisors and private-practice lawyers operating in the regions.

2008 is proving to be a successful year for Taxand. In addition to these awards our member firms have been shortlisted for some 33 ITR awards in total!

For further information please visit www.taxand.com/media.

TAXAND PRAISED FOR HIGH QUALITY TAX ADVICE IN WORLD TAX 2009

Taxand is celebrating, following the publication of International Tax Review's World Tax 2009, the prestigious guide to the world's leading tax firms and advisors.

85% of Taxand members were listed as leading firms for tax advice in: Argentina, Australia, Brazil, Canada, Chile, China, Colombia, Cyprus, Denmark, Finland, France, Germany, Greece, India, Ireland, Italy, Indonesia, Luxembourg, Malaysia, Malta, Mexico, Norway, Peru, Poland, Portugal, Russia, Singapore, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, United States and Venezuela.

Taxand firms in Australia, Denmark, Greece, India, Portugal, Russia and Spain received the highest accolade, being ranked in the top tier of tax advisors.

World Tax 2009 said:

Australia

"Greenwoods & Freehills looms a little larger... since the incorporation of the well-reputed Shaddick & Spence... The addition ... boosts the firm's already competitive staff-to-partner ratios".

Denmark

"Bech-Bruun (is)... one of the biggest (firms) in Denmark and as one observer commented, " they offer a realistic alternative to the big-four firms".

Greece

"...Konstantinos Yannopoulos is well known for his work in tax controversy, Yerasimos Yannopoulos is recognized by his peers for his work on capital markets and ...further recognized for his work on cross-border structuring."

India

"...A smaller national firm that competes directly with the big four is BMR Advisors... Out of a team of 18 partners and 195 other tax fee earners 20 lawyers and accountants specialize in international tax and 18 others are transfer pricing practitioners."

Portugal

"...Even though Garrigues has only had a presence in Portugal since 2005, the firm has the largest tax department of all the country's law firms... One client praised the group for "its deep analysis of subjects"."

Russia

"...Sergei Pepeliaev...is recognized as the leading figure within the market for tax controversy. He is described by his peers as "one of the best tax lawyers and tax litigators".

Spain

"...The tax team at Garrigues makes up one-third of the firm's Spanish office. Led by Ricardo Gomez, who is described by his peers as "outstanding" and is considered as "one of the best lawyers in Spain".

It is testimony to the quality of Taxand member-firms that we have received so many recommendations in this independent guide. Based on the opinions of clients, peers and the ITR, it also demonstrates Taxand has developed a powerful reputation not only for excellence in our respective national jurisdictions, but as a force to be reckoned with in the global tax advisory marketplace.

For further information please visit www.taxand.com/media.

accommodation and dining is pre-paid for select clients. Should you wish to come please email jnelson@alvarezandmarsal.com.

For further information on all Taxand news please visit www.taxand.com.

GLOBAL TAXAND CONFERENCE, MIAMI > PARTNERING FOR CLIENT SUCCESS

Each year, the Global Taxand Conference brings together Taxand member firms and a number of multinational Taxand clients for networking, informative sessions on the latest tax developments, and of course, fun.

The 2009 Global Taxand Conference, hosted by Alvarez & Marsal Taxand, LLC, our US member firm, will be held at The Westin Diplomat Resort & Spa located on the beach in Miami, Florida from the 18 to 20 February 2009. The conference will feature informative speakers and engaging plenary sessions addressing our clients' latest tax issues.

We'll be taking a look at how to achieve tax efficiencies through supply chain management; providing a global guide to getting your deals done from a tax perspective; revealing some key ways to profit in a crisis through real estate tax advice; delivering a summary of emerging global tax issues and focusing on how to help distressed companies. All sessions will present a global view and will be given by a cross-section of Taxanders from around the world combining actual case studies and the findings of surveys carried out across all of our 47 member firms. Delegate packs, available exclusively to attendees on the day, will provide further analysis and notes to add value. The program also includes a keynote speech on the global economic downturn, an exhibit hall, featuring each of the network's 47 member firms and a client panel sharing views about what the future holds.

In the evenings, we invite all members, clients and their guests to relax and enjoy the Latin-inspired flavor of the Miami area. After a full day of informative sessions, salsa music, Cuban cuisine and the authentic Miami ambience await you. Attendance is by invitation only and

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