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Contents: United Kingdom 2 • **North America and the Caribbean:** Canada 5 • United States Of America 7 • **Europe and the Mediterranean:** European Union 9 • Belgium 9 • Denmark 10 • France 10 • Germany 11 • Hungary 13 • Ireland 14 • Israel 14 • Italy 16 • Luxembourg 18 • Switzerland 19 • United Kingdom 20 • **Asia Pacific:** Hong Kong 21 • India: 22 • New Zealand 23 • Singapore 23 • Thailand 24 • **Sub-Saharan Africa:** South Africa 25 • **Latin America:** Paraguay 26

BDO World Wide Tax News
June 08

Welcome to Issue 2008 No. 1 of BDO World Wide Tax News which summarises important recent tax developments of international interest across the world. If you would like further information on any of the items featured, or would like to discuss their implications for you or your business, please contact the person named under the item(s). The material discussed in this newsletter is meant to provide general information only and should not be acted upon without first obtaining professional advice tailored to your particular needs. BDO World Wide Tax News is published quarterly by BDO Global Coordination BV in Brussels. If you have any comments or suggestions concerning BDO World Wide Tax News, please contact the editor, Zigurds Kronbergs, by e-mail at zkronbergs@bdoglobal.com or by telephone on +32 (0)2 778 0141.

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BDO International

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United Kingdom

Budget confirms non-domicile and capital gains changes

The UK Budget, delivered by Chancellor of the Exchequer Alistair Darling on 12 March, confirmed the controversial changes to the taxation of individuals' capital gains and the new charge on persons not domiciled in the UK, but with important modifications. As previously announced, reductions in the rates of personal and corporate income taxes will take place, as well as a reduction in the rates of capital allowances (tax depreciation) on plant and machinery.

Corporation tax reduced

The rate of corporation tax falls from 30% to 28%, with effect from 1 April 2008. However, the small companies rate increases from 20% to 21%.

Capital allowances

Capital allowances (tax depreciation) for plant and machinery (which includes computer equipment, furniture and fixtures) have previously been available at the rate of 25% per annum on a reducing-balance basis. The rate is now reduced to 20%, and for some fixtures attached to buildings, to 10%. As a partial offset for this reduction, most companies will be able to claim a 100% investment allowance for the first GBP 50 000 of expenditure on plant and machinery (excluding cars). Within a group of companies, there will be a single GBP 50 000 allowance.

Income tax reduced

The standard rate of income tax falls from 22% to 20%, from 6 April 2008. The higher rate (now charged on that part of taxable income in excess of GBP 36 000) remains at 40%. However, the starting rate of 10% on income other than savings income is abolished.

Capital gains tax

As previously announced, capital gains tax for individuals will no longer be charged at the individual's marginal rate of income tax (therefore as high as 40%) but at a single flat rate of 18%. Taper relief, under which gains from the disposal of business assets were effectively charged at a 10% rate, subject to a minimum holding period of two years, is abolished. However, entrepreneurs disposing of all or part of their business may qualify for a 10% rate of capital gains tax on the first GBP 1 million of gains, over a whole lifetime.

Companies' capital gains are unaffected. They will continue to qualify for indexation relief and be chargeable to corporation tax at the appropriate corporation tax rate.

Non-domiciled individuals

The Chancellor confirmed that, as from 6 April 2008, individuals not domiciled in the UK (broadly speaking, foreigners who may be tax-resident in the UK but do not regard the UK as their permanent or ultimate home) who are long-term tax-residents in the UK will have to pay an annual charge if they wish to continue to benefit from the so-called 'remittance basis' of taxation.

Under this basis, non-domiciled individuals have been free of UK income tax and capital gains tax (CGT) on foreign income and assets that remain outside the UK. It was only to the extent that the income and gains were 'remitted' or otherwise directly or indirectly enjoyed in the UK that they became subject to UK tax. The remittance basis remained available to non-domiciliaries (and those individuals 'not ordinarily resident' in the UK) regardless of how long they had been resident in the UK.

From 6 April 2008, however, an individual who is either not domiciled or not ordinarily resident in the UK but who has been resident in the UK for more than seven of the last 10 tax years and who wishes to claim the remittance basis for any tax year from 2008-09 onwards will have to pay a tax charge of GBP 30 000 (EUR 38 000; USD 59 275) in order to do so. Individuals will be able to opt in or opt out of the remittance basis each year as they wish.

To this extent, the measures are as announced last October, but there have been modifications. In particular:

- The de minimis amount of unremitted foreign income and gains not requiring payment of the charge to retain the remittance basis has been increased from GBP 1000 to GBP 2000
- The charge will apply to adults only (first taking effect in the tax year in which the taxpayer turns 18)
- The charge will be treated as a payment of income tax or CGT on unremitted income or gains and should therefore qualify as a creditable tax under a double tax treaty
- The income or gains identified as those on which the charge has been paid will not be taxed a second time if remitted to the UK. However, ordering rules will provide that remittances will be treated as coming first out of income and gains on which the charge has not been paid. This means that this concession will be of little practical use

Several loopholes that allowed remittances to be made without incurring a UK tax charge have been closed.

Non-resident trusts

Until now, UK-resident but non-domiciled individuals have been specifically excluded from a CGT charge in respect of capital gains realised by and capital payments received from non-resident trusts, whereas UK-resident and domiciled individuals have been so chargeable.

Originally, the Chancellor proposed that a UK-resident

but non-domiciled settlor of a non-resident trust would be taxable on the remittance basis on gains realised by the trust. This proposal has been dropped. However, the law is now to be changed so that any non-domiciled but resident individual (whether the settlor or a beneficiary) who elects for the remittance basis will be taxable to the extent that funds attributable to gains realised by the trust are remitted to the UK. This treatment will apply to all trust gains – whether derived from UK or foreign assets. Those non-domiciled but resident individuals who have not elected for the remittance basis will be taxable on those gains paid out to them whether or not the payment is remitted to the UK.

Non-resident companies

The CGT legislation contains a provision charging UK-resident individuals who are significant 'participators' (broadly, persons with an economic interest in the company, such as shareholders) in a closely owned foreign company to a proportionate share of capital gains realised by the company. If such an individual is not domiciled in the UK, however, the charge has not applied.

From 6 April 2008, this exemption is abolished. Where the company realises a gain on a UK asset, the non-domiciled participator will be taxed on the appropriate proportion in the year of realisation. Where the gain is derived from a foreign asset, the non-domiciled participator will be taxed to the extent that the gain is remitted to the UK, if the remittance basis applies to the participator. Where it does not apply, the participator will be taxed whether or not the gain is remitted.

Counting days for residence

An individual is considered to be tax-resident in the UK in any tax year in which he or she is physically present in the UK for more than 183 days in that year. Until now, the practice of the tax authorities has been to ignore days of arrival and departure for this purpose, so that, for example, a person arriving in the UK on a Tuesday and leaving the next day would not have been regarded as present in the UK on either day.

This practice is now to end. The law will provide that an individual is regarded as present in the UK on any day in which he or she is present at midnight. Days passed in transit through the UK will be ignored, unless the individual engages to any significant extent in activities (such as a business meeting) not connected with travel. Furthermore, we understand that HMRC practice on the non-statutory 90-day test for repeat visitors to the UK, as outlined in its Booklet IR20, will be revised to reflect the new method of day counting.

These measures, too, differ slightly from what was originally announced in October (see BDO World Wide Tax News 2007 Issue No. 4).

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North America and the Caribbean

Canada

Budget brings few surprises

As expected, the Canadian government's Budget for 2008-09, delivered in February, did not contain any significant tax relief for either individuals or businesses, additional to the changes already announced in the Economic Statement in autumn 2007. The temporary increase to the tax-depreciation rates for acquisitions of capital assets in the manufacturing sector has been extended for three additional years, to end on 31 December 2011, in an effort to encourage investment. There were also enhancements to tax credits for research and development for Canadian-controlled private corporations. On the personal side, the centrepiece of the Budget was the introduction of tax-free savings accounts, which will assist Canadians to save on a tax-efficient basis. However, investors who were hoping to see capital gains tax relief, as promised by the victorious Conservatives in the 2006 general election campaign, were again disappointed.

However, foreign investors will benefit from the streamlining of the rules for disposals of taxable Canadian property – see below.

Canada eases compliance burden for non-resident investors

Under Canadian tax law, where taxable Canadian property (TCP) is disposed of by a non-resident, the purchaser of the TCP must withhold a portion of the purchase price and remit it to the Canada Revenue Agency (CRA), unless the non-resident obtains a clearance certificate from the CRA. The purpose of these rules is to ensure that Canada collects any tax it is owed on disposals of TCP by non-residents. The 2008 Canadian Budget contains some welcome relief from this compliance burden when the gain on the sale of TCP by a non-resident is not taxable in Canada by virtue of a provision of a tax treaty (the property in such a case is known as 'treaty-protected property').

Generally, a non-resident of Canada must pay Canadian tax on gains realised from the sale of TCP, other than treaty-protected property. That said, the clearance certificate and withholding-tax requirements apply to all disposals of a TCP by a non-resident. TCP includes, but is not limited to, things like real property situated in Canada, shares of Canadian private corporations and shares of Canadian public companies where the owner of the shares (together with persons who do not deal at arm's length with the owner) have owned 25% or more of any class of shares of the company during the 60 months preceding the disposal. In addition shares of non-resident corporations and interests in partnerships are also TCP if they derive their value from certain types of TCP.

To alleviate the compliance burden for treaty-protected property, the 2008 Budget proposes the following, to be effective for disposals after 2008.

Exemption from Withholding Tax

Purchasers of TCP from a non-resident will no longer be required to withhold a portion of the purchase price and remit it to the CRA if, at the time of disposal, the following conditions are met:

- The purchaser concludes after reasonable inquiry that the vendor is, under the provisions of a tax treaty

that Canada has with a particular country, resident in that country

- The property sold would be treaty-protected property of the vendor if the vendor were, under the tax treaty referred to above, resident in the particular country and
- The purchaser provides a notice to the CRA in respect of the acquisition within 30 days, setting out basic information about the transaction and the vendor.

Elimination of Compliance Certificate Requirement

Non-resident vendors will no longer have to obtain a clearance certificate from the CRA if they are selling treaty-protected property.

Elimination from Filing Canadian Tax Returns

Currently, a non-resident must file a Canadian income tax return for any taxation year in which the non-resident disposes of TCP, even if no Canadian tax is owing because the property sold is treaty-protected property. For disposals after 2008, this requirement will be eliminated in respect of disposals of TCP if the non-resident satisfies all of the following criteria:

- No tax is payable by the non-resident for the tax year
- The non-resident is not currently liable to pay any amounts in respect of any previous tax year (other than an amount for which the CRA has accepted, and holds, adequate security); and
- Each TCP disposed of by the non-resident in the year is either 'excluded property' under the Canadian tax rules (treaty-protected property will be considered to be excluded property) or a property in respect of a disposal of which a clearance certificate has been issued.

Given current backlogs at the CRA, which often result in months of delay in getting required clearance certificates, the Budget proposals are welcome news for non-residents who are selling TCP that is treaty-protected property. However, the proposals put a very large burden on purchasers who will have to assess whether the conditions for the exemption from withholding tax have been met. Some purchasers may be reluctant to do so and still require the vendor to obtain a clearance certificate from the CRA.

For further information on this item, contact John Wonfor of BDO Dunwoody on +1 416 865 0111 or by e-mail at jwonfor@bdo.ca

United States of America

Contract manufacturing regulations

The US Treasury has issued proposed regulations clarifying guidance to the exemption from the Subpart F (CFC) rules for contract-manufacturing arrangements.

Generally speaking, US shareholders are taxed on their pro rata share of the passive income of a controlled foreign corporation (CFC) in a low-tax jurisdiction. The CFC rules are known as 'Subpart F rules'. One of the classes of chargeable income is 'foreign base company sales income' (FBCSI), which is essentially income derived by the CFC from related-party purchases or sales outside its own jurisdiction.

One exception to FBCSI is the manufacturing exception. This is generally met when the CFC meets one of two separate tests – the substantial transformation test, under which the property sold must be substantially transformed prior to sale from the property that has been purchased – or the substantive test, under which personal property sold is considered to be manufactured if the CFC's operations are substantial in nature and can be generally considered to constitute manufacture. This exception becomes complicated to apply where the manufacturing is performed by a third-party contract manufacturer or through a branch of the CFC, in either case outside the CFC's own jurisdiction.

The regulations under which the tests are applied date from 1964, since when the way in which business is conducted has changed considerably. The new proposed regulations introduce several clarifications, including an additional test – the substantial contribution test – which CFCs that fail the two existing tests could still satisfy in order to qualify for the exception. This test looks for a substantial contribution from the CFC's own employees to the manufacturing process. Such a contribution could be made through oversight and direction; performance of manufacturing activities considered for but insufficient to satisfy the existing manufacturing tests; control of raw materials, work-in-progress and finished goods; management of manufacturing profits; material or vendor selection, or a number of other ways.

The proposed regulations would also clarify several other matters, and would apply to taxable years beginning on or after the regulations are published as final, but taxpayers have the option to apply the proposed regulations to all open tax years as if they were final regulations.

Deductions denied for late filing

An Appeals Court decision has upheld Treasury Regulations that deny a foreign company a loss deduction on the grounds that its tax return in which the loss is reported is filed late.

A foreign company that is engaged in a trade or business in the US is taxed on its taxable income that is 'effectively connected with the conduct of that trade or business'. Deductions are allowed only if they arise in connection with income that is effectively connected.

Treasury Regulations under Code §1.882-4 disallow a deduction if the company in question has not filed a corporate tax return for the year concerned within 18 months of the due date.

In the case in question, a Barbadian company with real estate in California incurred expenses in excess of its rental income from the property over a number of years, but failed to make tax returns for the years 1993 to 1996 until 1999 – out of time according to the Regulation.

The company appealed against the disallowance on the grounds that the Regulation went beyond the Internal Revenue Service's rule-making powers. It argued that the provision under which the Regulation was made required only that a return be made in the manner prescribed, but did not stipulate a time period within which the return had to be made. This argument succeeded before the Tax Court, but has now been overturned by the Third Circuit Court of Appeals. Citing a Supreme Court decision in the 1984 Chevron case, the Appeal Court held that the Internal Revenue Service had to have discretion to interpret ambiguous provisions of law if Congress intended it to wield the force of law.

The judgment may be appealed before the Supreme Court, but all foreign corporations should note that, as the law currently stands, they may suffer a disallowance of business expenses if they file their tax returns outside the 18-month deadline.

Foreign tax credit regulations issued

The Internal Revenue Service (IRS) has issued final and temporary Regulations on the treatment of overall foreign and domestic losses and the reduction of foreign tax credit limitation categories.

Provisions under Internal Revenue Code §904(g) – the 'Overall Domestic Loss rules' – alleviate an issue created when US-source losses reduce the foreign tax credits that a taxpayer may claim against his US tax liability. Prior to the enactment of this section by the American Jobs Creation Act (AJCA) 2004, there was no mechanism for taxpayers to recapture the foreign tax credit limitation lost because of US-source losses. The Overall Domestic Loss rules essentially recharacterise US-source income as foreign-source income in circumstances where a taxpayer has an overall domestic loss from a prior year. The new Regulations provide guidance as to the application of the Overall Domestic Loss rules and update guidance on overall foreign losses and separate limitation losses.

Prior to the enactment of AJCA 2004, the foreign tax credit limitation applied separately to as many as nine separate categories (or 'baskets') of income. AJCA 2004 reduced the number of baskets for taxable years beginning after 31 December 2006 to two – 'passive category income' and 'general category income'. These new categories are reflected in the new Regulations, which also provide transitional rules for the treatment of earnings and profits and foreign taxes accumulated in years prior to 2007 and the carry-back and carry-over of excess foreign tax credits.

For further information on any of these items, contact Bob Pedersen of BDO Seidman on +1 212 885 8000 or by e-mail at rpedersen@bdo.com

Europe and the Mediterranean
European Union

Germany must allow exchange loss on foreign PE capital

See under Germany.

Belgian rule on reclassifying interest struck down

See under Belgium.

French 5% add-back for foreign tax in dividend may be upheld

See under France.

Belgium

Interest recharacterisation rule struck down

The European Court has struck down a Belgian rule reclassifying as a dividend interest paid by a Belgian company to its foreign parent where that parent company was a director of the Belgian subsidiary.

Under this Belgian thin capitalisation rule, interest paid by a Belgian company to a non-resident corporate director is deemed to be a dividend (and hence not deductible against taxable profits) to the extent that the loan from the foreign director exceeds the Belgian company's paid-up capital and taxable reserves, regardless of whether the interest is payable at an arm's length rate. However, if the corporate director were resident, and subject to Belgian corporate tax, the rule would not apply. It was on these grounds that the taxpayer company argued that the rule was in breach of the right to freedom of establishment.

In an unusual procedure, the Court gave its judgment without an oral hearing or an Advocate-General's opinion. It found for the taxpayer, on the basis of its decision in the Thin Cap Group Litigation case (Case C-524/04). Such a rule as the one in question made it less attractive for companies based in one Member State from acquiring or managing companies based in another Member State. Further, because the rule did not extend merely to purely artificial situations, it could not be justified on the grounds of preventing abuse.

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Denmark

Extensive work abroad allowed under expat régime

A recent ruling by the National Tax Tribunal has greatly extended the number of days an expatriate may spend working outside Denmark and still qualify for the special 25% expatriate tax régime.

Foreign nationals resident and working in Denmark for a limited period may qualify for a flat 25% rate of income tax on their Danish earnings if several conditions are satisfied. One of those conditions is that the work be performed in Denmark. This does not exclude work-related trips abroad, provided that the time spent working abroad is not 'significant'.

There is no statutory definition of what is meant by 'significant', but the accepted practice until now is that no more than 70 days or one-third of the days worked in the year could be spent abroad if qualification for the expatriate régime were not to be lost.

However, the Tribunal has now found in favour of an individual working for a Danish company that was part of a multinational group with its headquarters in the United States. Of 255 total working days in the year concerned, the individual had spent 136½ days working for the Danish company outside Denmark. The Tribunal ruled that the requirement to perform work in Denmark could not be interpreted as limiting the number of days spent travelling abroad, as long as the absence abroad was closely connected to the ordinary performance of the employee's duties in Denmark.

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France

5% add-back for foreign tax in dividend may be upheld

If the European Court of Justice follows the opinion of its Advocate-General, the inclusion by France of gross and not net foreign dividends received in the 5% exclusion from the participation exemption, will be upheld.

The EC Parent-Subsidiary Directive (90/435/EEC) permits (in Article 4) Member States adopting the exemption method for dividends received from associated EU companies to exclude from the exemption a fixed amount of no more than 5% of "the profits distributed by the subsidiary". France has chosen the exemption method and opted to add back the full 5% permitted. According to a circular of the tax authorities, the 5% is calculated not on the net dividends actually received but on the gross amount of distributed dividends, inclusive of credits for foreign and domestic withholding taxes.

In the case before the Court, the taxpayer's main argument was that the inclusion of the tax credits in the 5% add-back was contrary to the objectives of Article 4. The European Commission had submitted a written argument in favour of one aspect of the taxpayer's argument.

The Advocate-General's opinion dismissed both the Commission's case that a tax credit could not be regarded as distributed profits (based on the Court's judgment in the Océ van der Grinten case) and the taxpayer's argument that since it is granted by the State a tax credit cannot be considered as a dividend or a distributed profit. She concluded that the French practice was not in conflict with Article 4.

The Court is not bound to follow an Advocate-General's opinion but it normally does so.

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Germany

5% participation-exemption exclusion may be unconstitutional

A first-instance court has held that the rule whereby Germany excludes 5% of dividends from the participation exemption is unconstitutional.

Under the rule, whereas dividends received from other companies are in principle wholly exempt from corporate tax, the exemption in fact extends to only 95% of the dividends, as 5% is deemed to represent non-deductible business expenses.

However, the Hamburg Financial Court (Finanzgericht) has held that the 5% exclusion is unconstitutional, as it does not allow taxpayers to substitute their actual expenses where those amount to less than 5% of the dividend. Since this is now a matter of interpretation of the German Federal Constitution, the court stayed the proceedings and referred the case to the Federal Constitutional Court (Bundesverfassungsgericht) whose decision will be final.

Another case concerning the fixed 5% exclusion, in this instance operated by France, has come before the European Court (see under France).

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Exchange loss on foreign PE capital must be allowed

The European Court has held that a German company must be allowed to deduct an exchange loss arising from the repayment of start-up capital supplied to its Italian permanent establishment (PE), even though the PE's profits were exempt from tax in Germany.

The case involved the German member company (Deutsche Shell) of the Shell group, which set up a PE in Italy in 1974, which it supplied with start-up capital. Under the Germany-Italy tax treaty, the PE's profits were exempt from tax in Germany. Profits made by the PE and repatriated to Germany were deducted from the start-up capital at the Deutsche mark-lira exchange rates on the day of payment. When the PE was wound up in 1992, the remaining start-up capital in the PE's books, denominated in lire, was repaid to the German company. Owing to the depreciation of the lira against the mark over time, the German company recorded an exchange loss of over DEM 122 million. It claimed to deduct that loss from its profits taxable in Germany. The German tax authorities denied the deduction on the grounds that no real economic loss had been suffered, and that, even taking into account the depreciation in value (in Deutsche mark terms) of the start-up capital, the PE had recorded a positive result in the year concerned. In its appeal, Deutsche Shell argued that its inability to deduct the exchange loss was a restriction on its rights to freedom of establishment under the EC Treaty. The case was eventually referred to the European Court.

The Court held that Deutsche Shell's inability to deduct the financial loss it had suffered by exercising its freedom of establishment either in Italy or in Germany was a restriction on that freedom. What is more, that restriction could not be justified. Germany's right to allocate taxing powers between itself and Italy by means of a treaty was irrelevant since by its very nature, the exchange loss could only be taken into account in Germany (since there was no loss in lira terms in Italy). It was unacceptable for a Member State to exclude from the basis of assessment a currency loss suffered by a 'head office' in its jurisdiction upon the repatriation of start-up capital granted to its PE in another Member State. It was, however, for the German courts to decide whether Deutsche Shell had suffered a true economic loss.

Although such a situation cannot now arise within the euro zone, it is still valid where different currencies are involved between the Member State of the head office and the Member State of the PE. The judgment is, however, limited to situations where the PE is terminated.

What may be more significant is the observation made by the Court that a Member State is not obliged to take account in its own tax law of the losses of a PE situated in another Member State solely because that loss is not capable of being taken into account for tax purposes in the Member State where the PE is situated. This throws into question whether the Court will uphold a claim in another case (Lidl) involving the PE of a German company claiming to set the losses off against its own profits in a situation where the PE was ongoing. Germany denies the set-off because the PE's profits are not taxable in Germany by virtue of a double tax treaty. The Advocate-General's opinion in Lidl, if followed, would uphold the German company's claim.

For further information on the German aspect of this item, contact Gerhard Engler as above. For the wider European aspect, contact David Simpson of BDO Stoy Hayward on +44 207 486 5888 or by e-mail at david.simpson@bdo.co.uk

Hungary
Participation exemption relaxed

With effect from 1 January, Hungary has relaxed the terms on which it grants an exemption from corporate tax for dividends and capital gains from shareholdings in foreign companies ('the participation exemption').

Before this year, foreign dividends have been exempt provided that they did not come from a 'controlled foreign company' (CFC). The Hungarian definition of a CFC was a company controlled from Hungary and resident in a jurisdiction where the effective tax rate on its profits was less than 10.67% (two-thirds of the Hungarian corporate rate of 16%). There was an exception for some companies with a low tax rate if they had sufficient substance in their home jurisdiction. Under the new rules, a foreign company cannot be a CFC if it is resident in another EU Member State, in an OECD country or in any state with which Hungary has a double tax treaty, regardless of their tax rate. However, any company that is not resident in any of these jurisdictions will be a CFC, whatever substance it may have, if its effective tax rate is less than 10.67%.

As regards the exemption for capital gains from the disposal of a shareholding in a foreign company, this has previously been granted only if the shares had been held for at least two years and the participation was registered with the tax authorities. Participations could not be registered if the foreign company was a CFC or the holding was less than 30%. From 1 January 2008, the holding period has been reduced to one year, and the change in the CFC definition already described also broadens the number of companies that are not classed as CFCs. The 30% requirement, which does not apply to dividends, remains in force for capital gains.

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Ireland

Taxation of foreign dividends

Ireland's recent Finance Act 2008 contains an amendment to the taxation of foreign dividends.

Ireland has two rates of corporate tax – 12.5% on trading profits and 25% on other profits. Foreign dividends received by Irish companies are not exempt from corporate tax but taxable with a credit for foreign tax suffered.

With effect from 1 January 2007, dividends received from companies resident in other EU Member States or in jurisdictions with which Ireland has a double tax treaty will be taxed at the 12.5% rate if they are paid out of trading profits. Where such dividends are paid partly out of trading profits and partly out of other profits, the element attributable to trading profits will be taxed at 12.5%. In the majority of instances, this, combined with double tax relief, should ensure no further Irish tax is payable on such dividends.

In certain circumstances, the whole dividend may be taxed at 12.5% even if part of the dividend is paid out of non-trading profits. The 12.5% rate must be claimed when submitting the relevant tax return and any excess credits for foreign tax can be pooled or carried forward against other dividends taxed at 12.5%.

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Israel

Court rules on treaty-shopping issue

In a precedential ruling, the District Court in Israel has decided that domestic Israeli tax law governing artificial transactions – paragraph 86 of the Israeli Tax Ordinance ("ITO") – can take precedence over a relevant tax treaty stipulation, this despite the apparent specific domestic regulation giving tax treaties validity over and above local tax law as stipulated in paragraph 196 of the ITO, and despite no specific anti-abuse article in the specific tax treaty that was applicable to the case in question. It should be pointed out that in the more recent tax treaties that Israel has entered into, a specific reference to anti-abuse is generally included.

The case brought before the District Court dealt with an Israeli-registered holding company that migrated to Belgium in 1996 by relocating its effective management and control to that country. The company even produced a certificate of residence from the Belgian tax authorities attesting to its residence status in Belgium and based upon which the company had claimed – and indeed been granted by the Israeli tax authorities – a reduced withholding tax rate on dividend distributions that it received from its Israeli-resident subsidiary in accordance with the Israel – Belgium double tax treaty.

The tax authorities claimed that the holding company's migration to Belgium should be deemed an artificial transaction as described in paragraph 86 of the ITO as the migration was not for any economic reason and solely for the avoidance of Israeli taxation.

The company claimed that paragraph 86 of the ITO is in contradiction with international law, specifically with the Vienna Convention on the Law of Treaties.

The District Court in its ruling held that the competent authorities entering into a tax agreement intended first and foremost to create a situation whereby a person who falls under two tax jurisdictions should be able, in good faith, to avoid double taxation. The parties did not intend the agreement to be used as a tool for the avoidance or minimisation of tax liabilities by the creation of structures and the use of favourable contradictions between the tax régimes of the two jurisdictions. The tax authorities are allowed to raise any claim according to their domestic laws that a person is not acting in good faith with regard to the tax treaty, whether or not this is specifically stated in the relevant tax treaty. This position, claimed the District Court, is in line with the official commentary to the OECD Model Convention in its latest version, and which in paragraph 35 of the preface clearly allows for changes in interpretation to be effected retroactively.

Furthermore, according to the court, tax treaties are incorporated into domestic law in order to avoid double taxation – whether on par with the domestic law or given a superior status – and as such initially the tax liability is to be determined according to domestic law and only then the tax treaty invoked in order to avoid a situation of double taxation. In line with this a jurisdiction's anti-abuse regulations, which are an integral part of determining the tax liability, are to be upheld in conjunction with the tax-treaty stipulations in order to avoid double taxation (this may be by utilising the mutual agreement article of the particular tax treaty).

It should be pointed out that in an obiter dictumthe District Court indicated that when a tax treaty is signed between two countries, one or both of which are members of the OECD, the tax treaty should be interpreted according to the official commentary to the OECD Model Convention. This determination has far-reaching implications as the Israeli tax authorities have not always in the past adhered to the official commentary to the OECD Model Convention, when this was not in their best interest.

It should be stressed that this determination of the District Court in Israel can be appealed to the Supreme Court and as such the courts in Israel may not yet have had the final word in this matter.

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Italy

Corporate tax changes implemented

The corporate and other far-ranging tax changes reported in *BDO World Wide Tax News* 2007 Issue No. 4 have now been implemented. As a reminder, we feature the most important changes below. The changes have effect from 1 January 2008, or from taxable periods beginning after 31 December 2007.

Tax rates

The new tax rates are IRES (corporation tax) 27.5% (previously 33%) and IRAP (regional tax on production) 3.9% (previously 4.25%)

Interest expense

The previous rules on thin capitalisation (relating to interest on loans from connected parties) and profit-sharing loans have been replaced by a cap on overall interest deductions by reference to the gross operating margin. The rule, similar to that introduced by Germany from 1 January 2008, limits the total deduction for interest payable to 30% of an adjusted gross operating margin.

Within a group of companies where there is tax consolidation, the 30% limit is calculated on consolidated gross operating margin, i.e. including all participating companies as well as controlled foreign companies potentially eligible for world tax consolidation (such possible inclusion allows the consolidating parent company to utilise the excess 30% gross margin in respect of interest charges in controlled foreign companies).

The new régime allows for excess interest disallowed by the new restriction to be carried forward (indefinitely); this excess can be deducted in subsequent taxable periods where the 30% gross margin is in excess of current interest charges.

Anti-avoidance whitelist

Until now, transactions with countries on a blacklist (generally comprising tax havens) have been subject to a number of anti-avoidance measures, both for corporates and individuals. Under the new regime, there will instead be a 'whitelist'. Jurisdictions appearing on the whitelist will be those that operate effectively enforced rules on exchange of information with Italy, and which have a level of taxation not significantly lower than that in Italy. Transactions with whitelist countries will normally not be subject to special anti-avoidance rules, but transactions with any jurisdiction not appearing on the whitelist will be so subject. The anti-avoidance measures affect the following situations:

- residence for tax purposes of individuals
- the taxation of profits from low-tax countries accruing to individuals
- the residence condition for enjoying the participation exemption
- the residence status of trusts
- the imputation of profits and distribution of dividends from low-tax countries
- the deductibility of charges from low-tax countries
- the CFC régime
- withholding tax on payment of interest
- withholding tax on payment of dividends

Participation exemption

Under former rules, 84% of the capital gain realised from participations qualifying for the exemption was exempt from taxation, if certain conditions were met. Under the new provisions, the exemption is increased to 95% of the capital gain realised, putting capital gains on the same footing as dividends qualifying for the exemption, which are also now 95% exempt. The minimum ownership period to qualify for the capital gains exemption has been reduced to 12 months.

The 95% exemption on dividends received applies also in the case of tax consolidation (full exemption in previous years) effective for distributions approved from 1 September 2007. However, distributions of prior-year net profits (typically 31 December 2006 profits) still enjoy full exemption.

Reorganisations

Under previous rules, reorganisations were treated for tax purposes under the neutrality concept. As a consequence, prior values recognised for tax purposes remained unchanged for both the transferor and the transferee or the resulting entity. Only for spin-off operations was it possible to make an election for recognition of the stepped-up amount.

Under the new rules, although the neutrality concept is retained, taxpayers can elect to pay a substitute tax ranging from 12% to 16% in order for the participating companies to enjoy the tax effects from stepped-up amounts or newly recognised fixed assets (tangibles and intangibles).

Where such assets are sold prior to the fourth taxable period subsequent to that in which the option was exercised, ordinary taxation on the capital gain realised is recaptured.

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Luxembourg
New tax régime for intellectual property

From tax year 2008, 80% of income and capital gains from intellectual property ("IP") will be exempt in Luxembourg.

The new régime applies to software copyrights, patents, trade marks, designs or models. However, it does not cover copyrights of literary or artistic works, secret formulas or processes.

In order to qualify, IP can be acquired or self-developed by the Luxembourg company.

Royalties from qualifying IP will benefit from an 80% exemption. The exemption basis is net income. Net income is defined as the gross royalty income less any expenses directly connected with this income. The exemption will also be available for capital gains on the sale of the IP.

In order to qualify for the exemption, the following conditions need to be complied with:

- The IP must have been created or acquired after 31 December 2007
- The expenses in connection with the IP must be capitalised in the balance sheet for the first book year for which the application of the regime is demanded (for tax purposes).
- The IP may not have been acquired from a person who is considered to be an 'affiliated company'. An affiliated company is a company such that:
  - o the transferor company directly owns at least 10% of the share capital in the acquiring company or
  - o the acquiring company directly owns at least 10% of the share capital in the transferor company or
  - o 10% or more of the share capital of the acquiring company and the transferor company are directly held by the same company.

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Switzerland
Reform eases company and shareholder tax

A corporate tax reform that has effect from 1 January 2009 reduces the double taxation of dividends, eases the qualifying conditions for exemption of gains from foreign shareholdings and significantly reduces the incidence of cantonal net wealth tax on companies.

Shareholder taxation

Recipients of dividend distributions are typically subject to a progressive income tax, which can reach 40%, depending on the shareholder's place of residence.

Under the reform, only 60% of dividends from qualifying participations will be taxed in the hands of shareholders if the shares form part of the shareholder's private assets, and only 50% will be taxed if they form part of the shareholder's business assets. In order to be a qualifying participation, the holding must be at least 10% of the share capital of the distributing company.

Participation exemption

Generally, Swiss companies benefit from a participation exemption from corporate tax on dividends and capital gains from other companies. Whether income derived from dividends or capital gains qualifies for the deduction is determined differently for each. Currently, dividends are exempt if the holding represents at least 20% of the nominal share capital of the other company or the participation has a fair market value of at least CHF 2 million (EUR 1.267 million; USD 1.976 million). There is no minimum holding period. For capital gains on the other hand, exemption applies if the holding is at least 20% and the shares have been held for at least 12 months. There is no alternative holding value criterion.

Under the reform, the minimum holding size is reduced to 10% for both dividends and capital gains. For dividends, the alternative value criterion is reduced to CHF 1 million. The minimum holding period for capital gains remains as at least 12 months, but after the first qualifying sale in any one year, further sales will be exempt even if the holding falls below 10%, provided that the value of the holding remaining at the end of the year is at least CHF 1 million.

The effective date of these provisions is 1 January 2011.

Net wealth tax

Companies in Switzerland are subject to net wealth tax at cantonal and communal level (but not at federal level). In future, cantons will be able to set cantonal and communal corporate tax against cantonal and communal net wealth tax. If the corporate tax exceeds the net wealth tax, no net wealth tax will be payable. As a result, companies that are sufficiently profitable will pay no net wealth tax.

Repaid surplus

Current withholding tax rules under Swiss law require that all repayments of equity contributions to the paid-in surplus (agio) of companies be subject to 35% withholding tax. The reform allows repayments out of paid-in surplus to be treated as repayments of nominal share capital, which are free of withholding tax. The treatment will extend to repayments of all contributions made since 31 December 1996.

The effective date of these provisions is 1 January 2011.

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United Kingdom

3-year VAT recovery cap struck down

The attempt by the UK tax authorities (HMRC) to place a time limit on the recovery of input VAT has effectively been brought to an end by a recent judgment of the House of Lords.

In the cases of Flemingand Condé Nast,the issue concerned the lawfulness of a VAT regulation that was introduced with effect from 1 May 1997 to limit to three years the period in respect of which businesses could reclaim under-recovered input tax. The regulation in question was introduced following an earlier amendment to the VAT Act, which imposed a similar time limit in respect of overpaid VAT.

This change (the 'three-year cap') came before the European Court. In its judgment in that case – *Marks & Spencer plc v Commissioners of Customs and Excise* (Case C-62/00) – the European Court held that whereas reducing the repayment period was not incompatible with Community law, the lack of a transitional period following the enactment of the legislation to allow taxpayers retroactively deprived of a right that they had previously enjoyed to exercise that right was incompatible with the principles of effectiveness and legal certainty. Neither that earlier amendment nor the input VAT regulation contained a transitional period, although following Marks & Spencer, HMRC had, by concession, allowed a period of at first three and later six months to revisit claims. It is still the case that neither provision contains a transitional period.

In the present case, the UK Court of Appeal had earlier ruled that HMRC could not rely on a provision that, by lacking a transitional period, was in breach of Community law to refuse a taxpayer's claim to repayment on the basis of that provision alone. Condé Nast was thus entitled to recover input tax underclaimed on staff entertainment between 1 April 1973 and 30 April 1997. In Fleming, the taxpayer made a claim in 2000 for input VAT on cars purchased in 1989 and 1990, in respect of which it had only received the invoices in the year of claim.

In their judgment upholding the Court of Appeal's decision, the Lords were critical of transitional periods operated administratively by HMRC and concluded that no lawful transitional period for input tax had yet been introduced. In fact, not only was there no such period for input tax, there was also no effective transitional period for recovery of undue output tax, for which the three-year cap was imposed on 4 December 1996.

In its response to the case, HMRC has conceded that the cap is now ineffective with respect to both input tax and output tax. The way is now open, subject to other normal recovery rules, for claims to be made for

- output tax overpaid or overdeclared in accounting periods ending before 4 December 1996 or
- input tax in respect of which the entitlement to deduct arose in accounting periods ending before 1 May 1997

and which the retrospective application of the three-year cap sought to prevent.

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Asia Pacific
Hong Kong
Excise duties on wine abolished

With a record budget surplus of nearly HKD 116 000 million (EUR 9435 million; USD 14 900 million), Financial Secretary John Tsang was able to announce a combination of one-off giveaways and recurrent tax concessions in his recent 2008-09 Budget speech.

Among the tax measures in the speech were:

- A reduction in the corporate profits tax from 17.5% to 16.5%
- A reduction in salaries tax and profits tax on unincorporated businesses from 16% to 15%
- Increases in personal tax bands and allowances
- A 75% waiver of 2007-08 salaries tax and profits tax, capped at HKD 25 000
- A 100% waiver of the business registration fee for 2008-09
- An increase in the ceiling for tax-deductible donations
- Abolition of hotel accommodation tax

Perhaps the most striking measure announced by Mr Tsang was the complete abolition of excise duties on all alcoholic beverages, with the exception of spirits. By abolishing the existing 20%/40% duties and the related administrative controls, the proposal aims to develop various businesses in Hong Kong relating to quality table wine, with the intention of making Hong Kong a centre for the lucrative table-wine trading and distribution business.

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India

Cuts in income tax and central sales tax

The India Union Budget for 2008 includes reductions in income tax at the bottom and top of the income scale and a reduction in the central sales tax rate, together with a 'roadmap' for the introduction of a nationwide goods and services tax (the equivalent of VAT) in April 2010. There is to be no change in corporate tax rates, so the temporary surcharge on corporate profits also remains. There is to be an increase in the short-term capital gains tax on disposals of listed Indian securities from 10% to 15%.

For income tax, there is an increase in the nil-rate band from INR 110 000 (EUR 1725; USD 2750) to INR 150 000 (EUR 2375; USD 3750), while the top rate of 30% will not now bite until taxable income exceeds INR 500 000 (EUR 7900; USD 12 475). Previously, the 30% rate threshold was INR 250 000. Where taxable income exceeds INR 1 million, there is a 10% surcharge on total tax assessed. Female taxpayers and senior citizens have a wider nil-rate band.

Domestic companies remain subject to an effective corporate income tax of 30.90% where taxable income does not exceed INR 10 million (EUR 157 800; USD 249 300) and to an effective rate of 33.99% where it does exceed INR 10 million. The corresponding rates for foreign companies are 41.20% and 42.23%.

The rate of central sales tax is reduced from 3% to 2%.

These measures may yet be amended before they finally become law.

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New Zealand

Company tax rate down

With effect from the new tax year (beginning 1 April), the rate of company tax comes down from 33% to 30%. There are also changes in the due dates for advance payments of company tax, in order to align them with payment dates for GST (goods and services tax – New Zealand's version of VAT). In future, advance payments will be made in three instalments, falling due on the 28th day of the fifth, ninth and thirteenth month from the beginning of the company's accounting period. For companies with a 31 March year-end, however, instalments will fall due on 28 August, 15 January and 7 May. There will also be an option for companies to elect to base their advance payments on a percentage of their GST outputs. This method is likely to be of benefit to companies whose income is in decline or fluctuates significantly throughout the year. Companies electing for this method will, however, have to make six instalment payments in the year.

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Singapore

No change in headline tax rates

Confounding some expectations to the contrary, Singapore's Minister of Finance failed to announce any reductions in the headline rates of corporate or personal tax in his latest Budget speech. However, the Minister was able to propose enhanced reliefs for expenditure on research and development (R&D), a 20% rebate (capped at SGD 2000 (EUR 925; USD 1450) of income tax for resident individuals for year of assessment (YOA) 2008, and the abolition of estate duty.

Research and development

Currently, taxpayers carrying on a manufacturing trade or business or a trade or business providing services are entitled to a 100% deduction for expenditure on R&D whether carried out in-house or contracted out, and regardless of the location where the R&D is conducted.

To encourage businesses to undertake more R&D activities in Singapore, a new 150% deduction will become available in respect of R&D conducted in Singapore, for five years beginning in YOA 2009. Furthermore, provided that the R&D is conducted in Singapore, it will no longer need to be related to the taxpayer's existing trade or business. There will also be an additional R&D tax allowance for expenditure on R&D conducted in-house in Singapore.

In yet another relief for R&D, start-up companies incorporated and resident in Singapore and yet to make taxable profits in their first three tax years will be able to convert up to SGD 225 000 (equivalent to 150% of R&D expenditure of SGD 150 000) of tax losses into a cash grant of SGD 20 250 (EUR 9425; USD 14 700) for each tax year.

Other changes

These include the complete abolition of estate duty with effect from 15 February 2008, the introduction of an advance rulings system for goods and services tax (VAT), and enhanced incentives for the financial services industry.

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Thailand

Corporate and personal tax cuts announced

The new Thai Government has announced a package of tax cuts aimed at stimulating the economy.

Corporate taxation

The corporate tax rate for companies newly listed on the Thai Stock Exchange is reduced to 25% for a period of three years. Companies already listed there will also benefit from the 25% rate, restricted to net profits of no more than THB 300 million (EUR 6.112 million; USD 9.531 million). Companies applying to list on the Market for Alternative Investment will enjoy a 20% rate of corporate tax for the first three years. As with main listings, companies already listed on the Alternative Market will also benefit from the 20% rate, this time on the first THB 20 million (EUR 407 450; USD 635 425) of profits.

There will be an exemption from corporate tax for all companies with a taxable income of no more than THB 1.2 million (EUR 24 450; USD 38 125). Companies with taxable income greater than THB 1.2 million but with a paid-up capital of no more than THB 5 million (EUR 101 850; USD 158 850) will pay zero corporate tax on the first THB 150 000 (EUR 3050; USD 4775), and then be taxed at progressive rates of up to 30% on the remainder. There are also enhanced tax depreciation rates for certain plant, equipment and software.

On the personal tax side, the income tax threshold for individuals has been raised to THB 150 000, and deductions for insurance premiums and pension contributions have been increased.

In order to stimulate the housing market, the special tax on property transactions has been cut from 3.3% to 0.01%, the transfer fee from 2% to 0.01% and the mortgage registration fee from 1% to 0.01%. However, because this part of the package did not come into force before 1 April, industry experts report that homebuyers had been delaying the transfer of properties into their name during the first quarter of 2008, with a resulting negative impact on the first-quarter earnings of property companies and developers.

Capital controls lifted

The capital controls on foreign currency transactions imposed in December 2006 were completely lifted on 3 March. The controls required banks to withhold 30% of all currencies purchased or exchanged against the baht on a broad range of transactions. Customers who have suffered withholding are invited to apply for refunds to the Bank of Thailand via their respective bank or financial institution. Refunds not claimed after two years will be forfeited.

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Sub-Saharan Africa
South Africa
Budget brings some relief

Despite expectations that the worsening world economic climate might require some restrictive measures, South Africa's long-serving Finance Minister, Trevor Manuel, was able to announce modest tax cuts in his recent 2008-09 Budget speech.

Measures included a one percentage point cut in corporate tax (down to 28%), following a cut in STC (payable when making a distribution) from 12.5% to 10% last October. STC is to be replaced by a dividend tax at shareholder level in 2009. However, the Minister proposed to introduce a higher 40% corporate rate on closely held passive companies. There was a small increase in the threshold beyond which small companies start paying the full rate of corporate tax. Many small companies will also be relieved of the obligation to register for VAT, as the registration threshold was raised from ZAR 300 000 (EUR 23 800; USD 37 600) to ZAR 1 million (EUR 79 350; USD 125 350). The Minister also announced the introduction of an optional presumptive taxation system for small businesses (excluding personal-services businesses) with turnovers of no more than ZAR 1 million. Businesses electing for the system would be taxed at varying rates on their turnover, with the highest rate set at 7.5% on the tranche of turnover exceeding ZAR 0.75 million.

On the personal side, allowances were raised by approximately 7% and the highest marginal rate of income tax (40%) will now be charged on taxable income in excess of ZAR 490 000 (EUR 38 875; USD 61 425).

All these measures need to be approved by Parliament and may be amended.

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Latin America
Paraguay
New tax and audit regulations

New tax and audit regulations have come into force, with the recent issue of Decree 11526, which brings into effect Article 33 of the Tax Law 2421/04 (originally deferred) and also Regulation N° 20 from the Secretary of Taxation.

According to these provisions, all corporate taxpayers (companies and other legal entities) with annual turnover of at least the equivalent in Paraguayan currency of USD 1.2 million (approximately EUR 750 000) must file financial statements audited according to International Standards, and also undergo specific tax-related checks on particular tax matters, returns, criteria applied etc, from the external auditor.

It is expected that, starting from 2008, nearly 1200 additional corporations and/or entities will require this new form of tax audit.

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