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Germany. Cross border Information between tax offices

Introduction

The target of cross border information between tax offices is to guarantee the legality and the equality of taxation. In principle the states are allowed only to act in their own territory except another state permits specifically actions of one state in another state's territory. Therefore states enter treaties about legal and administrative cooperation.

Sources of law

In the EU the information exchange is governed by the directive 77/799/EEC and by the EC Collection Directive 2008/55/EC. For VAT and other consumption taxes the decrees 1798/2003 and 2073/04 are relevant. Moreover, there is the directive 2003/48/EC which governs the information exchange about interest.

For indirect taxes these laws govern cooperation up to a high extent. However, the directives that are relevant for direct taxes only give a frame and minimum standards for the transformation into national laws by the member states. In Germany there are the "EG Amtshilfegesetz" and the "EG Beitreibungsgesetz" (EC Legal Cooperation Law and EC Tax Collection Law). These laws only give directives for information exchange from Germany to other countries but not vice versa.

The EC Commission considers both EC directives as minor suitable and therefore it has presented a draft of a new Administrative Cooperation Directive. Amongst others they propose the following:

- to facilitate administrative cooperation by creating contact offices with special power
- to introduce electronic forms
- a legal deadline of 6 months for answering an information request
- widening of automatic and spontaneous information
- cross border audits of foreign tax inspectors
- to abolish bank secrecy.

The directive has to be accepted unanimously by the Counsil and in consequence be transformed into national laws by the member states. It is not unlikely that the unanimous poll will be realized because some countries have stopped their resistence against abandoning bank secrecy.

In the double taxation treaties there are information clauses that differ very strong one from another. The older treaties mostly contain information clauses that simply are made for serving better performance of the treaties (little information clause). In the new treaties there are big information clauses that apply not only to those taxes which are governed in the treaties.

In the meantime most of the tax heavens accept the pressure of the other states to cross border cooperation in tax aspects.

Instruments for Information Exchange

There are three types of information exchange:

- information on request: An authority requests information by a foreign authority
- automatic information: is given without request of a foreign authority as a result of abstractly defined cases
- spontaneous information: is given as a result of an individual audit of a particular case where there is a suspicion of tax fraud.

Active and passive Information Exchange

The requiring authority can not instruct the other authority about certain activities. However, the draft of a new EU-directive provides the possibility of presence of foreign tax inspectors on audits and to coordinate audits in different countries as well. By now this mostly happens on transfer price audits and on special VAT audits. The EU commission recommends a more active information exchange.

Business secret and remedy

The requesting state is due to international fiscal secret and the requested state has to obey business secret. International investigations are more limited by these duties than national investigations. In German laws there is no protection of business secrets. If the observance of the international fiscal secret by the state to which information shall be transferred is not sure the other state who shall give information has to apply his right to deny information. However, the taxpayer is not able to control the observance of fiscal secret nor can he prove violation of fiscal secret.

In German law there the state is obliged to hear the related taxpayer before requiring information from another state. There only is an exception of this duty in extraordinary cases e.g. if risks or danger are on the verge.

Conclusion

International information exchange in tax matters is increasing. OECD and EU create more and more laws and directives in order to widen information exchange and to put it on a higher level. Even some typical tax heavens cannot escape the international pressure of most of the states to enter so called "Tax Information Exchange Agreements" (TIEA).

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Austria. Sales management abroad: consequences besides income tax

The recent trend for foreign companies doing business abroad, i.e. sales and distribution in Austria, is not to establish subsidiaries or permanent establishments in the foreign country (Austria), but to employ a domestic (Austrian) employee being responsible for the sales management.

If a foreign company operates in Austria through a domestic employee, numerous questions arise. Does this employee, exercising his/her work mainly in his/her home country, maintain a permanent establishment of the company and thus a taxable presence? Which labour law has to be applied? Which taxes and other dues have to be paid? etc.

According to the OECD MC and its Commentary, exercising sales and distribution in Austria may lead to the foundation of a permanent establishment depending on the modality, extent and frequency. This may be circumvented, for example, if the rights and duties of the employee are reduced, i.e. the employee does not have the authority to conclude contracts. Although it is usually most important for the expanding company abroad to avoid a permanent establishment (generally corresponding with the definition in the OECD MC and its Commentary), there are also other aspects to consider. According to international private law, the labour law of the country agreed in the contract with the employee may be applied. Nevertheless, mandatory legislation of the country, where the employment is exercised, has to be applied. However, in Austria there is no final definition which elements are mandatory.

If the foreign company manages to avoid the foundation of a permanent

establishment following the underlying double tax treaty, it thus averts the payment of national income tax. Yet, it may not circumvent a permanent establishment following national law and its consequences. In Austria the following consequences for the employer have to be considered even if the employee has a home office, only:

- bookkeeping for payroll accounting following Austrian law
- monthly paying of Austrian earnings tax for the employee considering special tax consequences for payments in kind (i.e. private use of a car) etc.
- monthly payments into the Austrian social security system
- monthly payment of other taxes such as municipal taxes etc.

It is useful to find an agreement between employer and employee on the basis of which the Austrian employee is in charge of the employer's payments. We therefore assist clients in developing strategies to minimize administrative efforts and costs for the employer.

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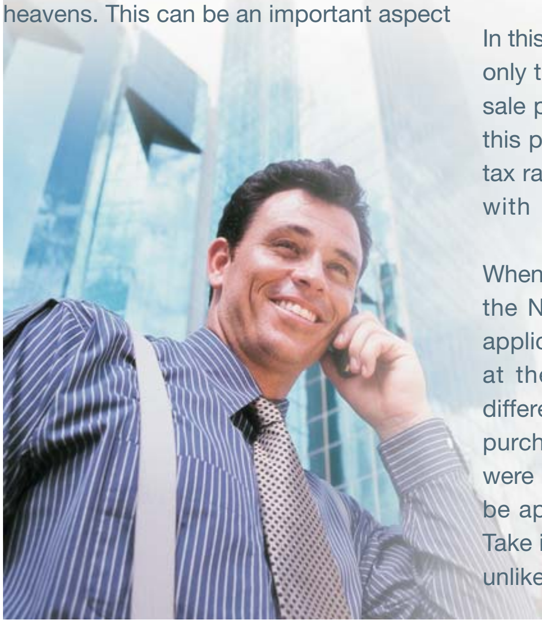
Some recently approved benefits offered by Uruguayan tax regime

Uruguayan companies as shareholders of international companies

Uruguay burdens the rents with the source criteria. So that if a Uruguayan society is shareholder of a society of a foreign country, there is no tax to pay for the dividends received nor the result generated in case shares are sold.

Although there are some exemptions Uruguay, is not included in lists of tax heavens. This can be an important aspect to take into account when deciding the way to build a holding.



So, Uruguayan companies offered important advantages in terms of taxes for using them as shareholders for international companies.

International trading operations

Uruguayan law offers a special regulation for the international trade operations of goods or services, where Uruguay is not the origin or destination.

In this case the tax to the rent in Uruguay is only the 3% of the difference between the sale price and the purchase price. It is on this percentage that it applies the income tax rate: 25%, determining a small tax but with the general rate of income tax.

When companies distribute their dividends the Non Resident Income Tax (IRNR) is applicable too. The distribution is taxable at the rate of 7% over the 3% of the difference between the sale price and the purchase price. If the amount distributed were less than that 3%, the tax rate would be applicable to the amount distributed. Take into account that this last situation is unlikely to happen.

Benefits over investments on fixed assets

Incredible tax benefits over investments have been approved in the last two years.

Companies that invest on fixed assets can ask to the national government for a benefit of at least the 51% percent of the amount invested. This percentage can be taken as a payment of corporate income tax (not a deduction but a payment). The percentage can be increased depending on the amount of the investment and other aspects.

There are some limits to the kind of investments that are likely to be accepted for obtaining the benefits. For instance, land acquisitions are not accepted as investments for these benefits.

To ask for these benefits some goals have to be achieved. These goals are related to employment, increase of exports, decentralization, among others.

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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.

Regulatory Requirements		
PI Fs sold to Experienced Investors	**PI Fs sold to Qualifying Investors**	**PIFs sold to Extraordinary Investors**
Target investors		
Experienced Investors	Qualifying Investors	Extraordinary Investors
Persons having expertise, experience and knowledge to be in a position to make Owm investment decisions and understand risks.	Including body corporates, associates trusts and individuals with net assets in excess of EUR 750, 000	Including body corporates, associations, trusts or individuals with net assets in excess of EUR 7.5 million
Minimum Investment		
EUR15,000	EUR75,000	EUR750,000
Nominee Investments		
Permissible subject to transparency of identity to the Manager/Scheme	Permissible subject to transparency of identity to the Manager/Scheme	Permissible subject to transparency of identity to the Manager/Scheme
Investment/Borrowing Restrictions		
Leverage restricted to 100% of Net Asset Value In the case of funds investing in immovable property, additional restrictions apply - further details available from MISA	None unless the fund invests in immovable property	No investment or borrowing (including leverage) restrictions other than those specified in the Offering Doctiment/ Marketing Document

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:-

PIFs	Application Fee(EUR)	Annual Supervision Fee(EUR)
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.

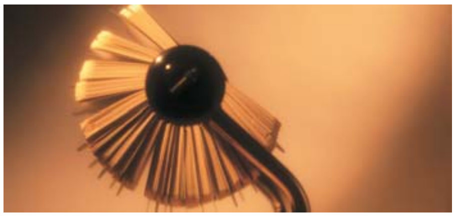
- No tax is withheld on investment income received by non-prescribed funds.

- 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.

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New portuguese tax regime for non-habitual residents

Portugal has introduced a new tax regime that recognises a tax incentive to persons willing to reside in Portugal from 2009 onwards.

This new legislation was created by Decree-Law nr. 249 of 23rd September 2009, published in the Diário da República (official gazette).

Said Decree-Law approved the so-called "New Investment Tax Code" («Código Fiscal do Investimento»), which, among other measures directed at improving Portuguese international competitiveness, creates a new Personal Income Tax regime («Imposto sobre o Rendimento das Pessoas Singulares», hereinafter «IRS») for non-habitual resident persons (individuals).

It is expected that this new regime will be effective in the attraction to Portugal of high net worth persons, increasing demand in the domestic market, and fostering increased fiscal revenue, in particularly on what concerns real estate and consumption taxes, who otherwise would not be taxpayers in Portugal.

Moreover, it has been constructed in order to encourage foreign highly qualified professionals, artists and authors to move residency to Portugal, besides of the return of highly qualified Portuguese nationals currently residing abroad. The fact that Spain is considering removing its equivalent system may have by result that some beneficiaries residing in Spain move to Portugal.

This statute will be granted to persons (Portuguese or non-Portuguese) who became or become resident for tax purposes in Portugal from 1st January 2009 onwards without having had this statute in the preceding five years.

Non-habitual resident persons may acquire such statute for a ten year period, renewable, after which they will be taxed under the standard IRS regime, which a typical regime with a band of progressive tax rates with the marginal higher rate at 42%.

Portuguese tax residence for IRS purposes, in a given fiscal year, may be acquired via a number of different ways, such as:

a)Staying more than 183 days in the period of one year in the Portuguese territory, whether these days are consecutive or not. The one year period starts on the first day of stay in Portugal and does not need to be in a given calendar year;

b) If staying for a shorter period, having in the Portuguese territory, on 31st December of the relevant year, a dwelling under circumstances that lead to the presumption of an intention to hold and occupy it as a place of habitual abode;

c) Being, on 31st December, a crew member of a ship or aircraft at the service of an entity with residence, head-office or effective management in Portugal; or

d) Being a member of a household where one of the spouses is, on 31st December, a Portuguese tax resident, which means that the spouse of a Portuguese resident becomes him/herself also a tax resident.

The new tax regime targets non-resident persons who have recently established or are likely to establish either a permanent or a temporary residence in Portugal that qualifies for tax residency purposes.

The regime includes two different sets of rules, one of them applicable to foreign-sourced passive income, similar to non-domiciled taxation regimes such as the ones of the United Kingdom and Switzerland, and the other to active income, in this case encompassing income derived both from foreign and domestic sources, following expatriate, rectius impatriate, taxation regimes such as the ones existing in Spain and France.

Passive income regime

Passive income included in the regime comprises interest, dividends, capital gains and other income from capital, income from immovable property and pensions.

Under the first set of rules, passive income derived by non-habitual residents will be IRS exempt (with progression, which means that it will be included for the computation of the rate band that will be applicable to other income taxed under the standard rules) in Portugal, provided it may be taxed in the source State under the rules of a tax treaty entered into by Portugal. If the income is sourced in a country or territory without a treaty entered into by Portugal, it will also be exempt (with progression) if i) it may be taxed in that source State according to the rules of the OECD Model Tax Convention (on which most tax treaties are based); ii) it is not considered to arise from a Portuguese source under the IRS Code territoriality rules; iii) the source State, region or territory is not included in the Portuguese tax havens' black list.

An interesting point of the regime is that it requires only a potential liability to taxation in the source State under the rules of a tax treaty or of the OECD Model Tax Convention, no effective taxation being thus required. Therefore, if that source State does not tax passive income earned by non-residents, such income may be exempt in the source State and in Portugal. If the source State taxes such income at a flat withholding tax, there will not be additional taxation in Portugal.

However, in respect of income deriving from pensions, taking into account its specific nature, this will not be the case. Actual taxation under the rules of a tax treaty or, in the cases where no treaty is in place, no connection of the income with the Portuguese territory under the territorial scope rules of the IRS Code, is required in order for the exemption regime to be applicable.

Active income regime

The second set of rules will apply to active income deriving from employment, independent personal services and also from copyrights and royalties.

Under it, foreign-sourced employment income will be exempt (with progression, as explained above) from IRS, provided it is effectively taxed in the source State according to the rules of a tax treaty entered into by Portugal. If the employment income is sourced in a country or territory without a tax treaty entered into by Portugal, it will also be exempt provided it is not considered to arise from a Portuguese source under the IRS Code territoriality rules. Foreign sourced independent personal services income, copyrights and royalties will be exempt (with progression) if it may be taxed in the source State according to the rules of a tax treaty entered into by Portugal. If the foreign sourced independent personal services income, copyrights or royalties is sourced in a country or territory without a tax treaty entered into by Portugal it will also be exempt (with progression) if i) it may be taxed in the source State according to the rules of the OECD Model Tax Convention; ii) it is not considered to arise from a Portuguese source under the IRS Code territoriality rules; and iii) the source State, region or territory is not included in the Portuguese tax havens' black list.

Effective taxation is therefore only required in regard of employment income. However, the independent personal services exemption will only be applicable to income derived from certain high value added activities of a scientific, artistic or technical nature defined by a Ministerial Decree still to be drafted.

Income deriving from employment or independent personal services of a domestic source or from a foreign source, but, in the latter case, not qualifying for the exemptions applicable under the first set of rules, will be liable to autonomous taxation at a special 20% flat rate and not to the general and progressive IRS rates (which higher bracket is 42%), provided it derives from high value-added activities of a scientific, artistic or technical nature, also to be defined in a Ministerial Decree still to be drafted.

Non-habitual residents deriving foreign-sourced income that will be IRS exempt under both these sets of rules will be allowed to opt, in its regard, for the credit method, the standard method for the elimination of international double taxation in Portugal. Whenever this option is exercised, the income will be taxed under the standard IRS regime, being liable either to progressive rates of up to 42% or to special lower flat rates depending on its nature, being the income from high value added activities of a scientific, artistic or technical nature also taxed at the 20% flat rate.

Example

As a simplified example, we show in the following table what would be the situation for the taxable income of a Professor that came to Portugal in 2009 and that derives income from University employment in Portugal (€ 80.000) lecturing in Portugal and abroad (€ 90.000, of which € 80.000 are foreign sourced) and from copyrights of his books (€ 100.000, of which € 90.000 are foreign sourced):

Description	Standard tax regime			Non-habitual residents tax regime		
	Employment	Independent	Copyrights	Employment	Independent	Copyrights
Income	80.000	90.000	100.000	80.000	90.000	100.000
Standard deductions	8.800 (1)	27.000 (2)	30.000 (3)			
Taxable income	71.200	63.000	70.000	80.000	10.000 (4)	10.000 (4)
Global taxable income	204.200			100.000		
Taxation	71.381 (5)			20.000 (6)		
Effective rate	29.7% (7)			10.7% (7)		

Notes:
In this example we have ignored taxation abroad on independent professional services and copyrights (in most tax treaties entered into by Portugal, this taxation would be shifted to Portugal). We have also assumed a single person situation without dependent children and other possible deductions, such as health expenses and personal pension contributions.
(1)Social security @ 11%
(2)Standard deduction for expenses of 30% (simplified regime)
(3)Taxable income deduction in accordance with article 58 of the Tax Benefits Statute
(4)Taxation only on domestic earnings
(5)Marginal rate of 42%
(6)Flat rate of 20%
(7)Including social security contributions on employment (other activities being exempt)

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Looking to invest in the UK?

For any individual from outside the UK looking to invest here, the UK can offer an attractive tax regime, both for non UK residents, and for individuals who have are resident in the UK but can claim non UK domicile status.

NON RESIDENTS

Looking at the three main areas of UK direct taxation, a non UK resident will not generally be subject to UK capital gains tax on the disposal of UK assets (other than those used by a business that that non resident has in the UK).

For inheritance tax purposes, a non UK resident (assuming that they do not have a UK domicile), could potentially be subject to UK inheritance tax on death on any UK assets held. However this can be avoided through some fairly straightforward tax planning, typically having the assets held by a non UK company for instance. Income tax is a little more complicated but nonetheless is still generally favourable. Generally the taxation position for the main types of UK investment income would be:-

Dividends from UK companies	No withholding tax or UK tax
Interest	Most double tax agreements ensure that there is no UK tax to pay on UK interest and low or zero rates of withholding tax
Real estate income	This is subject to UK tax. However planning, generally using a non UK company, and funding by way of debt, can do a great deal to eliminate any UK tax.
Trading income without a permanent establishment in the UK	Most double tax treaties ensure that this income would not be subject to UK tax
Trading income with a permanent establishment in the UK	This is one area where there will potentially be UK tax to pay. Even here though, by carefully looking at the reason for the establishment in the UK, the nature of its activities and so on, tax can be managed.

Therefore for non residents the UK, from a tax perspective, can be a useful place to invest.

BENEFITS OF BEING UK RESIDENT AND NON-UK DOMICILED

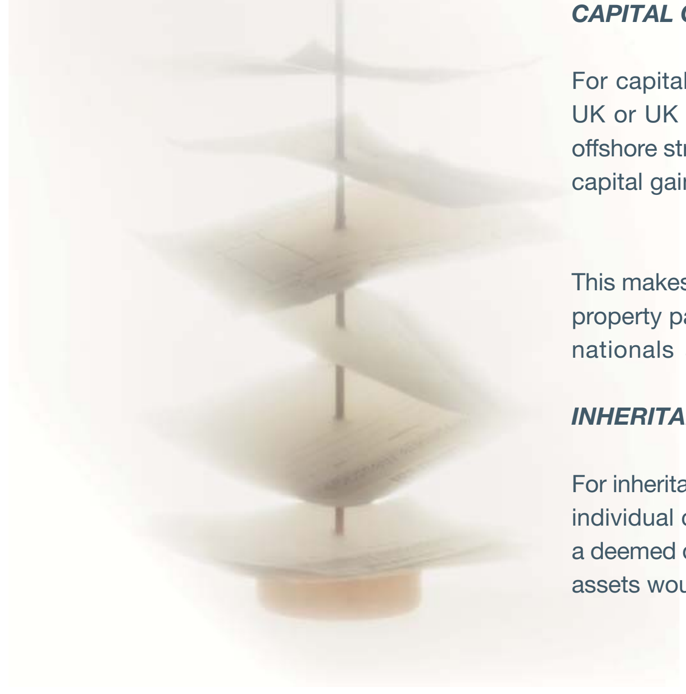
For individuals who've come to the UK and are resident here for business, pleasure or both, the ability to claim non UK domicile status, despite the recent changes to the regime, can still be very useful.

CONCEPT OF DOMICILE

For UK purposes, an individual is domiciled in the country they regard as their permanent 'home'. Unlike residence, domicile cannot be shared - each individual can only be domiciled in one place at any one time.

In practice most non-domiciliaries genuinely envisage circumstances in which they will leave the UK, and if so, they retain their foreign domicile. There are various reasons individuals may come to the UK, for example, they're sent on secondment by their employer, a wealthy family may relocate to the UK for the education of the children or an entrepreneur may decide to set up the base of their business operations in the UK.

The concept of domicile and the key legislative provisions relating to domicile are all worthy of articles in themselves; but here we concentrate on the practical application of those rules in relation to foreign nationals coming to the UK.



INCOME TAX

For income tax purposes any overseas income of a non-UK domiciled individual will not be taxable in the UK if it is not brought into the UK, and that individual claims to be assessed on the remittance basis for that tax year. The remittance basis is the term used to describe non-UK income and gains only being taxable if brought back to the UK.

Individuals who claim the remittance basis and who have been resident in the UK for seven out of the previous ten tax years will only be required to pay an annual charge of £30,000 to prevent all their overseas income and gains being taxable in the UK, regardless of the amounts. Individuals who have been resident in the UK for less then seven years do not have to pay the £30,000 charge to claim the remittance basis.

Overseas income includes bank interest, dividends from non-UK companies or overseas rental income. The non-UK domiciled individual should take UK tax advice to ensure their bank accounts are set up correctly. This gives the individual the flexibility to remit any capital freely to the UK, while the income rolls up tax free outside the UK.

CAPITAL GAINS TAX

For capital gains tax purposes, any non-UK or UK assets held by an appropriate offshore structure will not be subject to UK capital gains tax if they are sold at a gain.

This makes investing in UK assets such as property particularly attractive for non-UK nationals and this is discussed below.

INHERITANCE TAX

For inheritance tax purposes subject to the individual concerned not having acquired a deemed domicile in the UK, then only UK assets would be subject to UK inheritance tax. It is possible by using the correct structures to purchase UK assets and avoid any exposure to UK inheritance tax despite living in the UK.

This is in contrast to that for a person with a UK deemed or actual domicile where their worldwide assets would be subject to a UK tax charge.

The concept of a deemed UK domicile applies to inheritance tax only and is acquired when an individual has been resident in the UK for 17 out of the last 20 tax years. However, if the individual is approaching this seventeen year marker, if he undertakes appropriate planning before this date he will protect all his assets going forward.

A simple way to demonstrate the tax advantages for non-UK domiciled individuals living in the UK is to look at some practical examples.

PROPERTY INVESTMENT

Perhaps the non-UK domiciled individual wants to invest in UK property? With appropriate planning the properties can be held in a capital gains tax and inheritance tax shelter. Therefore despite the properties being situated in the UK, it is possible for a UK resident non-UK domiciled individual to dispose of these properties without any capital gains tax. In addition, on death the value of the properties would not be included in their estates for inheritance tax.

It is of course much more difficult for properties already owned and pregnant with gains to be transferred to a suitable structure. However it is possible, with appropriate planning, to do just that, without crystallising any tax charges on the way, with the properties then being held in a capital gains tax and inheritance tax efficient shelter going forward.

It may be possible to incorporate the property business into a non UK entity. No stamp duty land tax should be payable in these circumstances. The individual could then settle the shares in the non UK entity without incurring a capital gains or inheritance tax charge, providing he does so before he becomes deemed domiciled.

PROPERTY DEVELOPMENT

Non-UK residents or UK resident and non-UK domiciled individuals can in certain circumstances undertake property development in the UK, without incurring a UK tax charge.

If a UK property development is held by a company in an appropriate jurisdiction, the major decisions are made overseas and the build time is less than 12 months, then as a result of the appropriate double tax treaty the profits are not taxed in the UK.

RUNNING A BUSINESS IN THE UK

A non-UK domiciled person may come to the UK to start up a business, the business would likely be run through a UK company and corporation tax would be paid on the profits.

If the non-UK domiciled individual structures the ownership of the company correctly, then when he comes to sell the business perhaps after five to ten years this can potentially be done without any charge to UK capital gains tax. The structure could involve a non-UK holding company or a non-UK resident trust structure.

EMPLOYED IN THE UK BY A NON-UK EMPLOYER

A non-domiciled individual may work for an international business and be required to work in the UK and outside. Earnings attributable to workdays spent outside the UK may be excluded from UK tax, provided the pay arrangements are structured correctly.

Conclusion

There's little doubt that the well advised non-UK domiciliary currently has a large tax planning canvas available on which to create some very tax-efficient planning. This continues to make the UK a good place to do business and contributes positively to the economy. Therefore for individuals looking for somewhere to set up home or a business or are sent to the UK to work the UK is still an attractive destination.

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Local Matters, National Strength.

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Argentina. Promotional regime of tax incentives for the software industry

We thought it was interesting in this occasion to share with tax advisors colleagues, a group of tax rules making the Republic of Argentina a very attractive place for investment opportunities in business regarding the software development, mainly for export, because of the important existing tax benefits at levels, federal and local (provinces and the City of Buenos Aires).

1) Federal Promotional Regime. Law No. 25.922

It is applicable to all natural and artificial persons from the Republic of Argentina, whose main activity (more than the 50% of total income) is the software industry, and who carry out any of the following activities in the country:-

a) Creation, design, development and final installation of registrable original software products (unpublished work) manufactured in the country;
b) Implementation and final installation to third parties, of own software products or those created by third parties included in the above paragraph (a);
c) Development of spare parts, modules, routines, procedures, documentation which are complementary or included in the products defined in paragraph (a);
d) Development of personal-made software;
e) Added value computer services to improve security in computers and nets;
f) Services of design, implementation, maintenance, distance support, resolution of incidents, to be rendered to software products for external markets;
g) Development and final installation of software to be incorporated into computers, satellite and space equipment, fixed telephones, mobiles and transmission and reception of data.

Requirements

The interested company must present, for approval before the Secretariat of Industry, Commerce and Small & Middle Scale Companies which depends on the Ministry of Economy and Production, a plan of future activities that will include the following:-

- Projected cash flow of the activity to be promoted;
- Projected salary roaster related to the activity to be promoted;
- Description of the activity to be promoted and its objectives, especially regarding job creation, increment of investment and exports.

Tax benefits

Tax stability for the beneficiary company until the year 2014 inclusive. Until that date, there would not be any increment of national direct taxes (income tax, presumed minimum income tax, bank credits and debits) existing at the moment of presenting the project to request for the benefit. This benefit does not include export and import rights.

60 % reduction of the income tax determined by the promoted activities until the year 2014 inclusive.

70 % change of the amounts of social contributions paid by the company to the Social Security regime on the workers' salaries related to the activity being promoted, in a bonus of tax credit applicable to the VAT payment, or that of the presumed minimum income tax.

2) Local Promotional Regime

At local level, provinces have been included in the regime of Law No. 25.922 and have granted tax benefits to the software activity. We will talk about the cases of the City of Buenos Aires and the Province of Buenos Aires because they are the most important jurisdictions economically speaking.

2.1) City of Buenos Aires. Law No. 2.972 (January, 2009)

It involves the same activities than the federal law and it also includes the manufacture of hardware.

Requirements

It must carry out the promoted activity in a geographic area of the City of Buenos Aires, named Technological District of the C.A.B.A., located at the southern zone of the cuty. The company will request for its enrolment at the Registry of companies of Computers Technology and Communications (TIC).

Tax benefits

Exemption of gross income tax for the income coming from the promoted activity, from the moment of obtaining the enrolment at the TIC Registry and until January, 2019.

Exemption of the contribution of streets Lightning and Cleaning regarding the property where the promoted activity is being carried out until January, 2019.

Exemption of the seals tax on the contracts of:-

- Purchase of property where the promoted activity will be carried out; or
- Rent of the property.

It also gives non-tax benefits, such as credit lines to be granted by the Bank of the City of Buenos Aires, at flexible rates for the purchase of properties in the technological district for the companies developing activities there, and for the acquisition of residences in the same district for the staff working in the said activities.

2.2) Province of Buenos Aires. Law No. 13.649 (March, 2007)

It must carry out the promoted activity within the Province of Buenos Aires, and previously registered at the national registry foreseen by Law No. 25.922, to be later enrolled at a certain registry of the province.

Tax benefits

Tax stability until April, 2017, from the company's enrolment at the provincial registry until April, 2017.

Exemption of incomes coming from the promoted activity on the gross income tax, as long as they are more than the 80% of the company's total incomes. Exemption of the property tax regarding the properties where the promoted activity is being carried out. Exemption of the seals tax over the contracts with customers and suppliers related to the activities.

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Cyprus emerges in the global shipping industry

The negative impact the banking crisis is having on the shipping industry is set to continue as the world's banks attempt the claw-back of loans from ship owners struggling to meet repayments.

Recent statistics published by Clarkson's show considerable reductions in revenues in all vessel sectors with revenues down by almost 70% in some cases. The Clarkson statistics reveal revenues generated similar to income levels of 2003. Undoubtedly, operating costs are not parallel to those operating costs of six years ago so the rapid downfall in the shipping industry on a world wide scale is plain to see.

What does the future hold for shippers operating within the EU with further constraints likely amidst concerns over global climate change and continued pressure from environmental groups? There is worldwide governmental recognition to reduce carbon emissions and emission reductions in shipping will gather pace with Sweden proposing a cap on emissions in both aviation and shipping industry.

Speaking at the Maritime Cyprus Conference held in Limassol on September 28 2009, Nicos Nicolaides, minister of communications and works was more optimistic about Cyprus's shipping market asserting;

"Cyprus shipping has a leading role in the world stage and the intention of our government is to further strengthen this role and support Cypriot shipping through specific programmes, positive planning, new tax packages, motive-setting infrastructure and all that range of services and actions necessary to retain and extend the role of Cyprus in the top spots of international commercial shipping"

So what are the new are tax packages on the horizon? Cyprus offers a favourable tax treatment of shipping business related activities. A brief summary of tax benefits in relation to shipping activities that has contributed in Cyprus boasting the 10th largest shipping fleet in the World (now ranked third in the European Union) are noted below;

- No income tax is payable on the profits derived from shipping activities by a Cyprus shipping company which owns ships under the Cyprus flag.
- A very competitive annual tonnage tax or ship companies may opt to apply the reduced rate of 4.25% on income from provision of ship management services (corporation income tax)
- No capital gains tax is payable on the sale or transfer of a ship or shares in a shipping company.
- No stamp duty is payable on bills of sale and mortgages on ships and related documents.

In addition to the above and up to 31/12/2020 ship-owning companies are exempt from income tax on;

- Profits deriving from the operation and management of a ship registered in Cyprus
- Income of any person from the provision of ship-management services
- Dividend distributed to the shareholders deriving from the operation and management of a Cyprus registered ship or the provision of ship-management services
- On the emoluments of the captain, officers and crew.

Legislative proposals and current developments in the ship management industry

In June earlier this year, the European Commission issued a revised guideline approving the application for Cyprus to continue operating a tonnage tax system on the island, with the Department of Merchant Shipping (DMS) welcoming this approval as it will enhance competitiveness in the European Union fleet. Applying tonnage tax in place of flat corporation tax will encourage ship owners and ship management companies to the island and so approving this system is of great importance to the Cyprus maritime industry.

The DMS is now in the final stages of negotiations with the EU and seeking final approval of the proposals numbered 1 & 2 below;

1) The grant of tax relief with respect to joint and separate crew and technical management, subject to meeting a strict criteria some of which is summarised below;

In order to be granted relief the ship manager must demonstrate;

- Contribution to the economy and employment within the community, in other words those employees land based and sea based must be EU citizens.
- There must be an economic link between the managed ships and the Community – within the territory of the European Union.
- There is an obligation on each crew member and vessel within the fleet to comply with international and European Community standards.
- Additional conditions for crew management in respect training provided for seafarers and both living/social conditions must comply with maritime regulations.

In addition to the above the following is also sought;

2) Further tax exemption on income derived from; EU flags, time charterers, mobile off-shore drilling units and interest earned on shipping income taxed under normal taxation rules.

As to whether both proposals will meet EU approval is something of a lottery despite the revised guidance note from the commission. Extensive lobbying and negotiation undertaken by the DMS has obviously swayed commission thinking but will the EU be swayed to the same extent.

There is a stronger possibility the first legislative proposal will be approved but the second proposal may prove a step too far. If however, the second proposal is accepted, stringent criteria will no doubt be applied.

The deadline for the legislative matters to be concluded has been set for the end of the year and should one or even both proposals receive EU approval shippers surviving the crisis may well be encouraged to increase their investment or re-locate their operations to Cyprus which in turn will continue Cyprus's emergence as a key player in the shipping industry worldwide.

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Italian tax amnesty for offshore assets ("tax shield") Global Watch - Italy

In Brief

Tax Law Decree n. 78 dated July 1, 2009 (here in after Decree n. 78), converted by Law n. 102 dated August 3, 2009 (here in after Law n. 102) and in force as of August 5, 2009 has reintroduced for the third time the "tax shield", already enacted in the Italian tax system by Decree n. 350 dated September 25, 2001 (here in after Decree n. 350).

The purpose of this "tax shield" is to allow the "repatriation" and/or "regularisation" of offshore capital and assets held by Italian resident individuals (and transparent partnerships) as of December 31, 2008.

This provision can be applied to capital and assets held abroad as at December 31, 2008. The "tax shield" can not be used for capital and assets arising out of Italy after that date.

In particular, the amnesty applies to individuals who have held and/or exported capital and assets offshore in violation of tax and administrative provisions, as in the violation to disclose income sourced from said assets on the tax return.

The amnesty does not apply to companies incorporated by shares/quotas.

The tax amnesty can be applied using two different techniques:

- To regularise and "repatriate" offshore assets (money and financial investments) to Italy; and/or
- To regularise and "hold" offshore assets and capital, without physical transfer to Italy.

"Regularise" means to declare the investment(s) held abroad and pay only a substitutive tax on the income produced in the past, as outlined further below.

Decree no. 78 has established that assets from non European Union countries must be repatriated to Italy and cannot be regularized.

Regularisation with "repatriation" is applicable only to money and financial assets (shares, units, bonds, etc.); regularisation without repatriation is applicable to non-financial offshore investment/assets (e.g. real estate, time-share, jewellery, paintings, watches, etc.). Both options can also apply to regularisation of personal offshore companies, trust and fiduciary companies.

The amnesty requires:

- The payment of a total sum equal to 5% of the assets regularized (1), named "extraordinary" tax (with or without repatriation), regardless if the value of the relevant asset includes income not declared in the past and current tax periods;
- The filing of a special "confidential" return, to be filed with an Italian bank or other financial intermediary, for the disclosure of the assets to be regularised.

The above fulfillments shall be made in the period starting from September 15, 2009 and ending on April 15, 2010.

The consequences of the above amnesty for the assets disclosed in the "confidential" return are:

- To protect the individual against any tax and social security audit (2);

- To extinguish tax, social security and only the criminal penalties of unfaithful or omitted tax returns (3) related to the offshore assets;
- To extinguish tax, social security and only the criminal penalties of unfaithful or omitted tax returns related to undisclosed income that generated the offshore assets;
- To keep all transactions related to the repatriation of offshore assets fully anonymous to tax, social security and exchange authorities;
- To avoid the taxation of income, produced up to the year 2008, eventually generated by the repatriated financial assets (indicated in the "confidential" return) through the payment of the "extraordinary" tax (4); and
- To avoid, for tax period 2009 (and also FY2010, for regularisations occurred in 2010), the filing of Form RW (5) of the Italian tax return.

In addition, Decree no. 78 has increased the penalty range provided for the omission of Form RW, previously established by the Decree no. 350. The new penalty range is from 10% to 50% of the offshore assets value (6), plus the confiscation of assets of equal value.

Notes:

(1) The "extraordinary" tax is applied at an annual tax rate of 50% on an annual expected gross income of 2% for the five years prior to the repatriation or regularisation date, therefore 5% of the assets regularized. No loss can be deducted from this expected income.

(2) Decree n. 103 dated August 3, 2009, converted by Law n. 102, has amended the Decree no. 78 excluding the tax proceedings in force at the moment in which the final conversion law will become effective.

(3) The new decree has provided that all criminal penalties may apply except those for unfaithful or omitted tax returns. Other criminal penalties that may apply include those with regard to income from money laundering, terrorism, mafia activities.

(4) The previous Decree no. 350 foresaw the exemption from taxation of income eventually generated by the repatriated financial assets, in the period from August 1, 2001 to the date of repatriation, indicated in the "confidential" return by the intermediary and not disclosed in the individual tax return.

(5) On Form RW, the Italian resident taxpayer must disclose:

- The value of financial investments (assets) held outside Italy at the end of the fiscal year concerned (year ending December 31st) if their value exceeds € 10,000 at that date; and
- Any transfers of money/shares, from abroad, to abroad, or between countries outside Italy effected during the tax year where the total amount exceeds € 10,000 per annum.

(6) Decree n. 350 had established a penalty ranging from 5% to 25% of the value of the offshore assets, plus the confiscation of assets of equal value. Before Decree n. 350, the omission of Form RW was subject to a penalty ranging from about € 250 to € 2,000, regardless the value of the offshore assets.

ITER AUDIT
Società di Revisione Iscritta all'Albo Speciale CONSOB, al Registro dei Revisori Contabili e al Public Company Accounting Oversight Board

Mexican Tax Reform for year 2010

The Mexican Congress has already approved the initiative to amend some of the Mexican Tax Laws for year 2010. The scope of this document is to provide general information of the most relevant facts of this reform.

INCOME TAX LAW

- The corporate and individual (maximum rate) income tax rate increased from 28% to 30% for years 2010 to 2012. The income tax rate will decrease to 29% in year 2013 and to 28% in 2014.

- There is a requirement for taxpayers who consolidate their taxes to annually calculate the tax on benefits obtained in consolidation after five years. The actual payment is: 25% in years 6 and 7, 20% in year 8, and 15% in years 9 and 10.

VALUE ADDED TAX LAW

- The value added tax rate increased from 15% to 16% for activities conducted by non residents in the border region and from 10% to 11% for activities conducted by residents in border region.

CASH DEPOSITS TAX LAW

- The monthly amount exempt of MXN$ 25,000 was reduced to MXN$ 15,000. (This tax applies to monthly deposits exceeding the mentioned amounts).

- The tax rate of the exceeding amount (MXN$15,000) was increased from 2% to 3%.

NOTE: This tax may be recovered through a credit once the income is recognized.

EXCISE TAX LAW

- There will be a new 3% tax on telecommunications service, except for rural telephone services, public telephone services and internet services. This tax will apply to all other cell phone and land line services, satellite and Cable Television services.
- The tax rate on cigarettes and alcoholic beverages increased.
- The lottery and gambling games tax rate increased from 20% to 30%.

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Luxembourg. The 2009 tax package

The Luxembourg Parliament has enacted on December 19, 2008 a set of tax laws applicable as from January 1st, 2009. Various Grand ducal decrees from the same date have completed relevant new direct tax measures and the circular nr 739 from the Director of Customs and Excise ("Administration de l'Enregistrement") from December 31st, 2008 provided additional information on capital contribution duty abolition.

Nevertheless, the anticipated provisions aiming to adapt the Luxembourg tax law to changes of accounting referential have not been adopted, as the current international financial situation could relatively shortly lead to some readjustments of relevant international standards (IFRS).l

COMPANIES

Income tax : corporate income tax rate is reduced from 22 to 21%, thus reducing the overall tax charge on companies' profits from 29.63 to 28.59% (Municipality of Luxembourg).

Thus, one has to consider as comparable to the Luxembourg corporate income tax, particularly for participation exemption purposes, a tax levied by a public authority on a compulsory basis, at a rate of at least 10.5% on a tax base determined under rules and criteria similar to those applicable in Luxembourg.

Intellectual Property : the scope of the availability of 80% exemption on income derived from some IP rights (patents, trademarks, software, design or model) is expressly extended to income deriving from exploitation of domain names. The 80% exemption applies to net income, after deduction of relevant expenses, amortization and adjustments.

Eligible IP rights are now excluded from the computation of the so called unitary value of the company, on which the wealth tax liability (0.5% on net assets) is assessed. Equity (own funds) financing of R&D and/or of the acquisition of such IP rights by using owns funds is not disadvantaged anymore in comparison to debt financing in this respect.

Withholding tax on dividends : the withholding tax exemption is extended to dividends paid to parent companies tax resident in Double Tax Treaty countries (51 countries to date, see below "International").

This exemption is based on Luxembourg domestic tax law, irrespective of the withholding tax rate provided for in the DTT applicable on the case.

Eligible DTT parents companies are:

- entities subject to a tax on profits comparable to the Luxembourg corporate income tax, and
- owning for an uninterrupted period of 12 months a participation
  - of at least 10% of the share capital of the distributing company, or
  - of an acquisition price of at least € 1.200.000.-.

Capital contribution duty : the proportional 0.5% contribution duty (0.25% in some cases) on the raising of capital in civil and commercial companies is abolished, as well as the fixed € 1.250.- contribution duty payable by collective investment vehicles, securitization entities, venture capital investment companies, pension funds and specialized investment funds.

New measures applicable as from January 1st, 2009 are basically the following:

- The incorporation and any change in the Articles of incorporation (at the time of a capital increase, for instance) of a civil or commercial company having its statutory seat or its place of effective management located in Luxembourg is subject to a "Specific Fixed Registration Duty, SFRD" of € 75.-
- Contributions of Luxembourg located real estate are subject to the following proportional duties:
  - 1.1% (0.6% registration duty as

increased by 0.5% "transcription" duty) in case of contributions remunerated by shares, defined as any kind of rights similar to these of a shareholder, including voting rights, entitlement to profits or to liquidation surplus
- 7 or 10% (6 or 9% registration duty as increased by 1% transcription duty) in case of contributions not remunerated by shares and consequently considered as sales.

- Contributions of shares in real estate civil companies or EIG, ie civil companies or EIG the assets of which consist in whole or in part in Luxembourg located (fraction of) property, are subject to provisions applicable to real estate contributions ("tax transparency" principle, as applied to registration duty issues)

- Contributions of securities not aimed at the previous paragraph and remunerated by shares are expressly exempt from proportional duty, only SFRD applies.

- Straight forward movable property contributions, not aimed by any specific provision, are not subject to proportional duty

- Contributions of movable and immovable property are exempt from proportional duty in corporate restructuring situations, ie mergers or contribution of branches of activity mainly (more than 50%) remunerated by securities issued by the acquiring entity and going concern contributions made by 100% owned subsidiaries. Only SFRD applies in such cases.

- Former exemptions obtained under the previous legislation are final (no "recapture") from January 1st, 2009, as confirmed by the circular nr 739 from December 31st, 2008. Any "recapture" situation based on the content of the previous legislation is not possible, as this legislation itself has been abolished.

Tax credit for hiring of unemployed workers : the current legislation is extended for three more years and the tax credit is increased from 10 to 15% of the total gross remuneration of eligible people.

Charity : (see below « individuals »)

Self assessment and payment : the law from December 19th, 2008 on cooperation and collaboration between Luxembourg administrations implement a new measure allowing the Direct Tax administration to assess, subject to further control as the case may be, the tax liability on the only basis of the tax return filed by the taxpayer without undertaking an in-depth analysis at this stage.

Such assessment under the new procedure becomes final when the usual five years prescription deadline expires, unless tax authorities issue another tax assessment after in-depth examination of the case before that expiration date. According legislator's view, the new procedure is only applicable to corporate taxpayers at a first stage.

In this case, the taxpayer will be required to pay the self-assessed tax liability within the month of receipt of the "temporary" tax assessment. He will forced to manage his own tax position, as in our neighbor countries, including but not limited to the determination and payment of further tax advances based on the self-assessed, and temporarily accepted, tax liability.

Such new measure, aiming at accelerating the collection of taxes as well as at having a dynamic impact on tax offices saturated by the increase of the quantity of taxpayers, leads to some practical questions that would only be answered by reference of future implementing measures (administrative circulars, notes…) and practice.

Maritime industry : insurance premiums in relation with vehicles registered with the Luxembourg public shipping register and used in international traffic are exempt from insurance premium tax.

INDIVIDUALS

Tax rates : tax brackets applicable to individuals are increased by 9%, thus creating a general tax saving effect in the hands of taxpayers, up to an annual maximum of € 1.640 for class 2 taxpayers.

Repeal of reductions for salaried people, retired people and single parents : these reductions are replaced by (refundable) tax credits.

Measures aiming to promote housing (applicable as from tax year 2008 – law from October 22nd, 2008) : speculative gains and capital gains made on the disposal of property are income tax exempted if the transferee is the Luxembourg State, a commune or an association of communes (safe in preemption situations).

Charity (applicable to both individual and corporate taxpayers) : existing deductible amounts are doubled, eligible donations and gifts are deductible for municipal business tax purposes, initial gift to a foundation becomes tax deductible.

Miscellaneous :

- The option for the final 10% withholding tax regime (i.e. withholding tax in full discharge of income tax) on interest payments is allowed, under certain conditions, for interest attributed by non Luxembourg based paying agents
- Allowance paid to salaried people benefitting from a duly recognized employment preservation scheme is subject to the same exemption regime as severance pay provided for either by law or collective agreement

- The reference interest rate for determining the benfit in kind deriving from interest saving still fixed at 3.75% for 2009 and 2010
- Interest derived from home saving schemes (“Caisses d’épargne-logement”, duly accredited either in Luxembourg, or in another EU or EFTA country) is tax exempt
- Deductibility ceilings of lump sum premiums in relation with temporary life insurance policies assurance have been raised. As the case may be, both husband and wife (or recognized partners) may benefit from such deduction that is not reserved to premiums paid for personal housing purposes anymore.
- The child tax bonus is paid on a monthly basis
- The child education allowance is tax exempt
- The maximum deductible amount for alimonies paid to a divorced spouse has been increased from € 21.600.- to € 23.400.- per annum.

INTERNATIONAL

The list of the 51 countries with which Luxembourg has entered into a double taxation treaty is available at: *http://www.impotsdirects.public.lu/dossiers/conventions/conv_vig/index.html.*

Luxembourg expands its double taxation treaty network on an ongoing basis. An overview of this process is available at: *http://www.impotsdirects.public.lu/dossiers/conventions/conv_neg/index.html.*

Specific issues in connection with double taxation treaties shall be envisaged on a case by case basis and are beyond the scope of this document from a pure informative character.

AWAITING IMPLEMENTATION…

Inheritance tax and tax on transmission by death: the 5954 draft law aims to institute an equal treatment between heirs from a Luxembourg domiciled “de cujus” and heirs from a non Luxembourg domiciled “de cujus”. Accordingly, the proposal consist in the extension to tax on transmission by death of the existing inheritance tax exemptions in case of transmission in direct line or between spouses (and partners in the meaning of the law of July 9th, 2004) having common children or descendants.

Chamber of Commerce duty (from a non fiscal nature according to relevant jurisprudence): the 5939 draft law on reorganization of the Chamber of Commerce contemplates the implementation of a lump sum duty for holding companies, heavily handicapped by the current computation system, based on the commercial profits and disallowing losses carried forward, because of the high volatility of their results.

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Spain. Joint operations: how to deal with them?

The approval by the Council of Ministers of last Saturday 26th September of the Budgets of the State for the year 2010 has confirmed the expected increase in the fiscal pressure for the forthcoming financial years.

This increase has been carried out by means of the rise in the rates of “IVA” (VAT, sales tax) and of the yield of liquid capital, as well as the elimination of the deduction of 400 euros in “IRPF” (income tax). These changes respond to the necessity of augmenting income to the State, with the aim of facing up to the growing public deficit of our public accounts. Well then, we should ask ourselves whether this increase in fiscal pressure will be limited to the legislative modification of some of our tax payments, or whether it will also lead to a growing control of tax fraud, as well as the most exhaustive follow-up of some of the latest fiscal novelties, which is the case of the new legislation concerning joint operations which, we must not forget, comes accompanied by a substantial and controversial sanctioning regime.
Remember that the new sanctioning regime applicable to joint operations is established in article 16.10 of the “Impuesto sobre Sociedades” (Companies Tax), in which two specific infractions are typified with respect to joint operations: 1) Not to present or to present incompletely, inaccurately or with false data the documentation required in the tax regulation and 2) That the normal market value which is derived from the documentation presented does not correspond with that declared in “IS” (Companies Tax), “IRPF” (Income Tax) or “IRNR” (Tax on the revenues of non-residents) .

These two infractions are linked, in the same article 16.10, to two specific sanctions: 1) In the case that the Tax Authority does not carry out value corrections, the sanction will consist of a financial penalty of 1,500 euros for each item of data and 15,000 euros for the set of omitted, inaccurate or false data, referring to each one of the obligations of documentation which are established by regulation, and which we will comment on later; and 2) The sanctions corresponding to the second type of infraction are established as 15% of the amount which results from the value correction, although financial prejudice is not derived for the Tax Authority, with a minimum of double the sanction which would correspond by the application of the first point. It is worth pointing out that the carrying out of value corrections which are considered outside the ambit of the infraction behaviour (inaccurate or incomplete documentation, or with false data, or documentation with values differing from those declared) excludes the application of any type of sanction, thus, to value a price differently to that which is fixed by the Tax Authority, but in a reasoned way and not arbitrary, with consistent documentation, will NOT be sanctionable; as long as an evaluation which coincides with the Tax Authority's one, but with incomplete or incorrect documentation, it WILL be sanctionable.

This important sanctioning regime obliges companies to keep available to the Tax Authority a set of documentation defined in the "Real Decreto" (Royal Decree) 1793/2008, therefore modifying the "Reglamento del Impuesto sobre Sociedades" (Companies Tax Regulation), setting out in detail the new principles introduced by the "Ley de Medidas para la Prevención del Fraude Fiscal" (Law of Measures for the Prevention of Fiscal Fraud) in the Spanish rules of transfer prices. Article 16.2 of "TRLIS" (Summary of Companies Tax Law) establishes generically that persons or entities joined will keep available to the Tax Authority the documentation which is established in the rules. Thus, "Real Decreto" (Royal Decree) 1793/2008 divides the required documentation into two parts, that relative to the group to which the obliged taxpayer belongs and that which is owned by the taxpayer. In the first case it is basically a matter of presenting a general description of the structure of the group, identifying the different entities which carry out joint operations and detailing the operations which affect directly the obliged taxpayer, with the corresponding description of the method or methods of price determination which the group uses for those operations. As regards the documentation of the obliged taxpayer, it will include mainly the identification of the joint parties, the analysis of comparability and an explanation relative to the valuation method selection chosen, as well as other information relevant for determining the valuation of the joint operations carried out.

It is important to point out that the Regulation exonerates of the fulfilment of the obligations referring to the documentation of the group in respect of entities which fulfil the previsions of article 108 of the "Ley del Impuesto" (Tax Law), which is to say for those companies of reduced size which will also see documentation simplified relative to the same obliged taxpayer. Despite this relaxation in the documentation obligations of small companies, now that we have seen previously the sanctioning charge derived from the accumulation of small errors or inaccuracies in the information contained in the documentation, may be high.

Notwithstanding the importance given to the fulfilment of the documentation requirements established by the new regulation, we must not forget what its original aim is, which is nothing more than the valuation at normal market value of the operations carried out between joint persons or entities, that is to say, that the operations between these parties must be valuated at the price that has been agreed between independent persons or entities in conditions of free competition. In this way, to valuate and justify the price of the operations carried out, we will have to use the methods of valuation established in article 16.4 of "TRLIS" (Summary of Companies Tax Law), which habitually in the OECD regulation are divided into two types, the traditional methods and those of profit. The Spanish regulation, and also the international regulation, establishes a degree of hierarchy or general preference of some methods over others, in particular, of the so-called traditional ones (method of free comparable price, method of incremented cost and method of re-sale cost) over those of profit (method of distribution of the result and method of the net margin of the set of operations). Therefore, as regards any joint operation we will have to valuate using one of the three methods, and only in those cases in which the complexity or the relative information to the operations does not permit the use of the traditional methods, must we valuate operations using methods of profit. The choice of method to use will be the result of a technical-economic analysis, not exclusively fiscal, of various factors: type and complexity of the operations, nature of the commercialized products and services, geographical market, market conditions, risks, comparability with similar operations, and so forth.

To sum up, the correct fulfilment of the obligations derived from the new regulation covering joint operations, referring to required documentation as well as the correct use of methods of valuation and their technical consistency as regards the Tax Authority, will require companies to count on multidisciplinary consultancy, now that it is not only necessary to have correct fulfilment of fiscal legislation, but also in most cases the choice and development of methods of valuation will make technical-economic consultancy indispensable, which will be beyond the limits of fiscal knowledge.

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Antea

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