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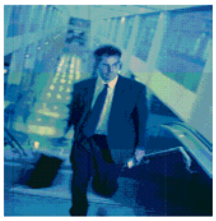

The International Tax Planning Newsletter is a quarterly newsletter of Broers & MacDonald tax lawyers and The ITPS Group, an independent provider of international tax planning and structure services. It provides these services in the Netherlands, Curacao (the Netherlands Antilles), Aruba, the British Virgin Islands, Belgium, Luxembourg and Cyprus

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PROPOSALS TO IMPROVE NETHERLANDS AS A HOLDING COMPANY LOCATION

Introduction

On 15 June 2009 the Dutch Ministry of Finance published a Consultation Paper, a kind of White Paper rather than a draft Bill, containing several proposals to amend the Dutch corporate income tax Act (*Wet op de vennootschapsbelasting 1969*). These proposals seek to improve the fiscal investment climate in the Netherlands, especially in the fields of financing and investing through the Netherlands.

The public has been requested to comment before 1 August 2009. Subsequently the Consultation Paper and the comments thereon will serve as a basis for a tax bill. The Ministry of Finance has promised to present this bill after Summer. The bill is expected to be enacted before the end of the year and to enter into force as of 1 January 2010.

2007 Tax reform

As we have informed you in our newsletter of February 2007, effective 1 January 2007, the Netherlands already enacted a favourable tax reform Bill to keep the Netherlands on the short list of top locations to base an (intermediate) holding company.

The measures included significant reductions of the corporate income tax and of the dividend withholding tax rates, beneficial changes to the participation exemption, relaxation of the rules relating to interest deduction, the introduction of a 10% patent royalty box and, subject to approval from the European Commission, the introduction of a 5% group interest box.

The Consultation Paper envisages to further improve the Netherlands as a holding company location.

Proposals

The Consultation Paper proposes the following changes to the Dutch Corporate Income Tax Act:

1. Improvement of the participation exemption regime.
2. The introduction of a compulsory group interest box.
3. The introduction of new provisions that limit the deduction of interest.

1. Improvement of the participation exemption

Under the current Dutch participation exemption dividends received from a qualifying subsidiary and a capital gain realized on the alienation thereof is exempt from corporate income tax, subject to certain conditions.

Current conditions

As from January 1, 2007, the Dutch participation exemption applies if the shareholding is at least 5% of the nominal paid-up capital of a company with a capital divided into shares <u>unless</u>:

1. The subsidiary is a passive company (the “asset” test) <u>and</u>
2. This passive company is subject to a profit tax resulting in an effective tax rate of <u>less</u> than 10% on a taxable profit which has been determined in accordance with rules that are acceptable by Dutch standards (the “subject to tax” test).

The “asset” test

Whether a subsidiary is considered to be passive will be determined by the assets of the subsidiary, which includes the interest that the subsidiary may have in other companies. This is the so-called “asset” test.

The subsidiary is passive, if the majority of its direct and indirect (through lower-tier subsidiaries) assets are of a passive nature with no function in the enterprise in which the entity is engaged in. This is the case if the aggregated assets (note: <u>not</u> assets less liabilities) of the participation, including its subsidiaries, primarily (at least 50%) consist of so-called “free portfolio investments”. These kind of “bad” assets are not linked with the business activity of the subsidiary, but are assets that generate passive income such as interest, royalties and rental income.

Generally speaking “good assets” are assets that are used in the active business of the subsidiary or of its first and lower tier subsidiaries. Therefore, the participation exemption can apply to an interest in a tax exempt holding company that in turn owns active subsidiaries. If the consolidated assets (note: assets <u>less</u> liabilities) of a subsidiary consist of at least 90% investment in real estate, the participation exemption is applicable.

Consequently, a distinction must be made between “good” and “bad” assets.

In case the participation exemption does not apply, the income received from the passive subsidiary will be fully subject to Dutch tax, but a tax credit will be available, i.e. the tax paid by the (grand-) daughter can be offset against the Dutch tax.

Tests led to uncertainty

The “asset” test and the “subject to tax” test were introduced in the 2007 Dutch corporate income tax reform to broaden the scope of the participation exemption regime and attract more investments to and through the Netherlands.

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In practice, it has sometimes been difficult to substantiate the requirements of the tests, leading in some cases to an uncertainty regarding the application of the participation exemption regime, where this was not intended.

Proposed new general rule

The Consultation Paper proposes to amend the application of the participation exemption to such extent that it would apply to a 5% or more participation in a (domestic or foreign) subsidiary, if it is the intention of the Dutch company not to hold the subsidiary as a "portfolio investment".

The "intention" test: the intention not to hold the participation as a portfolio investment

The ratio for the re-introduction of the "intention" test that is similar to the rule that was applicable prior to the tax reform of 2007, is that is gives more certainty than the "asset" test since, in determining whether a subsidiary is a passive company, the intention will not change as quickly as the relation between the assets and liabilities of the subsidiary on the aggregated assets balance sheet.

Whether or not a portfolio investment

In order to determine whether or not a subsidiary is held as a "portfolio investment" the intention of the Dutch shareholder should be tested.

A subsidiary is being held as a "portfolio investment" if it is the intention to realize a return that can be expected in case of normal asset management.

Certain subsidiaries are by nature being held as a portfolio management because the activity of the subsidiary is portfolio management, such as a Dutch fiscal investment company or certain foreign investment companies.

Certain subsidiaries are by fiction considered to be a portfolio investment:

1. If more than 50% of the consolidated assets of the subsidiary consist of shareholdings of less than 5%.
2. If the subsidiary - together with companies wherein it is (in-/ directly) holding an interest of at least 5% - has a financing function within the group.

A subsidiary is not held as a "portfolio investment":

1. If the enterprise of the subsidiary is in line with that of the Dutch shareholder; or
2. If the Dutch shareholder is a holding company and the subsidiary does not (in-/ directly) undertake portfolio management activities but carries on an (active) enterprise; or
3. If the Dutch shareholder is an intermediate holding company and the subsidiary carries on an (active) enterprise that is in line with the enterprise of the shareholder of the Dutch intermediate holding company ("link function").

If the subsidiary is (in-/ directly) undertaking portfolio investment activities but also is carrying out an enterprise that is in line with the enterprise of the Dutch shareholder, the main point of the intention of the Dutch shareholder is decisive: carry on an enterprise or portfolio investment.

Safe harbour test: participation exemption applies if the "new" asset test <u>or</u> subject to tax tests are met

The "asset test" and the "subject to tax test" would not cease to exist. They will however be simplified and maintained as an objective safe harbour test.

If the participation exemption would not be applicable based on the new general rule, it will nevertheless be applicable if the "new" asset test <u>or</u> subject to tax tests are met.

These test are met if either 50% or more of the assets of directly and indirectly held subsidiaries are considered to be "good assets", or the subsidiary is subject to an effective profit tax of at least 10%.

"New" asset test

Under the new asset test, the Dutch participation exemption applies to a portfolio investment if the aggregated assets of directly and indirectly held subsidiaries generally consist of at least 50% good assets, i.e. assets that are not portfolio investments.

On the aggregated balance sheet only portfolio investments held by companies the assets of which comprise more than 30% of portfolio investments are taken into account as non-business-related assets.

There are three kind of portfolio investments:

1. Ordinary investments.
2. Group receivables.
3. Assets that have been made available to the Dutch shareholder or to affiliated companies.

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Ordinary investments are portfolio investments if they are not business related. They may include interest bearing bank balances, receivables, bonds, real estate, etc. Ordinary investments are not considered portfolio investments:

- If the income derived from these investments is subject to a nominal tax rate of at least 10% with a realistic levy.
- If It concerns real estate or rights (in-/ directly) pertaining real estate that is held by a subsidiary that is not an asset management company.

Group receivables are not considered portfolio investment:

- If the income which is derived from these receivables is subject to a nominal tax rate of at least 10% with a realistic levy. An effective rate of 5% suffices as this is in accordance with the group interest box.
- If the company holding these receivables undertakes active finance activities.
- If these group receivable are financed for at least 90% by third party loans.

Assets of a subsidiary that have been made available to the Dutch shareholder or to affiliated companies are not considered portfolio investments:

- If the income which is derived from these assets is subject to a nominal tax rate of at least 10% with a realistic levy. An effective rate of 5% suffices in case of financing elements as this is in accordance with the group interest box.
- If the company holding these assets undertakes active activities.
- If these assets are financed for at least 90% by third party loans.

"New" subject to tax test

The new subject to tax test is met if the direct subsidiary is subject to a nominal tax rate of at least 10%. Whether the tax has been determined in accordance with rules that are acceptable by Dutch standards is not relevant anymore. A realistic levy suffices.

There is no realistic levy inter alia in case of a tax holiday, in case of a cost plus with an insufficient tax basis, if a dividend is tax deductible, if the tax basis is substantially reduced because of fictitious expenses or exemptions, if a participation exemption is broader than the Dutch participation exemption, if the tax is only levied in case of distribution, etc.

Hybrid receivables

Under current rules receivables that have been made under such conditions that they actually function as equity, so-called hybrid loans, will qualify under the participation exemption. Consequently, income from these receivables will be exempt under the participation exemption, subject to certain conditions being met.
In the Consultation Paper it is proposed to tax income from hybrid loans to group companies qualifying as equity for Dutch tax purposes in the interest box at an effective tax rate of 5%. Group has been defined as the group of companies who are affiliated through common control. Control is to be interpreted in accordance with commercial accounting consolidation rules (IAS 27). Group debt will be treated as external debt in case the group creditor has funded the group loan with external debt.

2. The introduction of a compulsory group interest box

Currently interest taxed at 25.5% tax

Under current rules interest income generally is taxable and interest expense is generally deductible at a 25.5% corporate income tax rate. The deduction of interest expenses is subject to transaction-based and thin capitalization rules.

Proposed 5% effective corporate tax rate for group financing income, expense and proceeds

The Consultation Paper proposes to introduce a compulsory group interest box - instead of the introduction of an optional interest box, which was proposed in the tax reform of 2007 but never enacted - that reduces the effective corporate tax rate for group interest to 5%. Group interest receipts would be taxed at an effective rate of 5%, while group interest payments would only be deductible up to an effective rate of 5%.

The group interest box would apply to all interest income received from and interest paid to a group company. Other income or proceeds that will be included in the new interest box are foreign exchange results on intra-group loans and profits and losses on hedging instruments in relation to interest and foreign exchange risks on intra-group loans.

Interest income and interest expenses (and other income as mentioned in the previous paragraph) would be netted and subject to taxation or deduction at an effective rate of 5% (5/25.5 of the netted amount against a tax rate of 25.5%).

A "group" refers to a controlling interest and is deemed to exist if the borrower has directly or indirectly a voting control (of more than 50%) over the lender or vice versa, or if another company (a common parent) has voting control over both lender and borrower. Since the statutory capital requirement of EUR 18,000 for the creation of a limited liability company will be abolished, accordingly, there will no longer be any legal or economic obstacles for the creation of a group. A group loan will be considered a third party loan if the group creditor has financed it externally.

The deduction of interest expenses would remain be subject to transaction-based rules. The proposed compulsory group interest box contains a number of anti-abuse measures aimed at combating potential abuse.

EC Dutch interest box not incompatible with State aid rules

The optional interest box, which was proposed in the tax reform of 2007, has never been enacted because prior approval had not been obtained from the European Commission.

On 8 July 2009, the European Commission announced, upon request, that it had found that the compulsory group interest box is not incompatible with State aid as it is not limited to certain sectors, certain types of companies or certain parts of the Netherlands. Moreover, there are no restrictions with respect to the turnover of the company, its size, its number of employees, whether or not it is part of a multinational group, or the nature of the operations that may be performed.

3. The introduction of a new provisions that limit the deduction of interest

Current rules

Under current rules, interest deduction is subject to transaction-based, anti-base erosion and thin capitalization rules.

Nevertheless it may be possible to deduct expenses in connection with the finance of a participation, while the income from such a participation is exempt under the participation exemption.

The same would apply to the compulsory interest box in case of third party leveraging if no counter measures would be taken: the interest income is partially exempt, i.e. it is only taxed at an effective rate of 5%, whereas the interest would be fully deductible.

Moreover, companies have still the possibility to structure group receivables and debts internationally in such a way that the interest income is taxed in a country with an effective low tax rate, whereas the interest expense is taxed in a country with a higher tax rate. This is especially the case with the take over of Dutch companies which is often substantially leveraged because the interest expense is deductible and the return on equity is not.

Two alternatives proposed

The Consultation Paper proposes two alternatives, both of which purport to partially disallow the deduction of (group and third party) financing expenses:

A. Specific interest deduction restriction measures that attack the above mentioned imbalances and
B. A general earning stripping measure, which generally restricts the deductibility of interest.

In both alternatives the current transaction-based rules will be maintained and a threshold will be introduced of € 250,000, i.e. deduction will not be restricted up to an interest expense of € 250,000 per year.

Since it is not clear which alternative will be chosen, we will only generally elaborate on both alternatives.

A. Specific interest deduction restriction measures

The specific interest deduction restriction measures proposed to prevent erosion of the Dutch taxable base are:

- A deduction restriction for participation interest on loans to finance the acquisition of participations, and
- A provision on the non-deductibility of excessive interest payments in case of a company take-over.

If this alternative is enacted, the current thin capitalization rules (Section 10d of the Corporate Income Tax Act) will be abolished.

Deduction restriction for participation interest on loans to finance the acquisition of participations

As mentioned above, under current rules it may be possible to deduct expenses in connection with the finance of a participation, while the income from such a participation is exempt under the participation exemption. The same would apply to the compulsory interest box in case of third party leveraging if no counter measures would be taken

These imbalance are attacked by the restriction to deduct participation interest on loans from both group companies and third parties to finance the acquisition of participations. Financing expenses which exceed € 250,000 will not be deductible to the extent that they relate to investments which qualify for the participation exemption and group receivables which qualify for the interest box.

Financing expenses will not be deductible to the extent the average tax book value of all qualifying participations and group receivables during the year exceeds the average amount of the net equity of the Dutch company during the year. The difference is considered participation debt. Any interest in relation to this debt is non-deductible.

Group receivables will for the purposes of this test be taken into account for approximately 80%. In addition, the amount of equity will be increased with (i) approximately 80% of group loans payable and (ii) the amount of tax loss carry forwards of the taxpayer (excluding prior liquidation losses).

A provision on the non-deductibility of excessive interest payments in case of a company take-over

The other measure would limit the possibility to offset interest expenses of an acquisition holding company against the income of subsidiaries which are part of the same fiscal unity for Dutch corporate income tax purposes.

If the deduction restriction for participation interest on loans to finance the acquisition of participations would only be introduced, it would be ineffective in case of a company take-over, because a Dutch acquisition holding company and the acquired company can form a fiscal unity from the outset, as a consequence of which no participation will be recognized on the balance sheet for tax purposes.

Therefore it is proposed that financing expenses insofar they exceed € 250,000 would only be deductible up to the amount of the taxable profits of the taxpayer on a standalone basis, unless the Dutch company substantiates that it meets a 3:1 debt-to-equity ratio. In order to determine this ratio the amount of equity is reduced by the average book value of qualifying participations.

B. A general earning stripping measure which generally restricts the deductibility of interest

As an alternative interest-deduction limitation measure, a general earning stripping rule is proposed that is similar to those recently implemented in Germany.
The earnings stripping provision would be applicable if the taxpayer belongs to a group for commercial accounting purposes and if the Dutch company is more thinly capitalised in comparison to the consolidated capitalisation ratio of it's (worldwide) group.
In brief, this measure allows the deduction of interest, group interest and interest paid to third parties, by a taxpayer only up to a certain percentage of EBITDA (Earnings Before deduction of Interest, Tax, Depreciation and Amortization), insofar as the balance exceeds a threshold of € 250,000. The Dutch proposal follows the German limitation restricting the deductibility of interest costs to a maximum of 30% of EBITDA.

The amount of interest expenses that is not deductible in one year can be carried forward for maximally nine years in which the interest expense is less than 30% of EBITDA. If this alternative will be introduced the current thin capitalisation provision will be amended.

Fiscal investment climate in the Netherlands will be substantially improved

If the measures, as proposed in the Consultation Paper of the Dutch Ministry of Finance to amend the Dutch corporate income tax Act (*Wet op de vennootschapsbelasting 1969*) published on 15 June 2009, will be enacted, the fiscal investment climate in the Netherlands, especially in the fields of financing and investing through the Netherlands will be substantially improved.

Financing through the Netherlands will be easier due to the introduction of the compulsory interest box and the abolishment of a number of complex rules on interest deductibility. Moreover, the changes of the participation exemption regime will further improve the Netherlands as a holding company location.

NEW VAT RULES IN EU ON PLACE OF SERVICES EFFECTIVE 1 JANUARY 2010

One of the most important changes in VAT legislation of the past 15 years will take effect on 1 January 2010. The European Commission has announced new rules for the place of supply of services for Business-to-Business (B2B) and Business-to-Consumer (B2C) transactions. The new rules will simplify cross-border business dealings.

Below we will elaborate the key changes.

Current general rule

At present, the general rule is that cross-border services are taxable in the country where the supplier is established.

Two new general rules

The following two new general rules will apply from 2010 onwards:

- B2B supplies will be taxable in the country where the customer is established; and
- B2C supplies will continue to be taxable in the country where the supplier is established.

This implies that B2B transactions will mostly be taxable in the country where the customer is established. In all these cases, supplies will be subject to the reverse charge mechanism. Consequently, the VAT charge is shifted to the customers local VAT return. As a result, a service provider will frequently neither have to charge VAT nor register in another EU Member State.

Examples of services that are affected by the new rules

Examples of services that are affected by the new rules are management services, work on movable tangible property (including the services of experts) and vehicle leasing.

Under the current rules, management services are taxable in the country where the provider of the services is established. With effect from 2010, B2B transactions will be taxable in the country of the customer.

Work on movable tangible property (including the services of experts) is taxable at present in the country where the work is effectively carried out. B2B transactions will become taxable in the country of the customer from 2010 onwards.

Vehicle leasing is now taxable in the Member State where the lessor is established. In the new situation, short-term leases will always be taxable in the country where the vehicle is being provided. In B2B transactions, long-term leases will be taxable in the country of the customer.

Exceptions to the new general rules

There are some exceptions to the new general rules as well. Some of these exceptions cause the current determination of the place of supply of a service to effectively remain intact despite the changes to the general rule and/or the abolition of the current exceptions.

These exceptions include:

- Work on immovable tangible property (including the provision of overnight accommodation);
- Services connected with cultural, sporting, academic, educational and entertainment events;
- Specific services (e.g. intellectual services) where the recipient is a non-taxable person established outside the EU; and
- Work on movable tangible property (including the services of experts) in B2C transactions.

New exceptions have been formulated for specific services, because the general rules would otherwise have unwanted tax consequences (e.g. in the case of restaurant services).

Reverse charge mechanism

If a VAT entrepreneur has foreign service providers, their services are, because of the new rules on the place of supply of services, more likely to be subject to the reverse charge mechanism.

The VAT entrepreneur should declare the reverse charged VAT in his own local VAT return.

An additional administrative requirement: EC Sales Listing

Besides simplifying the rules, the new legislation also entails an additional administrative requirement.

With effect from 2010, periodic EC Sales Listing (ESLs) will be required for B2B service transactions within the EU whose place of supply is the country where the customer is established. ESLs are similar to ICL sales listings for intra-Community supplies.

Practical implications of the new rules

The year 2010 will bring changes to the rules on the place of supply of services. The new rules bring a number of changes, and early and adequate preparation is imperative. Every taxpayer should assess as soon as possible his own individual situation to map out the consequences of these new rules.

OECD: "BANKING SECRECY AS A SHIELD FOR TAX EVADERS IS COMING TO AN END"

In our newsletter of April this year, we informed you that on 2 April 2009 in the Declaration on Strengthening the Financial System, the annex to the Global Plan on Recovery and Reform to deal with the global economic crisis, the G20 leaders stated that "the era of banking secrecy is over".

In recent months, because of pressure from the G20 to step up the drive against tax evasion, dozens of countries and territories have taken steps to conform to the standards for transparency and exchange of information in tax matters. Bilateral treaties have been revised and numerous new Tax Information Exchange Agreements (TIEAs) have been signed or are under negotiation.

Progress made up to 31 July 2009

On 31 August 2009, the OECD issued its Tax Co-operation 2009: Towards a Level Playing Field – 2009 assessment by the Global Forum on Transparency and Exchange of Information.

This is the fourth annual assessment of progress being made towards greater transparency and information exchange in the area of taxation. As the only comprehensive and objective compilation of such information, the assessments are a tool in measuring the ability of countries to provide international co-operation in tax matters.

The report covers 87 jurisdictions, including all the major financial centres around the world, and highlights the progress made up to 31 July 2009.

All OECD countries now accept the exchange of information article of the OECD Model Tax Convention

All OECD countries now accept Article 26 (Exchange of Information) of the OECD Model Tax Convention, as updated in 2005, following the withdrawal in March 2009 by Austria, Belgium, Luxembourg and Switzerland of their reservations to Article 26. Consequently, there are no countries listed anymore on the "Name and Shame" list.

International standards for transparency and exchange of information in tax matters

Hong Kong, China and Macao, China endorsed the standards for transparency and exchange of information in tax matters at the 2005 Global Forum meeting in Melbourne and have now put forward legislation to enable them to implement the standards.

Singapore endorsed the standards on 10 February 2009 and proposed relevant legislation in June 2009 intended to comply with the internationally agreed tax standard.

Tax information exchange agreements

Since the London G-20 meeting in April, over 50 new TIEA's have been signed, doubling the total number of Agreements signed since 2000 and over 40 double taxation conventions have been signed.

Andorra, Liechtenstein and Monaco – identified by the OECD in 2002 as un-cooperative tax havens – have endorsed the OECD standards and indicated their willingness to change their domestic legislation and to enter into agreements for the exchange of information for tax purposes.

Niue, which was identified as a tax haven by the OECD in 2000, reports that it has now eliminated its offshore sector and dissolved all of its international business companies, trusts, partnerships or other offshore entities.

Brunei, Costa Rica, Guatemala, Malaysia, the Philippines and Uruguay have all endorsed the OECD's standards of transparency and exchange of information and agreed to implement them.

These developments mean that all countries surveyed by the Global Forum are now committed to the standards.

Countries work to implement the OECD standards

Most importantly the report shows that many other significant developments are underway as countries work to implement the OECD standards. Since the report was finalized on the 31st of July jurisdictions have continued to make substantial progress:

Belgium, the Cayman Islands and Luxembourg

Belgium, the Cayman Islands and Luxembourg have now signed more than 12 agreements that meet the OECD standard and are considered to have substantially implemented the OECD standard for exchange of information.

Switzerland

Switzerland has now signed agreements with 4 OECD countries that provide for exchange of information to the OECD standard and has initialed agreements with at least 8 other OECD countries.

Singapore

Singapore has signed 5 agreements that meet the standard and initialed a number of others. It has also introduced legislation intended to conform its existing treaty network to international standards.

Macao, China

Macao, China has passed legislation intended to enable it to implement the internationally agreed tax standard.

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Austria

Austria has signed 2 agreements that meet the OECD standard and has initialed a number of others.

Virtually all countries are moving to eliminate strict bank secrecy for tax purposes

Virtually all countries are moving to eliminate strict bank secrecy for tax purposes.

Commenting on these developments, Angel Gurría, Secretary-General of the OECD said: "What has happened is nothing less than a revolution. For decades it has been possible for taxpayers to hide income and assets from the taxman by abusing bank secrecy and other impediments to information exchange. What these developments show is that this will no longer be possible."

Next steps for OECD Global Forum on information exchange for tax purposes

The report has been published in conjunction with the 5th meeting of the Global Forum in Los Cabos, Mexico, that too place on 1-2 September.

The Global Forum which now numbers almost 90 jurisdictions around the world highlighted that the standards on transparency and exchange of information pioneered by the OECD are now almost universally accepted and that extraordinary progress has already been made towards their full implementation.

Key decisions

Moreover the Forum took concrete steps to empower the Global Forum to play the leading role in the global campaign to fight tax evasion, i.e. they took the following key decisions:

- Global monitoring and peer review process: to put in place a robust, comprehensive and global monitoring and peer review process to ensure that members implement their commitments.
- Extended global reach: to further expand its membership and to enshrine the principle that all members enjoy equal footing.
- Faster agreements: to speed up the process of negotiating and concluding information exchange agreements including exploring new multilateral avenues.
- Developing country assistance: to put in place a coordinated technical assistance program to assist smaller jurisdictions to implement the standards rapidly.

G20 meetings

The Global Forum's conclusions have been reported to the G20 Finance ministers who met in London on 4 and 5 September.

The G20 Finance ministers stressed that more needs to be done to maintain momentum, make the system more resilient and ensure a level playing field, including the following actions:

- Tackling noncooperative jurisdictions: delivering an effective programme of peer review, capacity building and countermeasures to tackle tackling noncooperative jurisdictions that fail to meet regulatory standards.
- Tax information exchange standards.
- Standing ready to use countermeasures against tax havens from March 2010.
- Ensuring developing countries benefit from the new tax transparency, possibly including through a multilateral instrument.
- Calling on the Financial Stability Board to report on criteria and compliance against regulatory standards by November 2009.

The Global Forum's conclusions will also be reported to the G20 Leaders Summit in Pittsburgh on 24 and 25 September.

More information about the OECD report is available from www.oecd.org/ctp/htp/cooperation.

CIRCULAR BRINGS BELGIAN PARTICIPATION EXEMPTION IN LINE WITH *COBELFRET* CASE

Cobelfret case of the European Court of Justice of 12 February 2009

In its decision in the *Cobelfret* case on 12 February 2009 (*Cobelfret v. Belgium,* C/138-07), the European Court of Justice concluded that Belgium's "Dividends Received Deduction" or "DRD" as applicable to European dividends is not compatible with the EU Parent-Subsidiary Directive.

The decision only confirms the incompatibility of Belgium's DRD system in respect of dividends distributed by EU subsdiaries. It did not encompass the treatment of dividends received from subsidiaries resident in third (i.e. non-EU) countries or dividends received in a pure domestic (Belgian) situation.

Article 4 (1) of the EU Parent-Subsidiary Directive leaves the Member States the choice between the exemption method and the imputation method to avoid double economic taxation of dividends. By implementing the dividend participation exemption regime, Belgium opted for the exemption method.

95% of the dividends received are deducted: "Dividend Received Reduction" or "DRD"

Dividends received by a Belgian parent company are first added to its taxable profits. Subsequently 95% of the dividends received are deducted, the so-called "Dividend Received Reduction" or "DRD", in so far as the parent company has (after deduction of other exempt profits, etc.) sufficient taxable profits.

Prior to the *Cobelfret* case: no carry forward of excess DRD

Consequently, a Belgian company may after deduction of exempt profits or deductible costs have insufficient taxable profit to fully deduct the DRD. The balance or excess DRD is not transferable to a subsequent year and as a result is definitively lost.

Consequently, in practice the dividends are taxed in the same way as ordinary profits even though according to the Parent-subsidiary Directive these dividends must be tax exempt (at least to the extent that they are distributed by EU-subsidiaries).

Belgian participation exemption regime not compatible with EU Parent-Subsidiary Directive

As the Member States cannot unilaterally introduce restrictive measures, the European Court of Justice decided that the Belgian participation exemption regime was not compatible with the terms and objectives of the EU Parent-Subsidiary Directive.

Administrative Circular on the implementation of the Cobelfret case

On 11 May 2009, the Belgian Council of Ministers decided that it will comply with the European Court of Justice decision in the *Cobelfret* case and accordingly on 29 June 2009, the Belgian Ministry of Finance issued a Administrative Circular (Ci.RH.421/597.150.).

This Circular explains how the participation regime must be applied and interpreted in order to be in accordance with the principles of the *Cobelfret* case.

Excess DRD can now be carried-forward to subsequent tax periods

The government has decided that excess DRD can now be carried-forward to subsequent tax periods, provided the requirements for the DRD were met at the time the dividends were received.

The excess DRD is not subject to the limitiations regarding carry-forward of tax losses as mentioned in the Belgian Income Tax Code.

Dividends from companies resident in Belgium or another EU/EEA Member State

The carry forward of excess DRD will apply to dividends from companies resident in:

- The European Union, including Belgium (for dividends paid from 1992, when the Parent- Subsidiary Directive became effective); and
- The European Economic Area (i.e. the European Union, plus Iceland, Liechtenstein and Norway) (for dividends paid from 1 January 1994, when date the EEA Agreement became effective).

For the determination of qualifying carry forward excess DRD, the domestic law participation threshold at the time the dividends were received and not the more stringent threshold of the EU Parent-Subsidiary Directive is applicable, i.e.:

- No minimum participation for the dividends received during the tax years 1992 and 1993.
- Minimum 5% participation for the dividends received during the tax years 1994 up to 2003.
- Minimum 10% participation for the dividends received since tax year 2004.

Procedural steps

The circular also mentions the procedural steps to be taken into account to claim carry forward of the excess DRD.

Dividends received in the tax years 1992 to 2008.

There are three situations:

- If a final assessment has been issued: carry forward of excess DRD is not possible.
- If no final assessment has been issued: carry forward of excess DRD is possible by filing a claim within 6 months starting from the date of the provisional assessment or by filing an ex officio relief within 5 years starting January 1 of the year during which the tax has been levied.
- In case of a pending administrative or court case: carry forward of excess DRD should be accepted in accordance with the principles of the *Cobelfret* case.

Dividends received in the tax years 2009 and subsequent years

For dividends received in the tax year 2009 and subsequent years, the DRD will be limited to the taxable income and any excess DRD on EEA-dividends will be carried forward without limitation.

For the tax year 2009 an annex must be attached to the corporate income tax return. For subsequent years the carry forward of the excess DRD will be included in the corporate income tax return.

Non-EU dividends

As mentioned above, the decision only confirms the incompatibility of Belgium's DRD system in respect of dividends distributed by EU subsdiaries.

In its decision in the *KBC v. Belgium* case and *Beleggen, Risicokapitaal, Beheer NV v. Belgium* case of 4 June 2009, the European Court of Justice confirmed its decision in the Cobelfret case.

However, the European Court of Justice declined to issue a formal ruling on whether dividends received by Belgian companies from other Belgian companies or from companies resident in third countries can be treated less favourably than EU dividends.
Instead, the European Court of Justice referred these questions back to the Belgian courts to decide.

In anticipation of these decisions, tax payers should consider protective action, e.g. by filing an administrative claim, a request for ex officio relief or by claiming excess DRD in a tax return.

TAX TREATY DEVELOPMENTS

1. New Protocol to Cyprus-Russia tax treaty

On 16 April 2009, Russia and Cyprus signed a Protocol to the 1998 income and capital tax treaty between both countries. The Protocol is expected to be ratified by both countries in 2009 and to become effective as from January 1st, 2010.

Exchange of information

The Protocol introduces a new article on the exchange of information which will generally enable the Russian competent authorities to receive information from Cypriot banks, trusts and funds.

Removal of Cyprus from the Russian "Blacklist"

Russia also agreed to remove Cyprus from its blacklist. This means that that dividends received by Russian companies from Cypriot subsidiaries can now qualify for Russia's dividend participation exemption.

Change of taxation of capital gains of real estate companies: not until at least 2014

The major change to the existing treaty is the change of the taxation of capital gains on the sale of shares in real estate property-rich companies.

Currently, the treaty provides for the country of residence of the selling entity to have the taxing right (e.g. Cyprus for Cypriot companies selling shares in Russian property-rich companies). The Protocol generally moves to the latest OECD Model Treaty principle where such gains should be taxable in the country where the real estate is situated.

This amendment to the treaty is not expected to apply until January 1st, 2014, because the Protocol provides for this amendment to become effective on the first day of the
calendar year following four years after the Protocol as a whole enters into force. In the meantime, planning opportunities are likely possible to mitigate any negative implications of this change.

Generally unchanged: dividends, interest and royalties

It is important to note that there are no changes to the nil rates of withholding tax on interest and royalties. Consequently, this Protocol is a positive development in the relationship between the two countries, as it further strengthens the position of Cyprus as the key investment partner into Russia.

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2. Unsuccessful attempts to denounce treaty between Cyprus and Ukraine

On 17 December 2008, the Ukrainian Ministry of Finance has again tried to denounce the Cyprus – former USSR income and capital tax treaty of 29 October 1982, which the Ukraine and Cyprus currently apply in bilateral relations. The initiative failed because the required 226-vote majority was not reached. This was the second attempt in 2008 to unilaterally denounce the treaty.

The Ministry of Finance and the State Tax Administration of Ukraine stated that they would continue pursuing the denunciation of the treaty in 2009.

If the treaty is denounced, Ukraine will obtain the right to tax various types of income paid to Cypriot companies. The Ministry of Finance expressed hopes that the denunciation would persuade Cyprus to sign a tax treaty.

3. Negotiations for a tax treaty between Jamaica and the Netherlands Antilles

On 18 May 2009, the second round of negotiations for a tax treaty between Jamaica and Netherlands Antilles started in Kingston. The first round of negotiations was held in Curacao in January 2009.

4. India to amend tax treaty with Mauritius

India is planning amendments to the tax treaty for the avoidance of double taxation with Mauritius to prevent its misuse for avoiding taxes.

“Amendments to the Indo-Mauritius DTAC (Double taxation Avoidance Convention) to prevent its misuse and enhance exchange of information, including banking information, are being pursued...,” Minister of State for Finance S S Palanimanickam said in a written reply in the Rajya Sabha on 5 August last.

More than 43% of foreign investment inflows into India are routed through Mauritius to take advantage of the tax benefits provided in the treaty.

AUSTRIA EASES BANKING SECRECY

On 1 September 2009, the Information Exchange Implementation Act (the IEIA) was passed by the National Council of the Austrian parliament. The IEIA provides for the exchange of information and administrative assistance with respect to banking information.

Foreign tax authority may now request banking information

A foreign tax authority may now request banking information from the Austrian tax authority, which has so far been covered by the banking secrecy. The banking secrecy for Austrian citizens will however not be affected by the changes.

Subject to certain requirements

An override of the banking secrecy and the exchange of information and administrative assistance with respect to banking information is only possible subject to certain requirements being met:

- The foreign tax authority should prior to the request have utilized all domestic legal ways to receive the information.
- The foreign tax authority should file a special request to generally the Austrian Minister of Finance. There is neither an automatic exchange of information, nor an automatic override of the banking secrecy.
- The exchange of information should be based on a (tax) treaty, which specifically provides for the override of the banking secrecy for tax purposes.
- The foreign tax authorities should demonstrate that the request for information has to be relevant and specific. "Fishing expeditions" are not allowed.

“With the new law passed, Austria now has the means to get off the OECD’s grey list, Finance Minister”, Josef Proell said, as this will help bring Austria up to OECD standards on financial transparency.

From “grey” to “white” list

Austria is the only Member State of the EU on the OECDs “grey” list. Other EU members, Belgium and Luxembourg, have already revised their banking secrecy laws and been removed from the OECD list.
In order to be promoted to the “white” list of jurisdictions that have substantially implemented the internationally agreed tax standard financial centres, countries must sign at least 12 new bilateral fiscal treaties in which they agree to cooperate on tax evasion issues.

The International Tax Planning Newsletter is a quarterly newsletter of The ITPS Group, an independent provider of international tax planning and structure services. It provides these services in the Netherlands, Curacao, (the Netherlands Antilles) Aruba, the British Virgin Islands, Belgium, Luxembourg and Cyprus.

The ITPS Group

INTERNATIONAL TAX PLANNING AND STRUCTURE SERVICES

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.

Clients

The client base of ITPS consists of prominent individuals, including sportsmen and artists, small to large companies, including other professional firms, but also multinational (stock quoted) companies.

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;

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