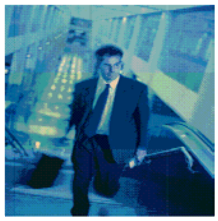
The ITPS Group
INTERNATIONAL TAX PLANNING AND STRUCTURE SERVICES



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International Tax Planning Newsletter

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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 Aruba, Belgium, Belize, the British Virgin Islands, Curacao, Cyprus, Hong Kong, Luxembourg, Malta and the Netherlands.

DUTCH CORPORATE TAX AMENDMENTS EXPECTED TO BE EFFECTIVE 1 JANUARY 2012

On 17 November 2011, the Dutch House of Representatives (“*Tweede Kamer der Staten Generaal*”) passed the Bill containing the tax measures for 2012, the so-called Tax Plan 2012. It is expected that the Senate (“*Eerste Kamer”)* of the Dutch Parliament will accept the Tax Plan before the end of the year and that consequently the measures will be enacted effective 1 January 2012.

Tax Plan 2012

The Tax Plan 2012 includes the following measures regarding dividend tax and corporation tax:

1. Further limitation of interest deduction for takeover holdings;
2. Introduction of an object exemption for foreign permanent establishment profits and losses;
3. Amendments to the substantial interest levy for foreign corporate taxpayers;
4. An anti-abuse measure for distributions by a cooperative, and
5. The introduction of a Research & Development (“R&D”) deduction.

1. Further limitation of interest deduction for takeover holdings

The Tax Bill includes a further limitation of interest deduction for takeover holdings. It is aimed at structures designed to offset interest expenses on the loans (whether third-party loans or related-party loans) taken up to finance the acquisition of (an additional interest in) the (Dutch) target company against taxable profits of this target company, whereby the target company:

i. Is included in a consolidation for corporate tax purposes (so-called “*fiscale eenheid* or fiscal unity”) with the acquirer, or

ii. Enters into a legal (de)merger with the acquirer as a result of which the loan to finance the acquisition and the assets of the target company are held by the same entity.

Under the new rule, such interest - including expenses and foreign exchange results - can only be deducted from the “own” profit of the acquiring entity, i.e. interest can only be deducted from the profits of the (fiscal unity of the) acquirer excluding profits of the target company.

Own profit

As “own” profit of the acquiring entity could be considered:

1. Profits of an entity that forms part of a fiscal unity, if the acquisition has been fully financed with equity or if the total acquisition loan in relation thereto has been paid off; and
2. Profits of all acquired entities that entered into a fiscal unity with the acquiring entity before 15 November 2011.

Two safe harbours

There are two safe harbours:

1. The first € 1 million of interest on acquisition loans will not be affected; and
2. The pertinent interest will only be non-deductible to the extent there is excess acquisition interest, i.e. the total interest on excess acquisition loans with respect to the entities which formed part of a fiscal unity (i) in the year itself and (ii) in each of the previous financial years.

   Acquisition loans are considered excess acquisition loans if in each separate year the total amount outstanding on acquisition loans exceeds a fixed →

percentage of the total amount of acquisition prices. This fixed percentage is 60% in the year the target is consolidated into the fiscal unity with the debtor of the acquisition loan and is reduced in annual steps of 5% until reaching 25% after seven years.

Interest that is not deductible as consequence of the measure can be carried forward to the subsequent year. At the end of the fiscal unity with the target, the amount of carried forward interest could be set off - without limitation - with the future profits of the former parent company of the fiscal unity.

The measure generally applies as of 1 January 2012 with respect to structures established on or after 15 November 2011. Existing structures in which the target and acquiring entity entered into a fiscal unity before 15 November 2011 will in principle be respected.

2. Introduction of an object exemption for foreign permanent establishment profits and losses

Current rules

Under the current rules, losses of a foreign permanent establishment are included in Dutch taxable income and immediately reduce the Dutch taxable base.

Object exemption

The Bill introduces an object exemption, i.e. profits and losses of qualifying foreign permanent establishments are excluded from the Dutch taxable base and thus (with the exception of final losses upon permanent wind-up of a permanent establishment) will no longer be deductible. The object exemption will not be applicable to so-called “passive” permanent establishment to avoid constructions using low-tax countries. The calculation method of profits allocable to a permanent establishment are not changed.

3. Amendments to the substantial interest levy regime for foreign corporate taxpayers

Current rules

Under the current substantial interest levy rule, non-resident corporate taxpayers may be subject to Dutch 25% corporate tax (20% on the taxable amount up to and including € 200,000) on income (including dividends, capital gains and income in respect of a loan receivable on such entity), derived from that entity if:

(i) The investor has a substantial interest (generally an equity interest of 5% of more) in the Dutch company; and

(ii) The substantial interest is not attributable to an enterprise.

Theoretical issue

In practice, this rule has for many years merely been a theoretical issue as the Dutch tax authorities have generally not invoked it.

Request of European Commission

As mentioned in our newsletter of December 2010, on 30 September 2010 the European Commission announced that it had requested the Netherlands to change this rule which it viewed to be discriminatory as it exempts domestic companies from tax on their income from substantial interests, but taxes companies established elsewhere in the EU and EEA on income from substantial interests in a Dutch company if the substantial interest does not belong to an enterprise carried on by that EU or EEA company

New rules

The Tax Bill limits the circumstances under which a foreign entity (i.e. not resident in the Netherlands, which includes entities incorporated under the laws of the Netherlands, but effectively resident outside of the Netherlands) is subject to corporate tax in respect of an interest in a Dutch-resident entity. →

Under the new rules, a non-Dutch-resident entity with a substantial interest will be subject to Dutch corporate tax if:

(i) Its substantial interest can not be attributed to the assets of an active business enterprise of the foreign shareholder (i.e. not held as passive investment) (the existing rule) or, alternatively

(j) The main reason or one of the main reasons for the non-Dutch resident corporate taxpayer to hold a substantial interest in the Dutch resident entity is the avoidance of Dutch personal income tax and/or Dutch dividend tax of another person, e.g. a direct of indirect shareholder of the non-Dutch resident corporate taxpayer (so-called "Purpose Test").

Purpose Test
Regarding the Purpose Test, the State Secretary further clarified that it should be determined whether the non-Dutch resident corporate taxpayer has real significance and what its motives are to hold the substantial interest. The test will not be met if there would not be a higher tax claim without the interposition of that non-Dutch resident corporate taxpayer.

Anti-abuse character
To emphasize the anti-abuse character of the substantial interest levy, this levy will be limited from 25% to 15% if the substantial interest in the Dutch resident entity is only held to avoid the levy of Dutch dividend tax, i.e. not to avoid personal income tax.

Limited or avoided under tax treaty
The substantial interest levy may be limited or avoided under an applicable tax treaty.

Existing advance tax rulings respected
The State Secretary confirmed that existing advance tax rulings confirming that the substantial interest can be attributed to an active business enterprise will be respected.

Only to be levied in abusive cases
Consequently, the tax on substantial interest will generally only be levied in abusive cases where the main aim, or one of the main aims, is to avoid income tax or dividend tax by another person.

This is in particular the case if a substantial interest in a Dutch cooperative is involved, whereby the deciding factor for using the cooperative was to avoid Dutch dividend tax and where the substantial interest does not form part of the business assets of the members of the cooperative.

It may also be the case if a substantial interest in a Dutch company can not be attributed to the assets of an active business enterprise of a shareholder, resident in a country that has not entered into a double tax treaty with the Netherlands.

No levy pertaining to Curacao parent companies in 2012
Please read the article in this newsletter about the headlines of the new Tax Arrangement for the Kingdom of the Netherlands (*Belastingregeling voor het Koninkrijk or BRK)*, wherein the Ministry of Justice has confirmed that during 2012 the Netherlands will not invoke the anti-abuse provision of the Tax Arrangement for the Kingdom of the Netherlands with respect to the non-residents taxation rules and, therefore, the Netherlands will not levy non-resident tax from Curacao parent companies of Dutch companies or Dutch cooperatives till the end of 2012.

4. An anti-abuse measure for distributions by a cooperative

In recent years, Dutch cooperatives have gained popularity in cross-border structuring because of their flexibility from a corporate law perspective, and because under current domestic tax law profit distributions by a Cooperative to its members should not subject to Dutch dividend tax. →

Principal new rule:
not subject to dividend tax

Also under the new rules, the principal rule will remain that distributions by Dutch cooperatives are not subject to dividend tax.

Purpose Test

The Tax Bill introduces however an anti-abuse measure for distributions by Dutch cooperatives that are artificially interposed between a foreign resident parent and a Dutch or foreign resident subsidiary with the main purpose (or one of the main purposes) to avoid Dutch dividend tax or foreign tax of another person, e.g. a person that directly or indirectly holds the membership interests in the Cooperative, without the cooperative having a real significance.

Similar to the substantial interest levy, it should be determined whether the cooperative has real significance and what the motives are for using a cooperative as intermediate holding company.

The State Secretary noted that the Purpose test will not be met if there will not be a higher Dutch dividend withholding tax or foreign tax claim without interposing a cooperative.

15% Dutch dividend tax

In the case of an abusive structure, members in the cooperative whose membership interest cannot be attributed to an enterprise are subject to 15% dividend tax on all distributions to such members.

In the case of such an abusive structure, members in the cooperative whose membership interest can be attributed to an enterprise are only subject to 15% dividend tax if the cooperative directly or indirectly holds shares in a Dutch company and only to the extent of the profits of such a Dutch company held by the cooperative which already existed at the time when the cooperative acquired the Dutch company.

The new rules apply to all cooperatives, regardless of whether they have been used for structures implemented prior to or after 1 January 2012.

Cooperatives with active investors for which a ruling has previously been obtained from the Dutch tax authorities will not be affected by the new rules according to the official commentary. Also, coops that did not obtain a ruling, but which meet the unpublished ruling guidelines, should not be affected.

No levy pertaining to parent companies in Curacao during 2012

Please note our remark on page 4 that the Ministry of Justice has confirmed that during 2012 the Netherlands will not invoke the anti-abuse provision of the Tax Arrangement for the Kingdom of the Netherlands with respect to the non-residents taxation rules and, therefore, the Netherlands will not levy non-resident tax from Curacao parent companies of Dutch companies or Dutch cooperatives till the end of 2012.

5. The introduction of a Research & Development ("R&D") deduction.

The Tax Bill introduces a research and development (R&D) deduction to reduce direct costs of R&D (other than employment costs that relate to R&D, which currently benefit from a (wage) tax incentive). Such R&D deduction will apply in addition to the so called “innovation” box and R&D wage tax incentive.

It goes without saying that we are reviewing the consequences of this and future legislation for all Dutch companies under management by ITPS and that we will take pro-active measures where required. ■

NEW PERMANENT RESIDENTS SCHEME IN MALTA

The High Net Worth Individuals ("HNWI") Residence Schemes

On 15 September 2011, the Malta Permanent Residents Scheme, suspended since December 2010, was replaced by a number of schemes referred to collectively as the High Net Worth Individuals ("HNWI") Residence Schemes. These apply separately to applicants who are EU/EEA and Swiss Nationals and to Non-EU, Non-EEA or Non-Swiss Nationals (hereinafter "Applicants from Third Countries").

Requirements

The Maltese Government has deemed it necessary to modify the previous Permanent Residents Scheme Regulations which were subject to abuse. With a view to limit the applicability of the new schemes to high net worth individuals, applicants under one of the new HNWI Residence Schemes are required to acquire property in Malta worth at least EUR 400,000 to serve as their main residence or rent a property for a minimum of EUR 20,000 per annum for the same purpose. The new HNWIR Schemes also require a minimum stay of 90 days in Malta per year whereas the applicant must not reside in any other country for more than 183 days.

Tax at a flat rate of 15% on remitted income

As under the previous Permanent Residents Scheme, successful applicants (being physical persons who are resident but not domiciled in Malta) are subject to tax at a flat rate of 15% on income sourced outside Malta and remitted to Malta only whereas income sourced in Malta would be taxable at the standard progressive rates. Income arising outside Malta and not remitted to Malta as well as foreign capital gains, even if remitted to Malta, remain outside the scope of the Maltese tax net.

Minimum tax payable

The minimum tax payable under this new scheme, however, has been increased to a minimum of EUR 20,000 plus EUR 2,500 per dependent under the HNWI Residence Scheme applicable to EU/EEA and Swiss nationals and EUR 25,000 plus E 5,000 per dependant under the NNWI Residence Scheme applicable to Applicants from Third Countries.

Financial bond/ health insurance

The latter must also enter into a so called "Qualify Contract" with the Maltese government and commit to a financial bond of EUR 500,000 and EUR 150,000 per dependant. This bond is refundable to the applicant if the applicant renounces to his special tax status under the Scheme within four years. After the fifth year of continuation of the scheme, the bonded money is appropriated by the government. Alternatively, applicants from third countries must renew their visa every three months.

In both cases, sufficient health insurance to cover the applicant and his/her dependants will also be required. This condition was introduced as a reaction to perceived abuse of the local healthcare system by persons under the previous Permanent Residents Scheme. Applicants must also undergo a "fit and proper" test.

Application fee

The application fee has been raised to EUR 6,000.

As was the case with the now defunct Permanent Residence Scheme, significant tax planning opportunities remain available to those having the necessary financial means and criteria to qualify under one of the schemes and who can shift their effective residence to Malta.

ITPS (Malta) can assist prospective applicants in connection with the filing of their application under the HNWIs Scheme as well as provide any legal and tax assistance in connection with their relocation to and stay in Malta. ■

NEW LEVY OF EUR 350 ON CYPRUS COMPANIES

On 26 August 2011 the House of Representatives of Cyprus passed laws to combat the global economic crisis and to reduce the sovereign deficit of Cyprus.

Fixed annual levy for companies
Amongst the measures an annual levy of EUR 350 must be paid by every company registered with the department of the Registrar of Cyprus Companies except for dormant companies and companies that do not own any assets or own property situated in the Turkish occupied area of Cyprus.

Furthermore if a Cypriot company belongs to a group of Cypriot companies the levy is capped at EUR 20,000 for the entire group irrespective of the number of entities within the group.

Payment of the levy
The annual charge for 2011 must be paid by 31st of December 2011, whereas the levy for 2012 onwards must be paid by 30th of June of each year.

For newly registered Cypriot companies, the first annual charge is payable by 30th June in the year following incorporation. For example, companies registered in 2011, will pay their first annual charge by 30th of June 2012.

Consequences of not paying the levy
Late payment of the levy of up to 2 months will give rise to a 10% penalty. The levy is further increased to 30% if the levy is paid within five months from the due date.

If the levy is not paid within five months from the due date, the department of the Registrar of Companies and Official Receiver will remove the company from the list of registered companies by invoking the procedure for striking off companies (Section 327 of the Companies Law, Chapter 113 of the laws of Cyprus).

If the company is removed from the list of registered companies and within two years after the removal the amount of EUR 500 is paid to the department of the Registrar of Companies and Official Receiver the Cyprus company may be reinstated to the list of active companies.

For periods exceeding two years the charge is increased to EUR 750. ■

BRUSH-UP: RE-DOMICILIATION OF A CYPRUS COMPANY OUT OF ITS JURISDICTION

This Brush-up focuses on the re-domiciliation of a Cyprus company out of its jurisdiction.

Re-domiciliation
Corporate re-domiciliation is the process by which a company moves its domicile from one jurisdiction to another by changing the country under whose laws it is registered or incorporated, while maintaining the same legal identity.

Reasons for re-domiciliation
Reasons for re-domiciliation may include to take advantage of more favourable tax laws, or double tax treaties, less stringent regulatory provisions, to align their place of registration with their shareholder base or to access specialist capital markets.

Possible in Cyprus since 28 July 2006
Re-domiciliation of companies in and out of Cyprus became theoretically possible on the 28th July 2006, when the House of Representatives enacted the Law 124(I)/2006 which amended the Companies Law Cap. 113 and made the transferring of the seat of a company to and from Cyprus possible.

Regulations issued by the Council of Ministers in 2007, which provided details of the procedure to be followed, the forms to be filed and the fees payable, made it also possible in practice.

Requirements
In order to re-domicile a Cyprus company out of its jurisdiction the Cyprus company must:

1. Obtain the consent of the Registrar of Cyprus Companies and,
2. Apply to a foreign country to continue its existence under the jurisdiction of that country, provided the laws of that country allow it. Countries that allow re-domiciliation include the British Virgin Islands, Luxembourg, Malta and Switzerland.

Obtaining the consent of the Registrar of Cyprus Companies
A prerequisite to obtain the consent of the Registrar of Cyprus Companies is that the company's memorandum and articles of association contain a provision allowing the company to change its seat and re-domicile. Otherwise, the company must amend them as per the provisions of the law.

In order to obtain the consent of the Registrar of Cyprus Companies, an application must be prepared and submitted together with a statement signed by the director(s) of the company which according to section 354IA of the Law must contain the following information:

1. Number of company;
2. Name of company;
3. Proposed name under which it wishes to be registered in the foreign country;
4. Country or jurisdiction where the company intends to continue;
5. Name and address of the relevant overseas authority;
6. Date of the proposed transfer of the registered office of the company outside Cyprus;
7. Nature of company's activities;
8. Address of the registered office of the company.

Documents to be provided
Moreover, the following documents should be provided to the Registrar of Cyprus Companies:

1. Special resolution of the general meeting of the shareholders of the company authorizing the filing of the application for re-domiciliation and approving the interim financial statements of the company;
2. Certified and audited interim financial statements according to Section 354 IB (a) of the Law, showing the market value of the assets of the company; →

3. Completed and duly signed Declaration of Solvency of the company;
4. Documents from the relevant authorities which confirm that the company does not owe any taxes and customs duties according to Section 354 IB (1) (h);
5. In case that the company is carrying out in Cyprus or from Cyprus activities which requires specific permit, that a consent of the relevant Cyprus supervisory or regulatory authority for the continuation of the company abroad was presented to the Registrar of Cyprus Companies.
6. If the company is listed on the stock exchange, a consent from the Stock Exchange of the Cyprus Council of Securities and Exchange Commission has been obtained and submitted;
7. Consent from the Cyprus Securities and Exchange Commission (where applicable);
8. Statement in lieu of prospectus or corresponding document for public companies according to Section 354 IB (1)(D).
9. Statement by a director of the company that all relevant fees in relation to the application for re-domiciliation have been paid; that there are no pending court cases or liquidation procedures against the company and that all taxes and duties have been paid by the company.

Publication

The company must publish a notice of the special resolution in two daily newspapers. Proof of the publication must be submitted to the Registrar of Cyprus Companies within fourteen days from the date of the publication.

After three months, if there is no objection made by a creditor of the company to the court and provided that all requirements and documents mentioned above are met and submitted, the Registrar of Cyprus Companies will give its consent for the re-domiciliation of the Cyprus company to a foreign country.

A Cyprus company, after having obtained the consent of the Registrar of Cyprus Companies, can apply to a foreign country to continue its existence under the jurisdiction of that country, provided the laws of that country allow it.

De-registration

The company then must provide a copy of the Certificate of Continuation issued by the foreign registry to the Registrar of Cyprus Companies and the Registrar deletes its name from its Registry and issues a Certificate of Deletion.

The Registrar of Cyprus Companies retains a record of all the companies for which the Registrar gave its consent to continue in another country, the record containing all the relevant details. ■

HEADLINES OF THE NEW TAX ARRANGEMENT BETWEEN THE NETHERLANDS AND CURACAO

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 avoidance of double taxation on income and capital between the Netherlands and Curacao.

Should become effective 1 January 2013
The new BRK should become effective 1 January 2013 and has been based on the OECD Model Convention. The most important headlines are the following:

1. The introduction of a zero percent dividend withholding tax rate;
2. The (temporary) reduction of the dividend withholding tax from 8.3% to 5%;
3. The Netherlands will not levy non-resident tax from Curacao parent companies of Dutch subsidiaries in 2012.

1. The introduction of a zero percent dividend withholding tax rate

The lowest dividend withholding tax under the current BRK is 8.3%. This applies to a Curacao company with an interest of at least 25% in the Dutch company.

A new "limitation on benefits" provision
A zero percent rate will be introduced on dividends distributed by Dutch companies to Curacao parent companies which hold at least an interest of 25% and qualify under a new "limitation on benefits" provision. It has not yet been clarified what this provision will look like.

2. The (temporary) reduction from 8.3% to 5%

The applicable BRK rate on dividends distributed by Dutch companies to Curacao parent companies which will not qualify under the above mentioned "limitation on benefits" provision will be 15%, which is the current domestic Dutch dividend withholding tax rate.

Reduced 5% up to and including 2019
However, this rate will be reduced to 5% for the period up to and including 2019 for distributions of profits by Dutch companies to Curacao parent companies which hold an interest of at least 25%. Therefore, for these structures it is recommended, if possible, to defer dividend distributions until after 1 January 2013.

3. No Dutch substantial interest tax in 2012.

As mentioned in the article about the Dutch Tax Plan 2012, the Dutch tax on substantial interest will generally only be levied in abusive cases where the main aim, or one of the main aims, is to avoid income tax or dividend tax by another Person, e.g. a direct of indirect shareholder of the non-Dutch resident corporate taxpayer

Anti-abuse rule
Article 35a of the BRK 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. Consequently the Netherlands could invoke the Dutch tax rules on substantial interest as per 1 January 2012.

Not invoked during 2012
The headlines confirm that during 2012 the Netherlands will not invoke this anti-abuse provision of the BRK with respect to the non-residents taxation rules and, therefore, the Netherlands will not levy non-resident tax from Curacao parent companies of Dutch companies or Dutch cooperatives till the end of 2012.

It goes without saying that we will keep you up-dated about the new BRK and that we will take pro-active measures where required. ■

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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.