The ITPS Group

INTERNATIONAL TAX PLANNING AND STRUCTURE SERVICES

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BRITISH VIRGIN ISLANDS: NEW RECORD KEEPING AND RETENTION REQUIREMENTS

On 12 November 2012 changes have been introduced to the record keeping and record retention obligations of all companies and limited partnerships in the British Virgin Islands with the enactment of the Mutual Legal Assistance (Tax Matters) (Amendment) Act 2012, and the Partnership (Amendment) Act 2012. The amending Acts were published in the Official Gazette on 26 November 2012.

Requirement to maintain and keep records and underlying documentation for at least five years

Following these changes, all companies and limited partnerships registered in the BVI are now required to maintain 'records and underlying documentation' and to keep such records and underlying documentation for a minimum of five years.

These changes were introduced in response to recommendations contained in the Phase 1 Peer Review Report on the BVI produced by the Global Forum on Transparency and Exchange of Information for Tax Purposes, published in August 2011, in order to ensure that BVI companies and limited partnerships adhere to global compliance standards.

Since 2005 BVI companies have been required to keep records

Since 2005, in accordance with section 98 of the BVI Business Companies Act 2004, BVI companies have been required to keep records that: (a) are sufficient to show and explain the company's transactions; and (b) will, at any time, enable the financial position of the company to be determined with reasonable accuracy.

Requirement also applied to limited partnerships

These statutory record keeping requirements on companies remain in force and have now also been applied to limited partnerships.

Records and underlying documentation to be retained for a minimum period of five years

Furthermore, the records and underlying documentation should be retained for a minimum period of five years from the date of completion of the transaction to which the records and underlying documentation relate or from the date the company terminates the business relationship to which the records and underlying documentation relate.

Unfortunately, there is little guidance at present regarding what comprises 'records and underlying documentation', although accounts of a company or limited partnership are expressly included.

At the offices of the registered agent or any other place as determined

Finally, BVI companies and limited partnerships are now required to keep such records and underlying documentation at the offices of their registered agent in the BVI, or at such other places (whether within or outside the BVI) as determined by the directors of the company or general partners of the limited partnership. The company or limited partnership must notify its registered agent of the physical location of the records and underlying documentation, and notify the registered agent within fourteen days of any change to that location. ■

STATUS OF THE NEW TAX ARRANGEMENT BETWEEN THE NETHERLANDS AND CURACAO

In our newsletter of December 2011 we informed you that, on 12 December 2011, the Dutch Ministry of Finance published the headlines of a new Tax Arrangement for the Kingdom of the Netherlands (*Belastingregeling voor het Koninkrijk or BRK*), which provides for the avoidance of double taxation on income and capital between the Netherlands and Curacao. This new Tax Arrangement, which was expected to enter into force on 1 January 2013, should replace the existing BRK, which dates back to 1964.

Expected to become effective 1 January 2014

In a press release of 21 December 2012, the Dutch Ministry of Finance announced that progress was made with respect to the framework for the new Tax Arrangement between the Netherlands and Curacao, that a final agreement is expected to be reached during 2013 and that accordingly the new BRK is expected to become effective from 1 January 2014.

Anti-abuse provisions

We also informed you in our newsletter of December 2011, that the BRK (article 35a) currently provides for the possibility for the Netherlands and Curacao to levy their taxes based upon any of their specific anti-abuse provisions, notwithstanding any of the other provisions of the BRK.

Dutch non-residents taxation rules

If the Dutch tax rules on substantial interest (article 17, paragraph 3(b) of the Dutch Corporate Income Tax Act) qualify as domestic anti-abuse provisions under the BRK, a non-resident shareholder, i.e. the Curacao company, holding a share interest (or option or profit rights) of at least 5 percent in a Dutch company, may be taxed in the Netherlands as a non-resident taxpayer if this shareholder lacks economic substance, if such substance does not exist at a higher level in the corporate structure, and if the main goal or one of the main goals of the structure is to (artificially) avoid Dutch income tax or dividend withholding tax.

Not invoked during 2013

However, in the press release the Dutch Ministry of Finance confirmed that for 2013 (like they have confirmed for 2012 in the headlines published on 12 December 2011) article 35a of the BRK will not be invoked in order to apply the Dutch non-residents taxation rules. ■

NEW DOUBLE TAX TREATY BETWEEN UKRAINE AND CYPRUS

Signed on 8 November 2012

Following several years of negotiations, a new double tax treaty between the Ukraine and Cyprus was signed on 8 November 2012 during an official visit of Ukraine's President Viktor Yanukovych to Cyprus.

To replace the USSR – Cyprus double tax treaty of 1982

Once ratified by both countries, the new treaty will replace the USSR – Cyprus Income and Capital Tax Treaty of 29 October 1982, that provided for 0% withholding tax on dividends,

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interest and royalties, and lacked any beneficial ownership or anti-avoidance provisions.

This treaty has contributed greatly to the success of Cyprus as the most attractive location to base an (intermediate) holding company for structuring investments into the Ukraine. According to official statistics, more than 27 % of foreign direct investment into the Ukraine comes from residents of Cyprus.

Expected to enter into force on 1 January 2014

The treaty will enter into effect on 1 January following the year in which the parties exchange notifications of ratification. Accordingly, it is expected that the treaty will enter into force on 1 January 2014.

Businesses will have by then to consider whether a corporate restructuring including re-allocation of holding and/or financial companies to other jurisdictions is required. The new treaty may force investors to move to comparable jurisdictions, such as the Netherlands. Nevertheless, Cyprus is likely to continue to play an important role in cross-border tax planning of Ukrainian businesses.

Most significant provisions

The most significant provisions of the new double tax treaty between the Ukraine and Cyprus are highlighted below.

Dividends

The withholding tax rate on dividends is 5% if the beneficial owner holds at least 20% of the capital of the company paying the dividends or has invested in the corporate rights of the company equivalent of at least EUR 100,000. In all other cases the withholding tax on dividends will be 15%.

Interest

The withholding tax rate on interest will be 2% if received by the beneficial owner of the income.

Royalties

The withholding tax rate will be 5% on royalties in respect of any copyright of scientific work, any patent, trade mark, secret formula, process or information concerning industrial, commercial or scientific experience if received by the beneficial owner of the income and 10% in all other cases if the recipient is the beneficial owner of the income.

Capital Gains

Capital gains arising from the disposal of shares (irrespective of the underlying assets of the company in which the shares are being disposed of) or any other movable property is attributed to the State where the person making the disposal is tax resident. Consequently, shares in Ukrainian companies can be sold by their Cypriot shareholders without any tax consequences.

Beneficial ownership provisions

The new double tax treaty introduces beneficial ownership provisions in almost articles, including but not limited to payments of dividends, interest and royalties. The income received will only attract the lower rate of withholding tax if the entity receiving the income is the beneficial owner.

This corresponds to international tax approaches as well as to Ukrainian tax legislation requirements. In this respect, in future attention should be paid to the so-called “substance” of foreign companies and ensuring availability of a real office abroad, effective management of the company in the country of its tax residence, availability of appropriate personnel, etc.

Exchange of information provisions

The double tax treaty also introduces general clauses regarding exchange of information between the Ukrainian and Cypriot authorities regarding tax matters. However, currently there is no clear mechanism how such exchange of information would work in practice. This should be further elaborated in the Protocol to the treaty. ■

CYPRUS REMOVED FROM RUSSIAN BLACKLIST

Effective 1 January 2013

Effective 1 January 2013, Cyprus will no longer be on the Russian Ministry of Finance's list of offshore zones, also known as the "blacklist". The removal is the result of the ratification in 2012 of the 2010 Protocol to the Russia-Cyprus tax treaty that applies generally from 1 January 2013 (except for certain provisions that will apply from 1 January 2017).

Consequently, Cyprus has become one of the preferential locations to base an (intermediate) holding company for Russian outbound and inbound investments.

Russian perspective

From a Russian perspective, the removal will have the following effect:

- Dividends received by Russian companies from qualifying Cyprus subsidiaries may be tax exempt in Russia.
  Under the Russian participation exemption, subject to certain conditions, dividends received by Russian companies from qualifying subsidiaries are not subject to tax at the rate of 9% but are tax exempt in Russia. These conditions include that the Russian entity must hold not less than 50% of the equity of the Cyprus subsidiary for at least 365 days and that the subsidiary is not resident in a "blacklisted" jurisdictions.
- Transactions between Russian individuals and/or companies and Cyprus residents will not be automatically considered "controlled transactions" for Russian transfer pricing purposes, provided the parties are unrelated and the transactions are not concluded with respect to goods traded on international commodity markets.
  Under Russian transfer pricing rules, a transaction is deemed to be controlled if one of the parties is incorporated or domiciled, or has tax residency, in a blacklisted jurisdiction.
- Any other tax restrictions that may be introduced in Russia in respect of payments to residents in blacklisted jurisdictions will not apply to transactions with Cyprus residents.
- Information exchange and transparency in tax relationships between the two countries is expected to improve, and there will be more efficient control of tax violations.

Russian blacklist – 41 jurisdictions

The 41 jurisdictions that still remain on the blacklist are: Anguilla; Principality of Andorra; Antigua and Barbuda; Aruba; Commonwealth of the Bahamas; Kingdom of Bahrain; Belize; Bermuda; Brunei Darussalam; Republic of Vanuatu; British Virgin Islands; Gibraltar; Grenada; Commonwealth of Dominica; People's Republic of China (Hong Kong Special Administrative Region; Macao Special Administrative Region); Union of the Comoros (Anjouan Island); Republic of Liberia; Principality of Liechtenstein; Republic of Mauritius; Malaysia (Labuan Island); Republic of Maldives; Republic of Malta; Republic of the Marshall Islands; Principality of Monaco; Montserrat; Republic of Nauru; Netherlands Antilles; Republic of Niue; United Arab Emirates; Cayman Islands; Cook Islands; Turks and Caicos Islands; Republic of Palau; Republic of Panama; Republic of Samoa; Republic of San Marino; Saint Vincent and the Grenadines; Saint Kitts and Nevis; Saint Lucia; Separate Crown dependencies of the United Kingdom of Great Britain and Northern Ireland (Isle of Man; Channel Islands); Republic of Seychelles. ■

THE END OF THE SWISS LUMP SUM TAXATION REGIME?

Swiss lump sum taxation regime

The Swiss lump sum taxation regime is granted at the federal level and in all cantons (with the exception of a number of cantons as mentioned below) of Switzerland and offers high net worth individuals with foreign nationality, who do not derive income from employment in Switzerland, the possibility to be taxed on their income and wealth on a fixed annual lump-sum basis obviating the need to report their actual world-wide income and wealth, unless the taxpayer voluntarily seeks treaty relief under a double tax treaty with Switzerland. Kindly note that a spouse must meet with the general condition, i.e. no Swiss citizenship and no employment activity.

Abolished in a number of cantons

On 23 September the canton of Basel-Landschaft decided by a people's referendum to abolish the lump sum taxation regime applicable to individual taxpayers with foreign nationality. The canton of Basel-Lanschaft is, after Zurich, Schaffhausen, Appenzell-Ausserrhoden and Basel-Stadt now the fifth canton of Switzerland which has abolished the lump sum taxation regime.

Other cantons, like Bern, Lucerne, St. Gallen, Thurgau have in general confirmed the application the regime but have defined minimum thresholds.

The federal parliament defined minimum thresholds

Moreover, the federal parliament confirmed the regime but defined minimum thresholds:

- For federal and cantonal tax purposes, the lump sum tax base will be at least:
  - seven times the rental value of the individual's own property; or
  - seven times the rent paid to the landlord in Switzerland; or
  - three times the costs for board and lodging;
- For federal tax purposes, the minimum tax base will be CHF 400,000;
- For cantonal tax purposes, the minimum tax base will be freely determined by the canton concerned; and
- A wealth tax will be levied at cantonal level.

Initiative to abolish the lump sum taxation regime

On 19 October 2012, signatures collected for a federal initiative by left-wing parties and labour unions with the title *"An End to Tax Privileges for Millionaires"*, proposing to end the lump sum taxation regime were submitted to the Federal Chancellery.

It is therefore very likely that Swiss citizens will have to vote on the matter within the next two to three years. If the initiative is accepted, the lump sum taxation regime will be abolished at federal and cantonal levels based on a new constitutional article. ■

COMPARISON OF EUROPEAN HOLDING COMPANY LOCATIONS AS AT JANUARY 1, 2013

Our newsletter of December 1999 featured our first comparison of European holding company locations.

Already at that time, we mentioned that, in choosing the favorable intermediate holding company a number of elements should be considered. No matter how important, tax is only one element to be considered.

Please find on pages 7 and 8 our Comparison as at January 1, 2013. →

Features / *Jurisdiction*	Netherlands	Belgium	Cyprus
Exemption of			
Dividends	yes	yes (95%)	yes (provided that 50% of the income of the company paying the dividend is derived directly or indirectly from trading activities or the tax paid by the foreign subsidiary is at least 5%)
Capital gains	yes	<1 year: 25% (+3% surcharge) >1 year: 0.4% if large or holding company	yes (provided that no immovable property situated in Cyprus is involved)
Passive income	no (unless subsidiary subject to 10% effective tax rate)	no	yes (provided the tax paid by the foreign subsidiary is at least 5%)
Conditions			
Dividends			
- minimum percentage held	5%	10% or € 2,5 million	n/a
- minimum holding period	no	1 year or commitment (if not: 25% tax)	no
Capital gains			
- minimum percentage held	5%	n/a	n/a
- minimum holding period	no	1 year	no
Foreign subsidiary subject to tax	no (unless portfolio investment)	yes (minimum effective tax rate of 15% if non-EU subsidiary)	no (unless portfolio investment)
Deductibility of			
- capital losses	no (unless liquidation losses, under restrictions)	no	yes (if derived from taxable business activity)
- interest	yes (restriction rules apply)	yes	yes (if derived from taxable business activity)
Other considerations			
Debt-to-equity ratio	yes (in practice 3:1)	1:1 (if financed by director or shareholder) / 5:1 (if financed by a group company)	no
CFC / anti-avoidance rules	no	no	no
Binding rulings	yes	yes	yes
Corporate tax	25% (20% on first € 200,000)	33.99% (including 3% crisis contribution charge)	10%
Other taxes			
Capital tax	no	no	no (provided that no immovable property situated in Cyprus is involved)
Transfer tax / stamp duty	no (unless domestic real estate company)/ no	no (exemptions)	On contracts of which its business affairs take place in Cyprus or relate to assets situated in Cyprus (0.6% on the issue of an additional share capital)
Withholding taxes			
Dividends			
- standard rate (possible reduction under DTT)	15%	25% 10% for liquidation dividends	no withholding tax to non-residents shareholders
- (lowest) non-EU treaty rate	0%	0%	no withholding tax to non-residents shareholders
Exemption to EU parent	yes	yes	
- level of participation	10%	10%	n/a
- minimum holding period	2 years or commitment	1 year (before or before and after dividend payment)	n/a
Liquidation (unless EU or DTT)	15%	10%	no withholding tax
Interest (unless DTT)	no	25% (exceptions)	no withholding tax (if the beneficiary is non Cyprus tax resident)
Royalty (unless DTT)	no	15% (of usually 85% of gross amount)	no withholding tax (for the use of rights outside Cyprus)
Treaty network			
- number of treaties	92	90	44
- quality	excellent	good	good

Jurisdiction / *Features*	Luxembourg	Spain	Switzerland
Exemption of			
Dividends	yes	yes	yes
Capital gains	yes	yes	yes
Passive income	no	no	no (federal) / yes (cantonal)
Conditions			
Dividends			
- minimum percentage held	10% or € 1,2 million	5% or € 6 million (if direct participation by ETVE)	10% or CHF 1 million
- minimum holding period	1 year or commitment	1 year	no
Capital gains			
- minimum percentage held	10% or € 6 million	5% or € 6 million (if direct participation by ETVE)	10%
- minimum holding period	1 year or commitment	1 year	1 year
Foreign subsidiary subject to tax	yes (minimum 10% effective tax rate if non-EU subsidiary, unless DTT)	yes	no
Deductibility of			
- capital losses	yes	yes	yes
- interest	yes	yes (restrictions if exceeds € 1 million per year)	yes
Other considerations			
Debt-to-equity ratio	no (in practice 6/1)	3:1 (except lender EU Member State)	7:3 (6:1 if financial company)
CFC / anti-avoidance rules	no	yes	no
Binding rulings	yes	no	yes
Corporate tax	29.22%	30%	7.8% (no profit taxes at cantonal/communal level; 8.5% federal tax rate; effective tax rate of 7.8% as taxes are deductible)
Other taxes			
Capital tax	no	1% (exemptions; no capital tax for incorporations and capital increases in Spanish companies)	1% (exemptions)
Transfer tax / stamp duty	no	exempt (unless real estate company)	no (unless securities dealer company)
Withholding taxes			
Dividends			
- standard rate (possible reduction under DTT)	15% (0% to fully taxable parent in tax treaty country, subject to conditions)	21%	35%
- (lowest) non-EU treaty rate	0%	0%	0%
Exemption to EU parent	yes	yes	yes
- level of participation	10% or € 1.2 million	5%	25%
- minimum holding period	1 year or commitment	1 year or commitment	2 years
Liquidation (unless EU or DTT)	no	yes	35%
Interest (unless DTT)	no	21%	no (exceptions)
Royalty (unless DTT)	10/ 12%	21%	0%
Treaty network			
- number of treaties	64	97	84
- quality	good	good	good

EC ACTION PLAN TO STRENGTHEN THE FIGHT AGAINST TAX FRAUD AMD TAX EVASION

Communication COM (2012) 351 of 27 June 2012

In our newsletter of July last year, we informed you that on 27 June 2012 the European Commission issued Communication COM (2012) 351 on concrete ways to reinforce the fight against tax fraud and tax evasion including in relation to third countries.

Moreover, we informed you that it was the intention of the Commission to come forward before the end of the year with an action plan based on a proportionate impact assessment, which would identify specific measures, together with the initiative on tax havens and aggressive tax planning, setting out concrete steps to enhance administrative cooperation, supporting the development of the existing good governance policy, the wider issues of interaction with tax havens and of tackling aggressive tax planning and other aspects, including tax-related crimes.

An Action Plan to strengthen the fight against tax fraud and tax evasion of 6 December 2012

On 6 December 2012, the European Commission published "An Action Plan to strengthen the fight against tax fraud and tax evasion". This Action Plan contains practical actions that are recommended for adoption by Member States in the two key areas of tax fraud and tax evasion.

Up to this point, the main measures taken by the European Union have concerned eliminating the risk of double taxation, whereby individuals or companies would be subject to the national taxation regimes of two Member States.

Amazon and Starbucks

However, as recent media controversy involving the corporate taxation of multinational companies such as Amazon and Starbucks has demonstrated, the non-taxation of companies has now become a hot issue. Such companies benefit from low corporate tax rates in their country of establishment, and they are not taxed on the substantial profits generated in Member States which impose higher rates.

Two formal Recommendations

The Action Plan includes two formal Recommendations, one on 'measures intended to encourage third countries to apply minimum standards of good governance in tax matters' and the other on 'aggressive tax planning'.

These non-binding Recommendations form part of a broader action plan to strengthen the fight against tax fraud and tax evasion and are intended to contribute to the work being carried on tackling these issues at international level.

First Recommendation - measures to encourage third countries

The first Recommendation regarding measures to encourage third countries to apply minimum standards of good governance in tax matters foresees a strong EU stance against tax havens. In its bid to encourage third countries (such as Hong Kong with respect to trading companies) to subscribe to the EU principles of transparency, the exchange of information and the abolition of harmful tax measures, the Commission spells out two minimum standards.

The first criterion establishes that a third country would be deemed to comply with these minimum standards where it has adopted the legal, regulatory and administrative measures intended to comply with the standards of transparency and exchange of information set out in the Annex to the Recommendation ("Annex on standards of transparency and exchange of information").

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The second main criterion requires that the third country does not operate harmful tax measures in the area of business taxation. Broadly speaking, a measure is considered harmful if it provides for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the third country. Such a level of taxation may operate by virtue of the nominal tax rate, the tax base or any other relevant factor.

Blacklists at national level/ Renegotiate, suspend or terminate double tax treaties

Third countries failing to comply with the minimum standards should be included in a blacklist published by individual Member States. Similarly, where a Member State has concluded a double taxation convention with a third country not in compliance with the above measures, it should seek to renegotiate, suspend or terminate the convention.

Although the Recommendation does not specifically employ the term “tax haven”, its text can be seen as a direct response to the June Communication, which recommended action be taken regarding third countries regarded as tax havens. Tax havens have been defined by the OECD as jurisdictions characterised by a lack of effective exchange of information, a lack of transparency and no requirement for substantial economic activities, often granting preferential tax benefits to non-residents.

The EU tends to mirror OECD action in this area, and the OECD has developed a black list of tax havens. However, in terms of the EU Recommendation, the blacklists which are to be adopted will be adopted at national level and not at European level. It will therefore be the decision of each Member State as to whether or not a specific jurisdiction will feature on its blacklist.

Second Recommendation – against aggressive tax planning

The second Recommendation, on aggressive tax planning, addresses those practices which reduce tax liability through strictly legal arrangements, but which seek to evade the intention of the law.
The second Recommendation therefore addresses the recently raised issue of the double non-taxation of companies, aiming to prevent the artificial shift of profits from one Member State to another in order to benefit from low corporate tax rates.

Artificial arrangements

The Recommendation clarifies that an arrangement may be regarded as artificial where it has been put into place for the essential purpose of avoiding taxation, it “lacks commercial substance” and avoids taxation where “it defeats the object, spirit and purpose of the tax provisions that would otherwise apply”.

National authorities are encouraged to establish whether the taxation of companies is assessed according to any artificial arrangement with reference to criteria set out in the Recommendation. This may be assessed by comparing the amount of tax paid by a company, having regard to the arrangement, with the amount that the same company would owe in the absence of the arrangement.

Introduction of subject-to-tax requirement

Member States are urged to introduce a subject-to-tax requirement both in their unilateral double tax relief rules and in their bilateral tax treaties, whereby income is only to be allocated to a certain State when this income is actually taxed there. The other State would thus retain the right to tax in situations where there would otherwise be double non taxation.

Introduction of a General Anti-Abuse Rule (GAAR)

Moreover, the Commission recommends that Member States incorporate a General Anti-Abuse Rule (GAAR) in their domestic legislation in order to counteract ‘aggressive tax planning practices’ which fall outside the scope of specific anti-abuse measures. →

Review of anti-abuse provisions in Directives

Finally, the Commission mentioned that it will review the anti-abuse provisions of the Interest and Royalties, Mergers and Parent-Subsidiary Directives.

The way forward

The Commission will publish a report on the application of its Recommendations within three years.

However, the Commission has noted its intention to undertake a revision of the Parent Subsidiary Directive and review the anti-abuse provisions of the Interest and Royalties, Mergers and Parent Subsidiary Directives in 2013.

Please note that the Action Plan only contains Recommendations from the Commission to the Member States. Member States will have to implement the proposed measures before they can have any direct effect for European taxpayers.

However, given the current political and economical climate, it seems likely that many Member states will follow some of these Recommendations in the very near future.

We therefore expect the proposals made by the Commission to have a significant impact on the position of European (corporate) taxpayers. ■

INTRODUCTION OF FOUNDATIONS IN GUERNSEY

From January 9, 2013

On 7 January 2013 the Foundations (Guernsey) Law 2012, approved by the Privy Council on 12 December 2012, which legislates for the introduction of the foundations form in Guernsey, was registered in the Royal Court. From January 9, 2013 the Guernsey Registry has to begun to accept applications for the formation of Guernsey's foundations.

Description of a foundation

There is no single legal definition of a foundation. However it may be described as a legal entity which is created when a person provides assets for a specific purpose.

The foundation holds the assets for purposes set out in its constitutive documents and is administered according to contractual rather than fiduciary principles - principles that are more widely understood than those that underpin trusts. The foundation is a distinct legal entity but unlike a company, it has no shareholders.

Foundations are structures that can be used in similar circumstances to traditional family trusts. Moreover, a foundation has similar features to a trust in that it has a founder who is akin to a settlor, beneficiaries who have similar rights to those of a discretionary trust, and a foundation instrument and rules which are similar to a trust deed. As foundations, unlike trusts, have legal personality, they will be entered onto a public register which will be administered by the Guernsey Registry.

General uses of a foundation

A foundation is typically used for:

- Wealth protection and asset management;
- Inheritance/succession planning and the circumvention of forced heirship rules;
- Charitable and non-charitable purposes;
- Orphan vehicle for funds, private securitisation etc;
- Pension funds;
- Holding capital, income and specific assets;
- As a trustee (as an alternative to a private trust company).

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Other jurisdictions with foundation legislation

Other jurisdictions with foundation legislation include: Anguilla, Antigua, Austria, Curacao, Cyprus, Isle of Man, Jersey, Liechtenstein, Malta, Monaco, Nevis, Panama, St. Kitts, Sweden and Switzerland.

Key features of the Guernsey foundation

The key features of the Guernsey foundation are the following:

- An incorporated entity with separate legal personality but without any shareholders.
- It is incorporated at the request of a founder. The founder of a Guernsey foundation may determine the purpose of the foundation, craft the foundation's constitution and endow it with its initial capital. The founder (or his agent) must also subscribe his name, as the founder, to the constitution of the foundation by signing it. It is also the founder's role to appoint the initial councillors and any guardian and to seek to have it registered. The founder can either be a councillor or a guardian (but not both simultaneously) in addition to being a beneficiary.
- The foundation holds assets in its own name on behalf of beneficiaries, particular purposes, or both.
- Generally, it cannot carry out commercial activities except those necessary for, or ancillary or incidental to, its purpose.
- It is managed, in accordance with a constitution comprising of a charter and a set of rules, by a council comprised of at least two councillors unless the constitution permits a single councillor. If one of the councillors or the guardian is a Guernsey licensed fiduciary, the foundation will be brought into the ambit of the regulatory regime. If neither of the councillors, nor the guardian, is a Guernsey licensed fiduciary, then the foundation will require a Guernsey resident agent to hold the foundation's records within the jurisdiction.
- A Guernsey foundation must have a guardian only where there are either disenfranchised beneficiaries or where there is only a purpose but no individual beneficiaries. The guardian's function is to enforce the purposes of the foundation on behalf of disenfranchised beneficiaries or, where there are no beneficiaries in substitution for them. Foundations that have beneficiaries but no disenfranchised beneficiaries are not required to have a guardian. The founder may act as guardian. The guardian will be named in the register and may not serve on the council at the same time. He must maintain accurate accounts and records of his guardianship.
- There is no requirement for either a council member or the guardian (if any) to be a Guernsey licensed fiduciary, although in such circumstances a "resident agent" must be appointed. The "resident agent" must be a Guernsey licensed fiduciary, resident in Guernsey, and will have rights to view such foundation information as is necessary to ensure the foundation is complying with Guernsey Law.
- Only a Guernsey licensed fiduciary may apply to register a foundation.
- The following information about the foundations will be publicly available in the Register: the name and registered number of the foundation, the name and address of the councillors appointed to act, the name and address of the guardian (if there is one) and the details of the registered office.

An excellent opportunity for Guernsey

The Minister for Commerce and Employment, Kevin Stewart said: "The introduction of Foundations in the New Year represents an excellent opportunity for Guernsey and is a welcome boost for the financial services industry as we enter 2013. Offering a new structure for financial services will increase Guernsey's competitive advantage and give industry an edge in an increasingly competitive global environment.". ■

BRUSH UP: THE LUXEMBOURG PRIVATE WEALTH MANAGEMENT COMPANY

Societe de Patrimoine Familiale or SPF

By law dated 11 May 2007, the Luxembourg government introduced the "Societe de Patrimoine Familiale or SPF" to replace the 1929 Holding Company regime which was terminated on 1 January 2007 after it was found by the European Commission to be in violation of state aid rules for providing "unjustified tax advantages" to providers of certain financial services who set up holding structures in Luxembourg.

The SPF tax regime has been implemented to answer the needs of individuals wanting to manage their private wealth and assets through a dedicated capitalization vehicle.

Tax features

Companies which have elected for the SPF regime are exempted from corporate income tax, municipal business tax and net wealth tax.

On the other hand, the SPF is subject to a subscription tax ("taxe d'abonnement") at an annual rate of 0.25% with a minimum amount of €100, and a maximum amount of €125,000. The subscription tax is levied on the amount of the paid-up capital increased by the amount of share premium and the amount of debts exceeding eight times the paid-up capital and share premium.

Distributions, whether in the form of dividends or interest payments or other, paid by an SPF are not subject to withholding tax, unless such distributions fall within the scope of savings withholding taxes. Non-residents will not be subject to capital gains taxation in Luxembourg upon the sale of all or part of their interest in an SPF.

An SPF is not considered to be a VAT entrepreneur. As such, it can not obtain a Luxembourg VAT registration and a VAT number. Luxembourg excludes the SPF from the application of its tax treaties. Accordingly, no regular residency certificates are issued by the tax authorities for an SPF. Note that in cases where treaty protection is sought for, regular companies may be interposed as so-called blocker entities.

Amendment of 1 February 2012 abolishing the low tax dividend condition

Following an opinion letter from the European Commission, the Luxembourg Parliament approved Bill n°6305 ("Amendment Law") aiming at abolishing the low tax dividend condition on 1 February 2012. Prior to that, the SPF regime provided that the favourable tax status would be lost any year during which the SPF received at least 5% of its dividend income from participations in unlisted and non-resident companies that were not subject to a tax similar to the Luxembourg CIT. In order to comply with this condition, the SPF had to provide annually a certificate issued either by its domiciliation company or by an auditor or by a chartered accountant that the 5% limit for dividends derived from non-resident and unlisted companies not subject to a tax similar to Luxembourg CIT is fulfilled.

Consequently, as from the 1st of January 2012, a SPF is allowed to receive incoming dividends from a non resident/non listed participation, without any restrictions whatsoever.

Legal form of an SPF

An SPF has to adopt the form of a public or private limited liability company (société anonyme or société à responsabilité limitée), a limited partnership having a capital divided into shares (société en commandite par actions) or a cooperative company organised in the form of a public limited company (société coopérative organisée sous forme d'une société anonyme). The articles of association of an SPF have to state explicitly that the company is subject to

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the provisions of the law regulating the SPF, and after the indication of the legal form of the entity, "SPF" is to be mentioned.

The shares of a SPF can either be nominative or bearer (not for a société à responsabilité limitée). The shares in an SPF may not be listed on a stock exchange.

Activities of an SPF

The activities of an SPF are limited to the acquisition, holding, administration and sale of:

- Financial assets as defined in the law of August 5, 2005 on financial collateral arrangements (securities in the broadest sense, including options, derivatives and structured financial products);
- Cash (including foreign currencies), and
- Other assets (e.g. precious metals) held in an account with a professional financial service provider.

An SPF is not allowed to perform commercial activities, such as trading in financial instruments, or providing financial services. Moreover, an SPF can not directly hold real estate. Nevertheless, real estate held directly for its own use or indirectly, through its participations, is allowed.

Although an SPF is allowed to hold shares in other companies (even majority shareholdings), it should limit its involvement in its shareholdings to the exercise of shareholder rights (voting rights, right to receive dividends).

An SPF may not be actively involved in the management of the participations or render services of whatever nature. An SPF is not allowed to grant interest bearing loans, not even to participations (to a limited extent it may grant interest free advances to participations).

Investors in an SPF

The investors eligible to invest in an SPF can be subdivided into three groups:

- (A confined group of) Private investors acting in the context of their private wealth management;
- Private wealth entities (i.e. trust, foundation, a Dutch *"stichting"*, etc.) acting solely for one or several individuals;
- Intermediaries acting on behalf of either one stated above (e.g. Institutional investors acting with a fiduciary contract).

Supervision

The SPF is subject to the control of the Administration for Registrations and State Property. Each year, the domiciliation agent, the auditor or a chartered accountant has to certify that:

- The SPF has fulfilled its obligations as paying agent under the EC Savings Directive; and
- The conditions pertaining to the nature of the investors are fulfilled; and
- The SPF did not receive at least 5% of its dividends from non-qualifying participations (see paragraph on taxation of an SPF). ■

NETHERLANDS RULES REGARDING RESTRICTION OF INTEREST DEDUCTION AMENDED

Thin capitalization rules abolished

On 20 November 2012, the Second Chamber of Parliament approved the Bill including the abolition of the thin-capitalisation rules with respect to the deduction of interest expenses for Dutch corporation tax. This takes effect for taxable years commencing on or after 1 January 2013.

New rule regarding the restriction of interest deduction

These rules are abolished because the regime has become superfluous due to existing specific restrictions of the interest deduction possibilities and the introduction of a new rule regarding the restriction of interest deduction on loans taken up for investment in participations qualifying for the participation exemption, which are also effective as per 1 January 2013.

Administrative guidelines

On 12 October 2012 Administrative guidelines were released dealing with certain technical aspects of this new restriction rule.

They address three specific aspects of the excessive debt financing rules:
(1) application of the rules in the context of restructurings; (2) interaction of the rules with the fiscal unity regime; and (3) interaction of the rules with the restriction on interest deductibility for acquisition holding companies. ■

THE END OF DENMARK AS A HOLDING COMPANY JURISDICTION

New anti-abuse rules introduced retroactively from 3 October 2012

On 14 December 2012 the Danish Parliament passed the draft Bill (L 10) introducing new anti-abuse rules responding to unintended consequences of the earlier rules, i.e. respond to the possibilities to avoid Danish taxes and/or foreign taxes by using Danish companies. These rules will apply retroactively from 3 October 2012.

The measures are intended to close certain loopholes for avoidance of the Danish with holding tax rules on dividends paid by Danish companies, but are also against the use of Danish companies as “conduit companies” for dividends from foreign companies to parent companies in non-EU member countries. Finally, rules are introduced pertaining to the place of management of Danish companies.

The highlights of the Bill are summarized below.

Avoidance of dividend withholding tax

First of all, artificially structures are attacked that convert taxable dividends into tax exempt payments. The Danish Ministry of Taxation mentions the following example: a foreign company sells its shares in a Danish subsidiary to a new Danish holding company, whereby the selling price is indebted by latter company. Subsequently, the Danish subsidiary distributes a dividend to the new Danish holding company, which then repatriates this dividend by repaying its debt to the foreign company without incurring any tax. Consequently, the Danish dividend withholding tax is avoided.

Under the new rules, the remuneration in case of group-related transfers of shares will be characterized as a dividend subject to dividend withholding tax if the remuneration is either entirely or partly not in the form of shares (but e.g. in cash or a debt instrument).

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The transfer will trigger a 27% Danish withholding tax -- regardless of whether the transferring company is resident or non-resident --, unless the transferring company qualifies for protection under the EU Parent-Subsidiary Directive or a double tax treaty.

Anti-avoidance rules for conduit companies
Under the Danish holding company regime dividends distributed by a Danish company to a foreign parent company may be exempt from Danish withholding tax provided that the foreign parent company is resident within the EU or in a jurisdiction that has entered into a double tax treaty with Denmark.

However, in recent years the Danish tax authorities have tried to deny this benefit if the Danish intermediate holding company has been interposed for the sole purpose of treaty shopping, by arguing that the foreign parent company is not the beneficial owner of the dividend.

Under the new rules, exemption from Danish withholding tax on dividends paid by a Danish company to a foreign parent company no longer if the dividends paid by the Danish company to the foreign parent company stem from dividends that the Danish company has received from a foreign subsidiary, and the Danish company is not the beneficial owner of the dividends received from the foreign subsidiary. The new rule does not apply if no dividend withholding tax is due under to the EU Parent-Subsidiary Directive.

Danish tax liability and the place of management
The Danish tax liability rule that depends on the place of registration will be expanded to include any company registered with the Central Business Registry. The tax liability of a company, other than a public or private limited company, previously depended on the company having its effective place of management in Denmark.

Under the new rules, a company is regarded to be resident in Denmark for Danish tax purposes if the company is either registered in Denmark or has its place of effective management in Denmark.

The end
It is expected that these new anti-abuse rules will bring forward the end of Denmark as a location to base an (intermediate) holding company. ■

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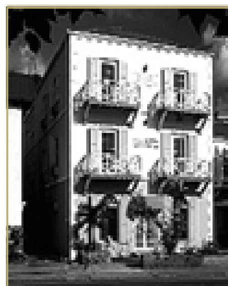

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ITPS GROUP PROFILE

Needs of clients

As business is becoming more international, organizations are seeking ways to minimize the incidence of taxation linked to it. On the other hand, organizations as well as individuals are seeking international ways to optimize their profits and to protect their assets. The increasing complexity of (tax) laws necessitates careful planning and consideration of the structure to be established and maintained. Customers require highly specialized professional services.

Mission

The purpose of ITPS is: doing the best the things that the customer values most. The focus is long term customer satisfaction. The mission of the ITPS Group is to create value for it's customers through the provision of professional services in the field of international tax planning and structure, designed to optimize the customer's after tax profits.

Services

The objective of ITPS is to meet customer needs for international tax planning and structure by rendering "total offering" services with the highest standards of professional and personal service combined with complete confidentiality.

This comprehensive offering comprises not only the advice for international tax planning (i.e. for legal and tax questions), but also implementation to establish and maintain structures.

These services include, but are not limited to:

- International tax planning;
- Company formation, registered office facility, management,
  accounting and tax compliance;
- Trust and foundation formation and administration;
- Licensing and sub-licensing of intellectual property rights.

The services ITPS does not provide, but which we are rendered by correspondents, include auditing, legal opinions, litigation and portfolio investment.

Why you should use ITPS

The ITPS Group holds an unique position in each of these jurisdictions for the following reasons:

1. Market oriented (and not product oriented):
ITPS focuses on meeting the needs of the clients;
2. Rendering international tax planning and structure (trust) services:
Tax planning and structure services are complementary. Planning is of no use if you do not structure it. Moreover you can not efficiently structure if you do not take the first step: plan the structure. Therefore, the services of ITPS are not restricted to trust services. Since ITPS has the combined skill and experience for more than ten years, high quality is ensured;
3. All included fixed fees for structure (trust) services:
In each jurisdiction, tax structure services are charged at annual fixed fees, generally payable in quarterly installments in advance. Tax planning services are charged at an hourly rate;
4. One contact person is possible for several jurisdictions;
5. Independent:
There is no conflict of interest. ITPS works with all other skilled professionals and (financial) institutions as the client deems appropriate;
6. Personal contact and continuity:
ITPS focuses on long-term customer satisfaction, providing proactive, personal, attentive and competent services;
7. Regular meetings:
Customers and correspondents are visited on a regular basis (three to four times a year) to touch base and to discuss opportunities and problems that may have arisen, without a fee being charged;
8. Tax sparring and education:
ITPS strives to built up a (tax) sparring relationship with customers and correspondents in order to keep each other abreast in a fast changing environment. A quarterly newsletter on international tax planning, the International Tax Planning Newsletter, is sent to inform customers and correspondents on the changes in legislation;
9. An excellent network:
Since ITPS is not part of an international network, it has built up a network of highly skilled professionals to work with.

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