AUREN

NEWSLETTER

INTERNATIONAL BUSINESS / March 2010

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Germany temporary assigments of employees abroad

Introduction:

The internationalization of markets causes that more and more employees work abroad. The temporary assignment of employees to work in another country involves issues of among others social security and tax law which should be paid attention to in advance to avoid negative economic consequences for both, employees and employers. The abstract gives a high-level overview of the most important issues from a German point of view. The basic principles are applicable in cases involving other countries as well.

Definition:

A temporary assignment of an employee is basically given when an employee is ordered by his domestic employer to work for him abroad for a period of time defined in advance. In case a new employee is engaged to work abroad by a domestic employer, the rules are to be applied as well (e.g. a person working for another company in Germany is hired by the new company to work for the company in Spain for three years). In case a person already living/working abroad starts working for a German employer, the employee is to be treated as local employee and no temporary assignment is given (e.g. a German has lived in Spain and worked for a Spanish employer for three (3) years. He is now hired by a German company to work for the company in Spain).

German social security:

An employee temporarily working abroad for a German employer is insured according to German social security system. In case the employee is assigned to a subsidiary of the German company, the German parent company has to have directive authority and also has to pay the employee.

In case said requirements are not fulfilled (i.e. no directive authority/no direct payments), the employee can be insured in the German social security system upon request. He can choose to be insured in the pension, health and nursing insurance. German unemployment and accidence insurance cannot be requested though. In case of temporary assignments within the EU lasting not longer than 12 months an insurance in the German social security system is possible.

Germany concluded social security treaties with various countries. For example, there are such treaties with Austria, Chile, Spain and the US while no treaty has been made with Argentina or Brazil. These treaties regulate which social security system is applicable for persons of one nationality living/working in the other country. Special attention has to be paid to the range of the treaties: while some cover the whole range of insurances other treaties cover one only.

German tax issues:

Place of residence:

The temporary assignment abroad does not automatically lead to the termination of the right to taxation. An employee is subject to income tax in Germany when his residence or habitual abode is in Germany. This means that the employee has to give up his domestic residence to avoid German taxation. In case the residence is sold or the rental contract is terminated, the employee gives up his residence.

If he is married, the residence of the spouse is regularly considered to be a residence of both husband and wife. Even in case the employee leases his residence to a third party for the time of the assignment and plans to return to this residence upon his return to Germany, he is considered to have a residence in Germany and is therefore subject to German income tax.

Germany's right to taxation covers all domestic and foreign sources of income (wages, rental income, dividends etc.). In addition the foreign country (place of work of the employee) has the right to taxation. Double taxation can be avoided. It has to be distinguished between countries having double tax treaties with Germany and other countries:

Countries with double tax treaties:

In case a double tax treaty exists, wages are subject to tax in the country where the employee is working (according to the OECD-MC). Hence, the wages are exempt from taxation in Germany. The wages nevertheless are to be considered for the tax rate, if the employee has national (German) sources of income (rental income, dividends etc.).

An important exemption to the above described rules applies, if the assignment does not exceed 183 days per calendar or fiscal year and the employer does not have a residence in the foreign country and the wages are not paid by a permanent establishment residing in the foreign country. The period of 183 days is calculated based on the total time spent abroad by the employee. Leave days and holidays spent in the country and the days of arrival and departure are to be included.

Since the double tax treaties can differ from the OECD-MC, each assignment has to be evaluated individually.

Countries without double tax treaties:

In case the two involved countries do not have a double tax treaty, the tax credit method is applicable meaning that taxes paid abroad are accounted for in the German tax assessment. This tax credit method is applicable, if the tax payer is subject to tax. In case the tax payer does not have a residence in Germany, he is limited subject to tax and his wages cannot be taxed in Germany.

Conclusion:

Temporary assignments are common in today's working environment. All countries can be involved either on the "releasing" or on the "receiving" side. The specific regulations need to be carefully evaluated. Therefore many states negotiated social security treaties and double taxation treaties. These are valuable sources of information for employers, employees and their advisors.

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Malta - Professional Investment Schemes (PIF's)

Malta is fast becoming a significantly important financial centre within the European Union. A long history of fiscal and investment incentives for foreigners wishing to set up shop in Malta have led to an very attractive package for both investors as well as for non residents wishing to use Malta in their international tax planning structures.

One area which is seeing an increase in popularity in recent months is the use of Malta's Private investment fund legislation. Especially with Investors looking for alternative vehicles to their current Swiss investments.

Professional Investor Funds (PIFs) are regulated under the Investment Services Act (ISA) – Chapter 370 of the Laws of Malta. The ISA establishes the regulatory framework for investment services providers and for Collective Investment Schemes (CIS) – which include PIFs. CIS are defined as follows:-

- Collective Investment Scheme means any scheme or arrangement which has as its object or as one of its object the collective investment of capital acquired by means of an offer of units for subscription, sale or exchange and which has the following characteristics:-
- The scheme or arrangement operates according to the principle of risk spreading; and either
- The contributions of the participants and the profits or income out of which payments are to be made to them are pooled; or
- At the request of the holders, units are or are to be re-purchased or redeemed out of the assets of the scheme or arrangement, continuously or in blocks at short intervals; or
- Units are, or have been, or will be issued continuously or in blocks at short intervals.

PIFs set up in Malta – Advantages

- Unlike the retail UCITS Fund, the PIF does not have investment restrictions and can invest in practically an unlimited

variety of movable and immovable assets, from financial securities and instruments, to immovable property and more 'exotic' such as art collections, vintage cars and watches etc;

- PIFs are therefore typically adaptable to the traditional private equity fund structures to the more innovative and complex hedge funds;

- No leverage restrictions, except for (I) PIFs targeted to Experienced Investors; and (II) PIFs targeted to Experienced or Qualifying Investors which are property funds. The leverage restrictions may be further relaxed by using a special investment vehicle;

- The Maltese regulator is very approachable and adopts a pro-active and flexible approach to new business proposals (subject to the primary objective of adequate investor protection). Pursuant to this flexible approach, legislative amendment proposals are considered and processed as and when the need arises to keep abreast with new products in the industry and to address the needs of promoters and investors in a timely fashion;

- In most cases no external service providers need be appointed (subject to the Fund having suitable internal or other alternative resources and arrangements as may be necessary to protect the interests of investors) – thus it is possible to set up self-managed funds without appointing an external Manager, as well as to set up a fund which does not appoint a custodian but adopts alternative adequate safe-keeping arrangements – see next slides;

- Even where service providers are appointed, it is not mandatory to appoint service providers established in Malta; thus promoters could set up the Fund in Malta (and benefit from the various advantages this entails) and continue to use the services of foreign service providers with whom they are accustomed to act;

- Set-up and on-going costs are relatively cheaper than in other jurisdictions;

- The use of Special Purpose Vehicles can:
  (I) increase tax efficiency of the structure (and, in particular, may make it possible to benefit from favourable double tax treaty provisions which may not otherwise be available);

  (II) provide structuring efficiencies, such as containing some high or undesirable risks at the SPV level (through the distinct personality the latter is vested with);

  (III) prove efficient to relax leverage restrictions otherwise applicable at Fund level.

Functionaries

- A PIF may appoint any functionaries it may deem necessary and which may include the following:-

  (I) Manager;

  (II) Administrator;

  (III) Investment Advisor; and

  (IV) Custodian / Prime Broker

- Any functionary appointed by the PIF which is located outside Malta and which provides services to PIFs in Malta must satisfy the MFSA's criteria of sufficient standing, repute and of regulatory status abroad.

- The appointed functionary need not be based in Malta. If a PIF is located outside Malta, a judicial representative must be appointed.

- In the case of PIFs promoted to Experienced Investors, the appointment of a Custodian is a requirement.

- The service provider should be established and regulated in a jurisdiction (EU/EEA/ Jurisdiction with which the MFSA has bilateral / multilateral MOUs covering the relevant financial service sector) or

- The service provider should be a subsidiary of a firm established and regulated in a recognised jurisdiction which controls the subsidiary and undertakes to provide the necessary information to the MFSA.

- The service provider should otherwise be considered by MFSA to be subject to equal or comparable level of regulation in its jurisdiction. In the latter cases, it is recommended to apply for preliminary indications of acceptability by the MFSA

PIFs - Fee Structure and Listing

■ fee is payable when the licence application (even if in draft) is submitted. An annual fee is payable on the day a licence is issued and on each subsequent anniversary thereafter. Fees are summarized as follows:-

Application Fee(EUR)	Annal Supervision Fee(EUR)
PIFs	
■ Scheme 1500	1500
■ Per Sub-Fund 1000	500

Tax Treatment

■ The provisions of Maltese tax legislation relating to the taxation of CISs are intended to create a fiscal framework that supports the development of the fund industry in Malta at the domestic and international levels.

Tax exemptions and withholding taxes

■ For tax purposes, a fund or a sub-fund of an umbrella collective investment scheme may be classified as a prescribed or a non-prescribed fund. Essentially a fund in a locally based scheme is classified as a prescribed fund if the value of the assets situated in Malta is at least 85% of the value of the total assets. Other licensed funds, including all funds in overseas based schemes, are classified as non-prescribed funds.

■ All income of collective investment schemes is exempt from tax in Malta except for the withholding tax applicable to local 'investment income' in the case of prescribed funds. Thus local investment income (excluding dividends) derived by prescribed funds is subject to a final withholding tax of 15% in the case of bank interest and 10% in the case of other investment income.

■ No tax is withheld on investment income received by non-prescribed funds.

■ No tax is payable by non-resident investors on capital gains realised on then disposal of their investment or when they receive a dividend from a fund (whether prescribed or non-prescribed).

■ Tax is, however, payable by the Maltese resident investors in such funds when they dispose of their investment or when they receive a dividend. This tax qualifies, subject to certain conditions, for a 15% rate under the final withholding tax system.

CISs - Exemption from other taxes

In addition, in respect of Collective Investment Schemes, there is:

(I) no stamp duty on share issues or transfers;

(II) no wealth or other tax on the net asset value of the scheme;

(III) no taxation on capital gains on the sale of shares or CIS units held in prescribed funds by residents provided such shares/units are listed on the MSE.

Please look at our website, www.sciantar.com for updates about this topic and any further related information.

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VAT amendments in the Bulgarian tax system

Bulgaria officially published on 1st December 2009 an amending Act to the Value Added Tax Act (VATA) providing for some significant changes with regards to its VAT system. The amendments shall come into force as from 1st January 2010. The major amendments on this aspect reinforce even further Bulgaria''92s compliance with European regulations and attempt to develop a more simplified and accessible VAT approach. Further below all key VATA amendments were briefly included providing in this way an overall picture of the transformation with regards to VAT Bulgaria as a state recently underwent.

The first area of change of the VATA was the actual place of supply of services which brought Bulgaria in compliance with the amendments in Council Directive 2006/112/EC that were to be implemented in the domestic legislation of the Member States not later than 01 January 2010. The significance of this turnover point is that the VAT levied on services shall be made at the actual physical place where the customer is located in those instances the customer is a taxable person (i.e. taxation at the place of consumption shall be observed). On the contrary, and as a general rule, non-taxable persons''92 place of supply (final customers, most often individuals), shall be the country in which the supplier is established / performs its economic activity.

The general rule is complemented by specific rules which override it and change the place of taxation depending on the nature of the supply and the residence of the customer (when the latter resides or has a permanent address outside the EU). Subject to specific rules is the delivery of the following services:

- provision or transfer of rights over license, patent, copyright, trade mark, know-how or other similar right over the industrial or intellectual property, as well as the transfer of rights over program product, different from standard software;
- advertising services;
- services, carried out by consultants, engineers, accountants, lawyers and other similar services, including the services regarding the processing of software;
- data processing and information providing;
- bank, financial, insuring, insurance and re-insurance services, except for letting out safes;
- personnel providing;
- letting out chattels, except for all kinds of vehicles;
- electronic communication services;
- radio and television dissemination services;
- services, carried out via electronic way;
- services regarding the provision of access, transport or transfer via distributing systems of natural gas or electric power and the delivery of other services, directly related to them;
- undertaking obligation for not performing activities or not exercising rights under any of the above hypothesis;
- intermediary services, carried out by a person, acting on behalf of and at expense of another person, in connection with the services under the above services.

Further substantive changes were also introduced covering on a wider scope the nature of VAT. Those changes provide as follows:

- Obligation for VAT registration is introduced in case of supplying or receiving reverse charge services before the date when the first transaction is performed or received
- Procedural representation shall no longer be levied with zero rate as a tax exempt supply;
- The revenue authorities shall be entitled to register under VAT a tax person that has not assigned a tax representative;
- The reimbursement tax shall be restored by the National Revenue Agency in 45-days term from the submission of the last reference-declaration (instead of the current 30-days period);
- Imported goods that don''92t exceed thirty (30) leva as well as non-trade shipments in amount of up to forty five (45) Euros shall be tax exempt;
- The registered person, who has made intra-Community supplies or supplies as an intermediary in a trilateral operation for the tax period shall submit together with the tax return also a VIES declaration for those supplies for the respective tax period.

The revision of the VAT legislation of Bulgaria was essential as to harmonized the existing legislation with the relevant European standards. The result is a more straight forward and precise approach, to the benefit of businesses, promoting transparency and mitigating tax fraud.

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Italy. VAT: Conformity Certification

D.L. 78/2009 has introduced, starting from last 1 January, a new discipline on the use of credits in compensation for VAT.

First of all, the D.L. determined that compensation may be made after 16 days of the month following the submission of the annual tax report or the instance which shows the claim. In order to facilitate the procedure, the law has introduced the option of submitting the VAT annual report independently, from the first of February of each year.

Consequently, the use in compensation of tax credit resulting from the annual report may be made as early as 16 March (or, anyway, after the 16th day of the month following the annual e- transmission).

Taxpayers wishing to apply for compensation for 15.000 Euros (or more) per year, must submit the annual VAT report certified by a qualified professional (as chartered accountants, employment consultants, experts of the Chambers of Commerce etc…) who guarantee that the data shown in the report corresponds to the results of its documents and standards, which was checked and kept with all the law requirements and that there is correspondence between the data and the related financial statement.

For taxpayers subject to legal-audit (Art. 2409-bis of the Civil Code), is required the certification of the subject who signs the audit report that provides the correspondence between the data on accounting records and those reported in the statement.

The purpose of the Italian legislator is to prevent the use of non-existing credits. For this reason, is requested an additional certification that becomes a bureaucrat-stress for all the professionals involved to which is also required by the legislator the subscription of a new professional insurance, in order to cover eventual case of insolvency.

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UK. Changes to the place of supply.

The "VAT Package" was adopted into the UK with effect from 1 January 2010. The package consisted of major changes to the place of supply of services rules and introduced new compliance requirements.

As of the 1st of January 2010, the general rule for the place of supply of services will change. For supplies from one business to another (B2B) it is no longer the place where the supplier is established but, rather, where the customer is established. This rule applies for business transactions both within and outside the EU.

For B2C supplies of services, the general rule for the place of supply will continue to be the place where the supplier is established.

However, there have always been exceptions to the general rule for certain services and some of these exceptions continue to apply. For example, the place of supply of land-related services continue to be where the land is situated.

In certain other cases, previous exceptions now follow the general rule but the date of implementation may not be 1 January 2010. For example, services such as cultural and sporting activities only change from the place where services are performed to the new general rule from 1 January 2011. Consequently, depending on the type of international services that they are involved with, businesses need to review both the liability impact and the timing of such changes.

Impact on UK businesses

In the majority of cases, a UK business customer of non UK services account for VAT using the reverse charge procedure. This means that the business have to initially account for the output VAT and then recover input tax under the normal rules. It is effectively neutral overall for a fully taxable business, provided that the services are for business purposes.

Conversely, for a UK business supplying B2B services under the general rule, the responsibility for accounting for any VAT due becomes that of the customer.

Time of supply changes

As of the 1st January 2010, the time of supply, otherwise known as the tax point, for cross-border services are based on when a service is performed, rather than when it is paid. For single supplies, this means that the tax point will occur on the earlier of:

- when the service is completed; or
- when it is paid for.

For continuous supplies, the tax point is at the end of each periodic billing or payment period. For example, if charges for leasing are billed monthly or the customer is required to pay a monthly amount, the tax point is the end of the month to which the bill or payment relates.

If a payment is made before the end of the period to which it relates or before the end of the billing period, the payment date, rather than the end of that period, is to be treated as the tax point.

Continuous supplies that are not subject to billing or payment periods will have a tax point of 31 December each year. If a payment has been made earlier, the payment will create a tax point.

Changes to the VAT refund procedure

The cross-border refund system allows businesses that incur VAT on expenditure in a Member State, in which they are not established and make no supplies, to recover that VAT directly from that Member State, known as the Member State of Refund (MSR).

The current paper-based system is being replaced with an electronic one, with specific deadlines and interest if these are not met. This new system applies to all refund claims submitted on or after 1 January 2010.

Requests for refunds continue to be dealt with by the MSR. The amount of refundable VAT also continues to be determined under the VAT rules of the MSR and the relevant repayment to be made directly by that Member State to the business.

Main changes under the new electronic system

Under the new electronic system, the claim is sent to the MSR, via the business's own tax authority, so eliminating the need for a VAT certificate of status, and the format of the claim is simplified.

After 1 January 2010, the period in which to submit claims for VAT incurred in the preceding calendar year was extended from six to nine months. Once the MSR receives the claim under this new system, it must normally be processed within four months and, if approved, repaid within ten working days. If further information is requested by the MSR, the processing period can be extended up to a maximum of eight months and, if these time limits are exceeded, interest will be paid.

Extension of ESLs to include services

An ESL is a declaration that lists supplies made by a UK VAT registered trader to a VAT registered customer in another Member State. ESLs are currently only required for supplies of goods. From 1 January 2010, ESLs are also required for intra-EC supplies of services to which a reverse charge applies in the customer's Member State.

ESLs are not required for:

- supplies which are exempt from VAT according to the rules in the customer's Member State;
- supplies covered by Article 194 of Council Directive 2006/112/EC;
- B2B supplies where the recipient is not VAT registered; and
- B2C supplies.

ESL reporting periods

The ESL reporting period for taxable supplies of services are a calendar quarter, although businesses may choose a reporting period of a calendar month instead.

Changes to the reporting period for ESLs for goods

The current ESL reporting period for intra-EC supplies of goods is normally a calendar quarter. From 1 January 2010 to 31 December 2011, quarterly ESLs can still

be submitted if the total quarterly value of supplies of intra-EC goods, excluding VAT, does not exceed £70,000 in the current quarter, or any of the previous four quarters. Otherwise, from 1 January 2010, the ESL reporting period for goods are a calendar month. Further changes are to be implemented in 2012.

New time limits for submitting ESLs

As of 1 January 2010, the new time limits for submitting ESLs are reduced from the current 42 days to 14 days from the end of the reporting period for paper ESLs and 21 days for electronic submissions.

Reverse Charge

The purpose of the reverse charge is to ensure that VAT is not a factor in the decision making process for determining which supplier to chose.

Looking at it from a UK perspective, if there is a supply of services where the place of supply is in the UK and the supplier belongs outside the UK (and does not have a UK VAT registration or liability to be VAT registered in the UK) then the UK VAT registered recipient is responsible for accounting for VAT under the reverse charge mechanism – where the recipient is not VAT registered these services count towards to the registration threshold.

The reverse charge mechanism works by requiring the recipient to account for output VAT as if they had sold the services to themselves and then also on the same return to account for input VAT on the "purchase" of these services.

By way of example

UK client receives legal services (not relating to land) from a lawyer based in France, value of €1,000, for ease assume the exchange rate is £1:€1.

- UK client has to account for a sale of £1,000 and output VAT of £175.
- UK client has to account for a purchase of £1,000 and input VAT of £175.

For a fully taxable client the net position is zero.

However, where you have a partially exempt client then your ability to recover the input VAT would be restricted and the VAT should fall as an absolute cost. Thereby meaning they suffer a VAT cost in the same way as if they had purchased the goods from a UK supplier.

Therefore, supplies of services that fall under the general rule for the place of supply as outlined above should be subject to UK VAT in the recipients country (where you have a B2B supply). As with VAT there are a number of exceptions to these rules where the place of supply does not follow the general rule.

The exceptions can be summarised as follows:

Land related services – which fall to be supplied where the land is situated;

Cultural, artistic, sporting, scientific, educational or entertainment services – which fall to be taxed where the activity takes place (with changes from 1 January 2011);

Hiring of vehicles with different rules for short and long term rental;

Transportation of goods – will be where the customer is established for intra-community and domestic transport for B2B supplies;

Electronic services to consumers;

Restaurants and catering services;

Services by intermediaries for non-taxable consumers; and

Passenger transport.

If you make supplies which fall into one of these categories then we suggest you seek further advice.

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Local Matters, National Strength.

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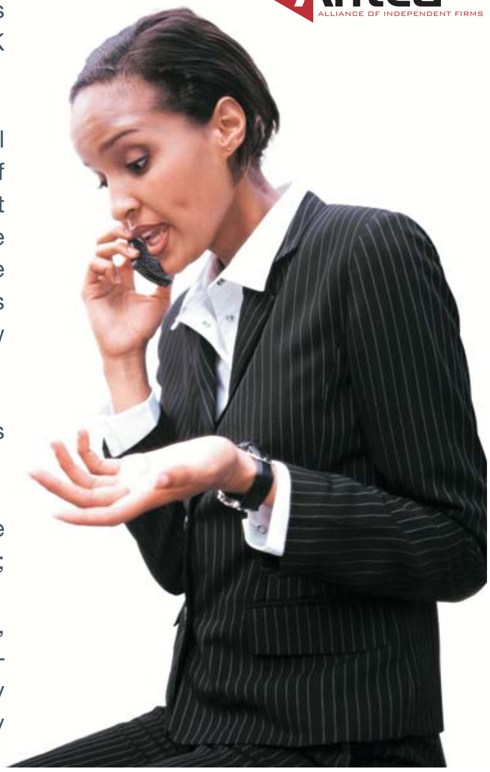

Spain. Special Tax Regime

WHAT IS THE CANARY ISLANDS SPECIAL ZONE (ZEC)?

The Canary Islands Special Zone is a low tax zone created within the framework of the Canary Islands Economic and Fiscal Regime for the purpose of promoting the economic and social development of the Islands and diversifying their production structure.

The Canary Islands Special Zone was authorised by the European Commission in January 2000 and extended in December 2006. The Spanish Government subsequently adapted the regulations concerning the ZEC zone contained in the Canary Islands Economic and Fiscal Regime.

The benefits provided by the Canary Islands Special Zone will initially remain in force until 31 December 2019, and this time frame may be extended on the authorisation of the European Commission. The final date for authorisation to register in the official ZEC Register (ROEZEC) will initially be 31 December 2013.

WHAT ARE THE REQUIREMENTS TO BECOMING A ZEC ENTITY?

- The entity must be newly created and have its registered office and effective place of management within the geographical area of the ZEC.
- At least one of the administrators must be resident in the Canary Islands.
- A minimum investment of 100.000 euros must be made in the case of Tenerife or Gran Canaria, or 50.000 euros in the case of Fuerteventura, Lanzarote, La Gomera, El Hierro or La Palma, in fixed assets related to the business activity within the first 2 years following registration.
- A minimum of 5 or 3 jobs must be created, depending on whether the location is one of the capital islands or an outlying island, in the first 6 months following registration, and this average must be maintained during the time the entity remains within the ZEC.
- The corporate purpose must consist of undertaking, within the area of the ZEC, one of the authorised activities.

CORPORATE INCOME TAX

ZEC entities are subjected to the Corporate Income Tax in force in Spain for all companies, at a reduced rate of 4%. As of 2010 the Corporate Income Tax rate in Spain ranges from 25% to 30% or 20% to 25% for little and medium companies under certain circumstances.

The special rate of 4% shall be applied to a maximum amount of the tax base, depending on the number of jobs created and the type of activity carried out by the ZEC Entity.

DOUBLE TAXATION AGREEMENTS, EUROPEAN UNION PARENT-SUBSIDIARY DIRECTIVE AND NON-RESIDENT INCOME TAX

The Canary Islands form part of the Spanish and European Union territory, which means that:

- Double Taxation Agreements signed by Spain apply to ZEC entities.

- The European Union parent-subsidiary Directive applies to ZEC entities. Therefore, dividends paid by subsidiaries of ZEC entities to their parent companies resident in other countries within the European Union are exempt from withholding tax.

- ZEC regulations include application of the following exemptions to income obtained by residents in non-UE states when the income is paid by a ZEC entity and results from operations materially and effectively carried out within the geographical area of the ZEC.

  - For individuals: interest and other returns obtained by the assignment of own capital to a third party, as well as capital gains on movable assets, obtained without the intermediation of a permanent establishment.

  - For Corporate companies: profits paid to parent companies by its subsidiaries domiciled in Spain.

These exemptions will not apply when the income is obtained through tax heavens or territories with which there is no effective exchange of tax information, or when the parent company has its tax residence in such countries or territories.

CANARY ISLANDS GENERAL INDIRECT TAX called IGIC

IGIC is the Canary Islands indirect tax levied on final consumption, in substitution of the European Union Value Added Tax (VAT). It is similar in nature to VAT, although there are main differences such as the lower tax rates. The general IGIC rate is 5%.

Within the regime of the ZEC, the provision of goods and services among ZEC entities is exempt from IGIC, as is the importing of goods by ZEC entities.

TRANSFER TAX AND STAMP DUTY

ZEC entities are exempt from Transfer Tax and Stamp Duty in the following cases:

- The acquisition of assets and rights to be used for carrying out the activity of the ZEC entity within the geographical area of the ZEC.

- Company operations carried out by ZEC entities, except in the case of their dissolution.

- Stamp Duty on documents associated with operations carried out by ZEC entities within the geographical area of the ZEC.

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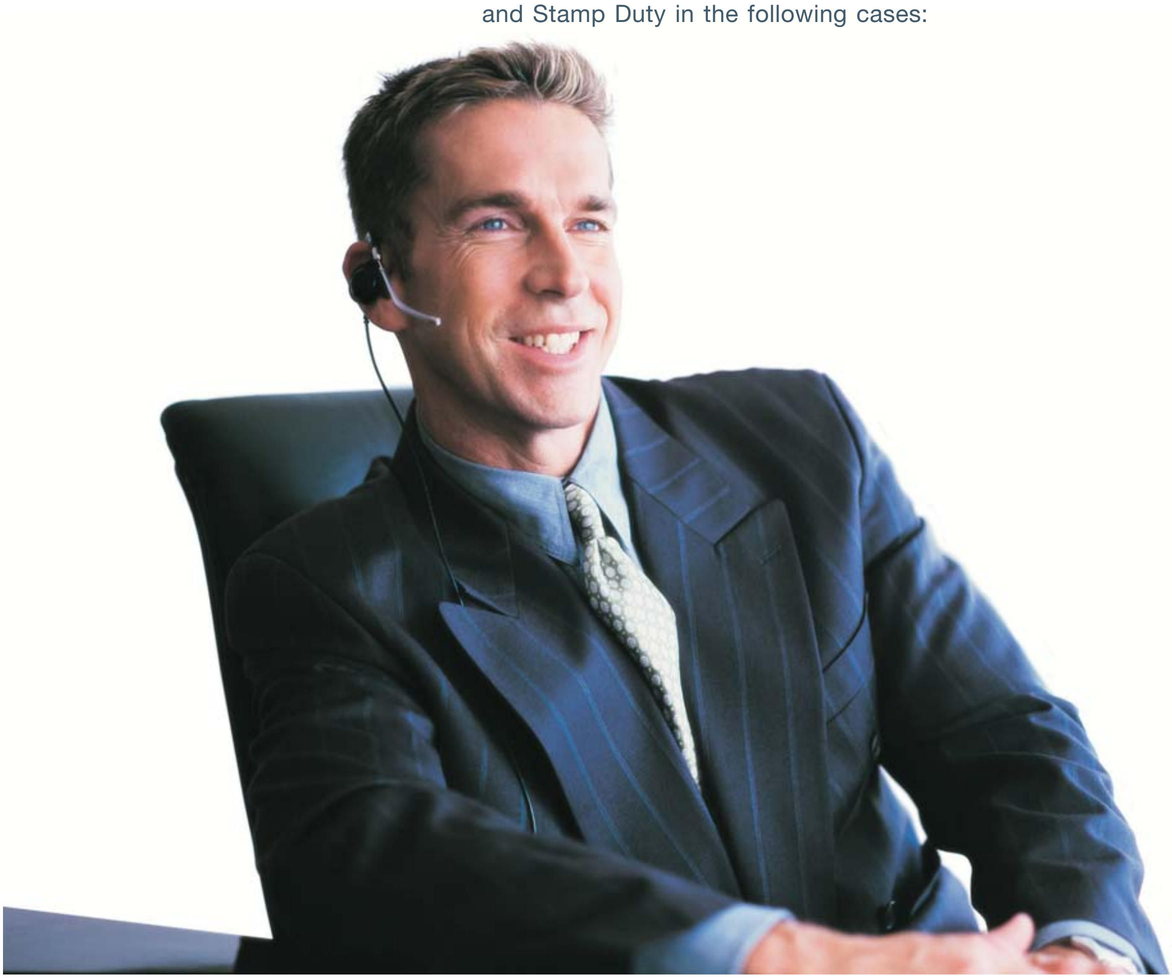
Source: web site Consorcio ZEC



The introduction of Advance Pricing Agreements in the Portuguese Tax Legislation

Although the arm's length principle has always been included in the Portuguese tax legislation, it had generally not been enforced, due to a lack of clarity and supporting rules. This has changed in December 2000 when the new Portuguese Transfer Pricing legislation was enacted, through Law number 30-G/2000 of 29 December, entering into force in 1 January 2001.

This legislation requires that all transactions between companies with "special relations" (its extended definition is included in the legislation) have to be made on an arm's length basis. This concept implies that every transaction related to goods, rights, services or financial arrangements between a taxpayer and another entity with which it has special relations must be conducted as if they were independent entities carrying out comparable transactions.

The key elements of the transfer pricing rules are: (i) the concept of special relations between entities, (ii) the definition of methodologies for the evaluation of transfer prices and the comparability factors, (iii) the obligation to use the concept of the best method to explain every transaction, (iv) the documentation requirements and, finally, (v) a shift in the burden of proof to the taxpayer.

Besides the extended definition of situations where two companies must be considered as having special relations, the Law also defines the transfer pricing methods allowed to be used, which are: the comparable market price method, the resale price method, the cost plus method, the profit split method, the transaction net margin method, or other methods when the methods mentioned above cannot be applied or do not give a reliable measure of the terms that independent parties would apply.

The taxpayer should select the transfer pricing method that assures the best grade of comparability between its transaction or series of transactions and the market uncontrolled benchmarking data. Where possible, the comparable market price method should be used to establish an arm's length price, making use of available comparable price information.

Transfer pricing is becoming an area of increasing focus for the Portuguese tax authorities and is one of the most complex matters related to the taxation of multinational companies. The complexity and relevance of this matter lead to upgrades in the legislation, namely to the possibility of applying to Advance Pricing Agreements with the tax authorities. This possibility was already considered in the Decree 1446-C/2001 and was formally introduced with the State Budget for 2008, where the requirements and conditions for preparing and filling a request, as well as what procedures, information and documentation are to be applied in the Advance Pricing Agreements.

The Advance Pricing Agreements allow the definition of the adequate transfer pricing principles previously to the existence of the transactions, in order to determine the rules to be applicable during a limited period of time.

The celebration of these Agreements introduces a security factor both to the tax authorities as to the taxpayers, giving more transparency to all transactions, being its main objective to give the companies a legal basis and certainty of the eligibility of the prices adopted.

In practical terms these Agreements define the method, or methods, that will be used to guarantee that the operations between related entities have the same result as if they were normally made between independent entities in their commercial or financial operations, including intercompany services and cost sharing agreements.

The request must be submitted to the Tax Authorities General Manager (Director Geral dos Impostos), and must: (I) present a proposal about the methods for determining the transfer prices, (II) identify the type of operations and the respective period they relate, (III) be signed by all entities involved in the operations, and (IV) include a declaration of the taxpayer about the duty of collaboration with the tax authorities in the supply of the necessary information. The request has to be submitted until 180 days before the beginning of the first applicable fiscal year, and the tax authorities have 60 days to accept or refuse the proposal. The next phase, the assessment of the proposal, can go from 180 to 360 days, depending on the type of agreement. Once the agreement is signed it enters into force on that date, but its effects may retroact to a date foreseen in the agreement.

These agreements are valid for a maximum of three years and the tax authorities are obliged to act in such conformity, unless there are changes in the legislation or significant variations in the economical and operational circumstances prevailing at the time of the agreement.

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Cyprus. Important changes in Cyprus tax system to benefit inversors

TRANSFER TAX AND STAMP DUTY

On 22 October 2009, legislation amending both the Cypriot Income Tax Law as well as Special Contribution to the Defence Fund was passed by the Parliament, and subsequently published in the Official Gazette of the Republic on 6 November 2009.

The new amendments, which may prove to be most favourable for international investors given that they enhance the attractiveness of the Cypriot jurisdiction in the international tax arena even further, are in full force and effect and applicable from the tax year 2009, and accordingly will have retroactive effect as from 1 January 2009.

Financing Companies as well as other companies earning interest, portfolio investors, investors with investments in collective investment schemes shall all benefit from the even more favourable provisions incorporated in the legislation of Cyprus.

1. Tax implications on interest income:

Prior to the recent changes in the tax system, treatment of interest income derived outside of the ordinary course of business of a company was subject to income tax at the rate of 10% with a 50% exemption on the amount and 10% special defence contribution on the whole amount (effectively taxed at the rate of 15%). On the other hand, interest received in the ordinary course of business or closely connected to company''92s ordinary course of business was not treated as interest income per se but rather as business profits or profit income and solely subject to corporation tax at the normal rate of 10%.

As per the revised pieces of legislation, interest income received from Cypriot Companies is subject to a 10%, either in the form of Income Tax (allowable expenses are deducted) or Special Contribution to the Defence, depending on the nature of the said interest.

Accordingly, interest income may fall in one of two categories:

(I) Interest income derived in ordinary course of business or closely connected to the ordinary course of business of a Company, which is ultimately treated as income and as such solely subject to 10% income tax;

and

(II) Other income, i.e. interest income that is neither deriving from the ordinary course of business of a company nor is it closely connected to the ordinary course of a company''92s business, will only be subject to special contribution to the defense at the rate of 10% as it is expressly provided that it is fully exempt from the scope of income tax. Prior to the announcement of the amendments, such interest income was also subject to income tax, with a 50% exemption allowed.

The amendments to the legislation on Income Tax and Special Contribution to Defence Fund will have retroactive effect from 1 January 2009 and will provide further incentives for investors to the island and will provide means of greater liquidity for domestic companies in the current economic downturn. Finance companies as well as companies earning interest will welcome these changes particularly and will go a long way to further Cyprus as a viable jurisdiction for the international investment community.

2. Participation exemption requirements on dividends received from non-resident subsidiaries:

The participation exemption requirements under Cyprus law were further loosened, by the abolition of the 1% holding requirement. As a result, incoming dividends from foreign portfolio participations now also qualify for tax exemption subject to the fulfilment of the additional exemption criteria under the law Prior to the amendments to the Special Contribution to the Defence Fund legislation, inbound dividends received by Cyprus Companies from their non resident subsidiaries were subject to a 15% defense tax unless a holding of at least 1% could be established, irrespective of the fulfilment of the other exemption criteria provided for under the law.

In line with the new amendments to the legislation, portfolio investors can now also benefit from the beneficial provisions under Cyprus law.

3. Collective Investment Schemes:

(I) Participations in open-ended or close-ended collective investment schemes The definition of securities and titles, as further expanded in a circular issued by the Cyprus tax authorities, is deemed to also include units in collective investment schemes. This clarification was also reflected in the revised legislation, providing that gains from the redemption of units or other participations in Collective Investment Schemes constitute a sale or disposal of securities and are subsequently exempt from tax.

(II) Interest income received by an open-ended or closed-ended collective investment scheme Interest received by a collective investment scheme is only subject to 10% income tax. Accordingly, any allowable expenses are also deductible. Such interest income does not fall within the scope of Special Contribution to the Defence Fund.

(III) Collective Investment Schemes

The provisions on deemed dividend distribution applicable in cases of dissolution of companies are also extended to open-ended and closed ended collective investment schemes.

The redemption of units or participations in either open-ended or closed-ended Collective Investment Schemes does not constitute as reduction of capital, and as a result distributions deriving thereof are exempt from the 15% special contribution to the defence which would have otherwise been imposed. This provision is most favourable for Cypriot investors, given that non-residents were in any case exempt from such withholding tax obligation.

4. Undertakings for Collective Investments in Transferable Securities (UCITS)

A Cyprus tax resident individual who is deemed to be receiving dividends from UCITS is subject to a Special Defence Contribution, rated at 3%, on the amount of the dividend.

It is worth mentioning that all the above amendments to the Law have retroactive effect as of 1 January 2009.

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Serbia. New treaty on income and capital gains between Denmark in Serbia.

New Treaty on Income and Capital Gains between Serbia and Denmark

The old treaty in force between Denmark and the Former Yugoslavia having application to Serbia has been recently replaced by a new treaty on Income and Capital gains, signed on 15th May 2009. The new treaty came into full effect as of the 1st January 2010 removing every possibility to be terminated prior to a period of at least five years as of the entry into force date.

The new Double Tax Treaty (DTT) mainly brought about amendments focusing on the tax treatment of interest as well as capital gains and social security matters.

Treatment of dividends did not suffer any changes still providing for the general 15% withholding tax on dividends distributed. The exception granted to the beneficial owner of the dividends to be taxed at a rate of 5% is still in place provided that he is a resident of the recipient state and holds directly 25% of the capital of the company that is distributing the dividends.

Minor changes occur on the treatment of royalties without changing the withholding rate of 10% of the gross amount of royalties. Irrespective of whether the royalties' payer is a resident of either contracting state, and such payer has a permanent establishment or a fixed base elsewhere then such royalties shall be deemed to arise in the state such permanent establishment or fixed base are located. This provision also extends its applicability not only to royalties but also interest treatment.

On the contrary, major change has occurred on the treatment of interest whereby a withholding tax of 10% at source is provided for. In any case rate applicable is 10%. However, interest is only taxable in recipient state if the recipient of the interest is at the same time the beneficial owner of the interest and such interest derives by; (I) the Government of the other Contracting State or political subdivisions or local authorities thereof. (II) the Central or National Bank of the other Contracting State. (III) any national agency or any other agency (including a financial institution) fully owned or controlled by the Government of the other Contracting State or political subdivisions or local authorities thereof.

Moreover, capital gains also underwent through significant changes permitting taxation of gains deriving from the alienation of immovable property where the property is situated. The alienation of shares deriving more than 50% of their value either directly or indirectly from immovable property has also become taxable where the property is located. This newly incorporated provision might bring significant changes to current structures in place; therefore, careful consultation shall be sought from international tax experts.

Nonetheless, various other changes did come into force relating to pensions and social security payments as well as the elimination of double taxation under which Serbia allows credit and exemption with progress method rather than Denmark applies solely the credit method for such double taxation avoidance.

The new Treaty into force between Serbia and Denmark provides for various favorable provisions especially in the area of dividends (subject to special treatment please see above). It shall also be taken into serious consideration that the amendments occurring in the capital gains treatment and extensively in the inclusion of taxation of disposal of shares. Current structures in place as well as potential structures to be carried out shall seek careful professional consultation in this respect.

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Argentina. The trust and the investment in Argentina

Introduction

Over recent years, we have observed how a considerable portion of investments in the real economy in our country has been channeled through the use of this legal framework.

For example, a significant number of organized agricultural, housing and other such projects are currently adopting the trust instrument.

Pursuant to Law 24,441, there are two different classes of trusts: the common trust and the financial trust. The latter may be placed by public offering and requires the authorization of the National Securities and Exchange Commission (CNV as per the Spanish acronym).

The aim of the present article is to briefly outline the tax benefits and fiscal aspects of standard trusts. This kind of trust is very common in medium sized investment projects such as those mentioned above.

What is a Trust?

The underlying nature of any trust is an associative confluence of wills to do business.

First and foremost, there is a contract or legal instrument which allows for obtaining financing at lower cost and which provides enhanced security for participants, who allocate savings to said business.

Legal Framework

Argentinean Law 24, 441 defines a Trust in the following terms "A Trust shall exist when a person or body (settler) conveys the trust ownership (fiduciary ownership) of specific properties to another person (trustee) who is bound to hold said trust for the benefit of the person designated in the contract as the recipient and to transfer said properties to the beneficiary upon completion of fixed term or condition.

Therefore, the parties to these contracts were originally:

Trustor: The person or body who transfers specific properties (goods and / or rights) for the benefit of designated beneficiaries.

Trustee: The recipient of such assets constituting trustee ownership (in trust) and holder of legal title of same, with the specific provision subjecting said assets to a specific term or condition and not in perpetuity, as would be the case in legal title over a standard ownership agreement.

Beneficiary: The person or entity for whose benefit such assets are managed. This party does not form part of the contractual conditions for the trust, and may initially not be identified, although conditions must be included to allow said party to be included at a later date.

Fideicomisario – or Final Trustee: This figure is particular to Argentine Law and unlike similar figures elsewhere, legal doctrine is limited to the first three parties mentioned. In general, the fideicomisario is the final recipient of any results, whether this be income or a specific good. In the trusts to which we refer (investment projects), the beneficiary and the final trustee may often be one and the same individual, which as stated above, may also be the Trustor.

Main points

The Trust is established for a period not exceeding 30 years and for a specific purpose (as per the business type (e.g. the construction of a building or development of a soybean plantation, etc).

The Trust is neither a company nor a legal entity given that we are dealing with a contract.

The transferred assets constitute separate assets and are immune from legal proceedings taken by creditors of the Trustor, except in the event of legal proceedings arising as a result of a fraud.

Advantages of using this instrument for certain investment projects:

1. The trust isolates the assets in question and establishes them under as separate financial resources or for a fixed period of time.

2. The failure of the trustee or the trustor does not affect the assets under trust.

3. Given that the arrangement constitutes a formal management contract, it thereby ensures the correct allocation of funds and prevents the deviation of same.

4. Reduces business risk, lowering interest rates to finance the operation.

5. It is a participatory, non-corporate partnership with a more agile structure than a corporation, with shareholders and Board of Directors, etc.

Tax Matters

Income tax:

Under the provisions of Law 20,628, these trusts are subject to income tax, but are not subject to tax liabilities in all cases. For both methods of taxation to be applied concurrently, the Trustors, or at least one of them, must be a resident abroad, or if they are resident in the country, the Trustor and the beneficiaries cannot be one and the same person.

In the event that Trustors (resident in the country) are the same person(s) as the beneficiaries of the trust, then these are subject to and liable to pay income tax, after the proportional gain generated by the trust has been assigned.

Profit is determined by applying general rules of law and in the event that the trust is subject to tax liability, the proportional rate applied to determine the tax shall be 35%.

Tax on Minimum Assumed Income:

This is determined by applying the proportional rate of 1% of the value of assets (determined in accordance with the rules of law) at the end of each fiscal year. The income tax is payment on account of this tax and vice versa. If the trust is not subject to income tax liability, the tax payment may be transferred to the Trustors.

The minimum amount free from tax is $ 200,000.-

Indirect taxation: VAT and Gross Income:

In the case of value added taxes (L 23,349) and tax on gross income (pursuant to Tax Code applicable in the jurisdiction where the Trust operates), the trust will always be subject to tax and tax liability. The respective tax depends on the type of activity carried out and the corresponding regulatory framework to be applied. One particular aspect that should be taken into account and considered is that if a credit balance is generated in the case of any of the aforementioned taxes, as a result of payments or deductions, this amount cannot be transferred to the Trustors or Beneficiaries, as legally they are considered independent tax entities.

Personal Property Tax:

With regard to personal property tax, Argentine Law 26,452 enacted in 2008, establishes that the trustee must pay tax, which is calculated by applying a proportional rate of 0.5% value of assets at 31 December each year.

Moreover, goods assigned to the trust on behalf of Trustors are not subject to this tax, thus avoiding double taxation.

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