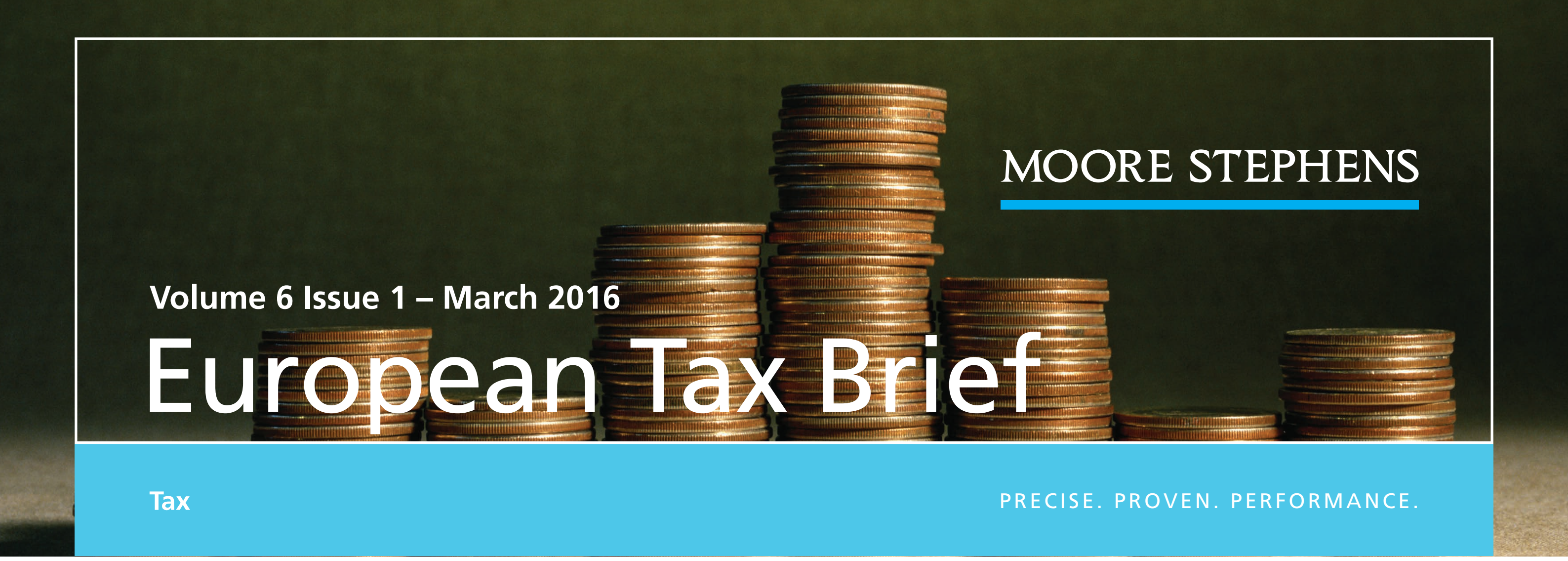


MOORE STEPHENS

Volume 6 Issue 1 – March 2016

European Tax Brief

Tax

PRECISE. PROVEN. PERFORMANCE.

Editorial

Welcome to the latest issue of Moore Stephens *European Tax Brief*. This newsletter summarises important recent tax developments of international interest taking place in Europe and in other countries within the Moore Stephens European Region. If you would like more information on any of the items featured, or would like to discuss their implications for you or your business, please contact the person named under the item(s). The material discussed in this newsletter is meant to provide general information only and should not be acted upon without first obtaining professional advice tailored to your particular needs. *European Tax Brief* is published by Moore Stephens Europe Ltd in Brussels. If you have any comments or suggestions concerning *European Tax Brief*, please contact the Editor, Zigurds Kronbergs, at the MSEL Office by e-mail at zigurds.kronbergs@moorestephens-europe.com or by telephone on +32 (0)2 627 1832.

Inside

Belgium

Notional-Interest Deduction does not require substance

A Belgian court has held that there is no substance requirement for a Belgian company to claim the notional-interest deduction.

The case concerned a Finnish group that acquired a Russian power plant using a Belgian finance company. The company managed and held only the single loan used in the acquisition and had no employees. It claimed the NID on the increase in its paid-up capital when the Finnish company contributed the loan back to the Belgian company.

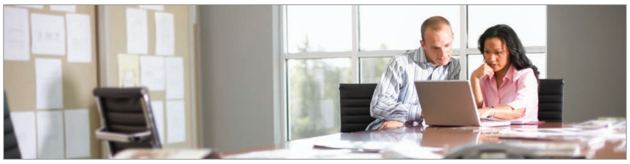
The tax authorities maintained that the transactions were abusive on the grounds that they conferred an abnormal advantage on the Belgian company, but the Antwerp Court of Appeal rejected this approach. It held that the interposition of the Belgian company was not abnormal and that the NID legislation did not require the company claiming the deduction to have sufficient substance.

The tax authorities may appeal further, and a change in the law cannot be ruled out if that appeal were to fail.

koen.vandorpe@moorestephens.be
an.lettens@moorestephens.be

1.6995% withholding tax to be levied on certain outbound dividends

As from 28 December 2015, certain foreign companies having a holding of less than 10% but with an acquisition value of EUR 2.5 million or more in a Belgian company are subject to a reduced withholding tax of 1.6995%, provided certain other conditions are met.



Holdings of less than 10% do not qualify for exemption from withholding tax under the EU Parent-Subsidiary Directive. Under Belgian law, the exemption also extended to domestic dividends under the same terms, except that Belgian corporate shareholders could also claim the exemption if their holding amounted to less than 10% but had been acquired for EUR 2.5 million or more. The non-availability of this alternative threshold to foreign shareholders was found to be in breach of European law by the Court of Justice of the European Union in the *Tate & Lyle* case (C-384/11).

In response to the judgment, Belgium has now extended the alternative threshold to corporate shareholders resident in another EEA state or a third country that has a tax treaty with Belgium allowing for exchange of information.

To qualify, the shareholding must still be held for an uninterrupted period of at least one year.

koen.vandorpe@moorestephens.be
an.lettens@moorestephens.be

Excess-profit scheme ruled to be unlawful State aid

At the conclusion of its latest tax investigation, the European Commission has held that Belgium's 'excess profit' scheme, under which multinationals could adjust their Belgian taxable profits downwards by comparison with the (lower) profits that would have accrued to a hypothetical stand-alone company in a comparable situation, constitutes illegal State aid. The Commission has consequently ordered Belgium to recoup approximately EUR 700 million in tax from the companies that have benefited.

It is likely that the Belgian Government will appeal against the ruling.

koen.vandorpe@moorestephens.be
an.lettens@moorestephens.be

'Speculation' tax introduced

With effect from 1 January 2016, Belgium is charging a 33% tax on 'speculative' capital gains derived by individuals (non-residents as well as residents). Gains are defined as speculative if they arise from disposals made within six months of acquisition.

The tax applies only to gains from the disposal of listed securities, profit certificates, warrants, put and call options and derivatives held other than for business purposes. Involuntary disposals are excluded, as are disposals of shares in UCITS and regulated real-estate investment funds. The last-in, first-out (LIFO) method will be used to identify securities for this purpose.

Belgium does not have a capital gains tax applicable to individuals generally.

koen.vandorpe@moorestephens.be
an.lettens@moorestephens.be

Belgium threatens withdrawal from FTT

See under 'European Union'.

VAT threshold raised to EUR 25 000

Belgium has raised the annual turnover threshold for compulsory VAT registration from EUR 15 000 to EUR 25 000 as from 1 January 2016.

The threshold applies only to businesses established in Belgium. Businesses established abroad and making taxable supplies in Belgium must register whatever the value of the supplies.

koen.vandorpe@moorestephens.be
an.lettens@moorestephens.be

European Union

EU publishes VAT Road Map

The European Commission has issued a Roadmap ahead of the release this spring of its Action Plan for a 'simple, efficient, and fraud-proof definitive' VAT system tailored to the single market. According to the Roadmap, the Action Plan will set out the main features of a definitive VAT régime for intra-EU trade, centred on the use of the destination principle. This provides that supplies should be taxed where they are effectively used and enjoyed.

zigurds.kronbergs@moorestephens-europe.com

Commission launches ambitious anti-avoidance package

On 28 January, the European Commission issued an ambitious new anti-avoidance package as part of its programme to counter aggressive tax planning and align Member States' responses to the OECD's BEPS package.

The Commission's package contains:

- A proposed new anti-avoidance Directive
- Recommendations to Member States on adapting their tax treaties
- A proposed revision of the Administrative Cooperation Directive
- A communication on external strategy (how to interact with third countries)

According to the Commission, '[The package] is part of the Commission's ambitious agenda for fairer, simpler and more effective corporate taxation in the EU. [It] contains concrete measures to prevent aggressive tax planning, boost tax transparency and create a level playing field for all businesses in the EU.

It will help Member States take strong and coordinated action against tax avoidance and ensure that companies pay tax wherever they make their profits in the EU.'

Anti-avoidance Directive

The proposed new Directive provides for legally binding measures in six specific areas:

- Deductibility of interest: the net amount of interest expense a company would be allowed to deduct in any taxable period would be limited to a defined percentage of its gross earnings. Similar rules already exist in several Member States (e.g. Germany). Financial undertakings would be exempt from the restriction for the time being.
- Exit taxation: Member States would be required to impose a tax on the unrealised capital gains accruing to companies removing their assets out of the taxing jurisdiction of that state. Many Member States already have such rules; in order to comply with EU law, deferment and instalment options would have to be offered in respect of unrealised gains.
- Switch-over: in order to prevent the entry and circulation in the European Union of tax-free income originating in third countries, Member States would have to tax income from foreign (third-country) permanent establishments where it is taxed at a rate lower than 40% of the rate in the Member State concerned and give a credit for that tax, instead of exempting foreign-branch income, as many do currently.
- A general anti-abuse rule: all Member States would be required to write such a rule into their tax legislation.
- CFC rules: although many Member States have CFC (controlled foreign company) rules, several do not. Under CFC rules, income (largely passive income) realised in low-tax jurisdictions by subsidiary companies controlled by a parent company in a Member State are attributed to that parent company. CFC rules would have to be adopted by all Member States.
- Hybrid mismatches: this proposed rule would tackle the situation where income qualifies for a deduction in the Member State in which it is paid but either escapes taxation in the Member State in which it is received or also qualifies for a deduction there. An example is a payment treated as deductible interest in one State but as a tax-free dividend in the other. Under the proposed Directive, the Member State of receipt would have to follow the treatment of the payment in the Member State of payment.

zigurds.kronbergs
@moorestephens-europe.com

FTT: Now we are ten, perhaps even nine

At the meeting of EU Finance Ministers at the beginning of December, the participating countries decided to press on with proposals for the controversial financial transactions tax (FTT), to be introduced under the special enhanced cooperation procedure.

Estonia, previously one of the 11 states involved, has dropped out. The remaining ten are now committed to finalise details by the end of June 2016. Essential features such as the rates and the scope of the tax are yet to be agreed.

In late January, however, the Belgian Government announced that it is not in agreement with the latest proposals for the FTT, placing the whole project in danger.

Because there is no unanimity on FTT, to the concept of which a number of Member States have strong objections, those countries wishing to introduce such a tax have had recourse to a special procedure known as the 'enhanced cooperation procedure'. Under the enhanced cooperation procedure, a minimum of nine Member States must agree to introduce a measure.

As officials have tried to reach compromise on the detailed rules, Belgium has signalled that it would only give its consent to a modified and less comprehensive form of the tax and moreover only if it were to be introduced by all Member States, a condition that will clearly not be satisfied. Belgium's original consent was given by the previous governing coalition, which was of a different political complexion.

Belgium's withdrawal would leave just nine Member States, the bare minimum (but still including France and Germany) committed to proceed.

The earliest starting date is now likely to be 1 January 2017.

zigurds.kronbergs@moorestephens-europe.com

European Union replaces Savings Directive

European Union Finance Ministers meeting together on 9 November formally repealed the Savings Directive, under which Member States were obliged to inform each other of deposits and other accounts held in their financial institutions by individuals resident in the other state or levy a 35% withholding tax on the interest.

The Savings Directive has been made redundant by much broader automatic exchange of information (AEOI) under amended existing mutual administrative assistance Directives.

Certain non-member states such as Andorra and Switzerland had parallel agreements with the European Union, which the Union is now renegotiating to broaden their scope accordingly.

These negotiations are well advanced, and in some cases concluded, with Andorra, San Marino, Monaco and Liechtenstein. Thus, an agreement with Liechtenstein was signed on 28 October, with San Marino on 8 December, and with Andorra on 12 February, whereas an agreement with Monaco was initialled on 22 February.

The European Union has already concluded an AEOI agreement with Switzerland.

zigurds.kronbergs
@moorestephens-europe.com

Luxembourg's ruling given to McDonald's under EU probe

See under 'Luxembourg' below.

zigurds.kronbergs@moorestephens-europe.com

Exchanging bitcoins for legal currencies is VAT-exempt

The Court of Justice of the European Union has held that exchanging bitcoins and other cryptocurrencies for legal currencies and vice versa is an exempt transaction in means of payment. It did so in the case *Skatteverket v David Hedqvist* (Case C-264/14).

Some EU Member States (e.g. Belgium, Spain and the United Kingdom) had already adopted this position, whereas others took the opposite view (i.e. that such transactions were liable to VAT). This difference of opinion, now definitively settled by the Court in favour of exemption, hinged around the interpretation of Article 135(1)(e) of the VAT Directive, which exempts, inter alia, 'transactions ... concerning currency, bank notes and coins used as legal tender...'

Although bitcoins are not legal tender, the Court held that the exemption had in this case to be applicable and in order to preserve fiscal neutrality had to include all pure means of payment, and not be limited to 'traditional' currencies.

The corollary of the decision is that persons providing the exchange services may not deduct input VAT incurred in their provision.

t.vanden.berg@mth.nl

Exemption for management of investment funds clarified

In a landmark judgment, the Court of Justice of the European Union has held that the management of collective investment funds is exempt from VAT provided that the fund is subject to specific state supervision (or directly supervised under EU law, such as the UCITS Directive).

The VAT Directive (112/2006/EC) already provides in Article 135(1)(g) that the management of a 'special investment fund' shall be exempt from VAT. In the case in question (*Staatssecretaris van Financiën v Fiscale Eenheid X NV*, Case C-595/13), the taxpayer was a collective investment fund in real property in the form of a limited-liability company.

The Court held that a fund of this description for investment in real property could qualify as a 'special investment fund' within the meaning of the VAT Directive provided that it was subject to specific state supervision, in the absence of supervision under EU law. The management of the fund itself (including the selection, purchase and sale of the assets) would thus be exempt from VAT. However, the Court also held that management of the assets themselves (in this case, of the real property) was not so exempt.

The impact of the judgment is not limited to funds investing in real property but to all collective investment funds satisfying the appropriate criteria. Several Member States, including Belgium, France, Germany and the United Kingdom (as well as the Netherlands, where the case originated) will all need to amend their law or practice to extend exemption to entities comparable to the company in the case.

t.vanden.berg@mth.nl

Sale of no-show air tickets liable to VAT

The European Court (CJEU) has held that the sale of non-refundable airline tickets that are never used due to the traveller's non-appearance are nevertheless liable to VAT just as if the traveller had used the service.

In the case (actually the joined cases *Air France-KLM* and *Hop!-Brit Air SAS*, C-250/14 and C-289/14), the airlines concerned had ceased to account for VAT on revenue from tickets that were unused (but the revenue from the sale of which they nevertheless retained). The French tax authorities had issued assessments to VAT in respect of the revenues so retained.

The CJEU ruled that the consideration for the issue of the ticket is not given for the physical presence of the passenger at boarding but for the passenger's right to use the service, regardless of whether that right was exercised

t.vanden.berg@mth.nl

France

Participation exemption amended

The French rules under which a 100% exemption was available for intercorporate dividends within the same tax group have been amended, following an adverse judgment of the Court of Justice of the European Union (CJEU), which held them to be unlawful, as representing an unjustified restriction on the freedom of establishment guaranteed by Article 49 of the Treaty on the Functioning of the European Union. The CJEU so held on 2 September 2015, in the *Groupe Steria SCA* case (C-386/14).

Under French law, a company holding at least 5% of the voting share capital in another company may, subject to certain other conditions, be entitled to exemption from corporate income tax on 95% of the net dividend received from that other company. The remaining 5% remains in charge to tax as representing non-deductible expenses.

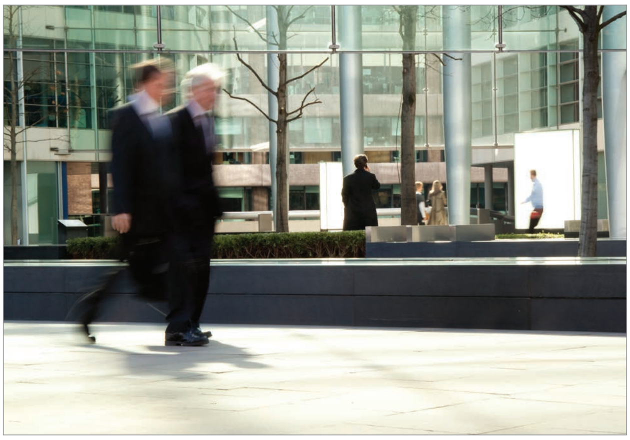
However, within a tax group or fiscal unity, the 5% deduction could be eliminated. The discrimination lay in the fact that only French-resident companies or the French permanent establishments of foreign companies could be included in a French tax group. Consequently, dividends from foreign companies continued to be exempt to the extent of 95% only, whereas dividends from French-resident companies in the same circumstances but within the tax group were wholly exempt.

Under new rules applicable to accounting periods beginning after 31 December 2015, the 100% exemption within a group has been abolished and replaced by a 99% exemption; the remaining 1% remains in charge to tax as representing non-deductible expenses. In order to avoid discrimination against foreign companies, the 99% rule is also available for dividends from companies resident in other EU or EEA states which are not members of a French tax group, provided that the company in question:

- Is subject to a corporate tax equivalent to French corporate tax in another EU Member State or in an EEA state that has concluded an administrative assistance agreement with France with regard to tax fraud and tax evasion and
- Would be eligible to be a member of a French tax group if it were established in France

Dividends from companies not satisfying these conditions remain subject to 95% exemption, provided the requisite conditions are satisfied, as previously

nmilbradt@coffra.fr



Consultation on a PAYE system to be held

France is virtually alone among developed countries in not having a system in place for deducting tax (and social security contributions) from payments of wages and salaries to employees. Instead, French taxpayers deriving employment income are required to declare it in their tax returns and pay the tax due in respect of the previous year during the current year. The Government has announced that consultation is to be held with a view to introducing a pay-as-you-earn system (*prélèvement à la source*) as from 1 January 2018.

nmilbradt@coffra.fr

VAT still due on no-show air tickets

See under 'European Union' above.

Germany

Interest-limitation rule may be unconstitutional

Germany's supreme court in tax litigation, the Bundesfinanzhof, has taken the view in a case brought before it that the interest-limitation rule for corporate tax may be in breach of Article 3 of the German Constitution, which enshrines the ability-to-pay principle, and has referred the question to the Constitutional Court (*Bundesverfassungsgericht*). The judgment of that court will be final.

Under the interest-limitation rule, excess interest expense over EUR 3 million may only be deducted for the purposes of corporate tax in any year to the extent that it does not exceed 30% of EBITDA (earnings before interest, tax, depreciation and amortisation). There are other safeguards.

sven.helm@moorestephens.de

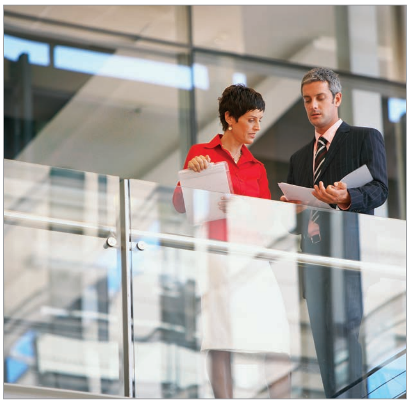
Loss-transfer rules relaxed

Germany has relaxed its rules on a transfer of losses following a reorganisation.

Under rules introduced with effect from 1 January 2008, changes in ownership of a company over a five-year period can lead to a partial or total forfeiture of the company's brought-forward losses.

A direct or indirect change in ownership of between 25% and 50% of the shares over the five-year period leads to a pro-rata forfeiture of the losses. However, in cases where more than 50% of the shares change hands within that period, the losses are wholly forfeited.

These rules originally did not include any exception for intra-group transfers.



Therefore, a change of ownership at a higher level could also result in a forfeiture of losses.

With effect from 1 January 2010, a rather narrow intra-group restructuring exception to the change-in-ownership rules was introduced. This exception applies where the 'same person' directly or indirectly holds a 100% participation in both the transferor and transferee entities.

That exception has now been extended with retroactive effect from 1 January 2010. The extended exception applies to changes of ownership within a 100%-controlled group, including a situation where the ultimate parent entity is the transferor or transferee entity and is held by more than one person. Furthermore, the ultimate shareholder may be a partnership or an individual, as well as a company

sven.helm@moorestephens.de

Ireland

Revenue turns spotlight on tax avoidance

The Irish tax authority, Revenue, has published a new page on its website, defining what it means by 'tax avoidance' and the weapons (including but not limited to the General Anti-Avoidance Rule) it has at its disposal to counter avoidance. The web page contains a definition of 'tax avoidance' and the advice relates to transactions that begin after 23 October 2014 only.

According to the website, tax avoidance 'can be described as using tax reliefs and allowances in a way in which they were not intended to be used or seeking to re-label or re-characterise a transaction undertaken primarily to seek to claim a tax advantage and not primarily for business reasons.'

eoghan.bracken@moorestephensnathans.com

Bank levy extended

Ireland's bank levy, originally designed to expire in 2016, is to be extended for a further five years, to 2021, but the method of calculation is to be reviewed.

This measure was announced as part of the Budget speech made to the Dáil by the Minister of Finance on 13 October 2015.

eoghan.bracken@moorestephensnathans.com

Italy

Major changes to corporate taxation

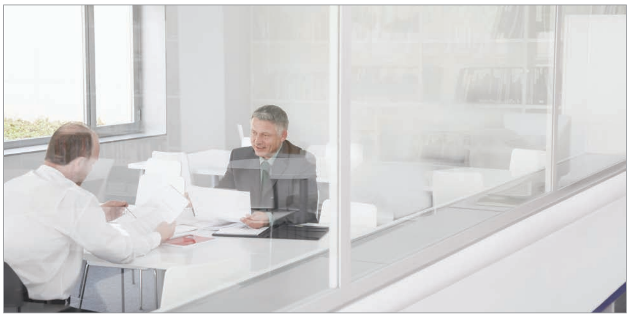
Wideranging changes to cross-border aspects of Italian taxation have been enacted under Legislative Decree No 147.

The changes include:

- Dividends received from non-resident controlled companies will from 2016 be included in earnings before interest, tax, depreciation and amortisation (EBITDA) for the purposes of the restriction on the deduction of interest (generally limited to 30% of EBITDA).
- From 2015, expenditure related to transactions between Italian-resident taxpayers and enterprises located in a blacklisted (tax haven) jurisdiction will be deductible up to their fair-market value, subject to the provision of proof by the taxpayer that the transaction had a real business purpose.
- Qualifying Italian permanent establishments of foreign companies resident in another EU or EEA country that has an agreement with Italy for the effective exchange of information are now allowed to join an Italian tax-consolidated group, with effect from 2015.
- With effect from 2016, the 'authorised OECD approach' to attribution of profits to an Italian permanent establishment has been adopted, and the 'force of attraction' principle previously used has been abandoned. Under the OECD approach, the permanent establishment is treated as if it were a separate and independent enterprise engaged in the same or similar activities.
- Companies transferring their residence into Italy from a jurisdiction that allows adequate exchange of information are now allowed to step up the tax basis of their assets to their fair market value, with effect from 2015.

paoloborghi@studiopdb.it

Corporate and withholding taxes to be cut in 2017



Italy will reduce its rate of corporate income tax (IRES) from 27.5% to 24%, with effect from 1 January 2017. From the same date, the reduced rate of withholding tax on qualifying dividends to EEA companies will be further reduced, from 1.375% to 1.200%.

These and other measures are included in a Stability Act (Law 208 of 28 December 2015), which took effect on 1 January this year.

paoloborghi@studiopdb.it

Patent-box rules clarified

The detailed rules of Italy's new patent-box régime for income from intellectual property (IP) have been set out in a Ministerial Decree of 30 July 2015, published on 20 October.

Details include:

- 50% exemption from 2017 from corporate income tax (IRES) and the regional tax on productive activities (IRAP) for qualifying income (in 2015, exemption is limited to 30%, and will be limited to 40% in 2016)
- 100% exemption for capital gains from qualifying IP if at least 90% of the proceeds are reinvested within two years in R&D activities
- The exemption is available to individuals, companies and commercial partnerships and non-residents with a permanent establishment in Italy to which the qualifying IP may be attributed. The latter must be resident in a jurisdiction that has a tax treaty with Italy allowing for effective exchange of information
- Qualifying IP includes copyrighted software, industrial patents, trademarks, designs and know-how.

paoloborghi@studiopdb.com

Luxembourg

Luxembourg to appeal against Fiat Finance ruling

Luxembourg has announced that it will formally appeal against the European Commission's decision that its tax arrangement with Fiat Finance constituted unlawful State Aid (see below). Luxembourg joins the Netherlands, which is also appealing against the Commission's similar decision concerning the ruling granted to Starbucks Manufacturing by the Netherlands tax authorities.

If the appeals fail, the respective governments will be required to claw back some EUR 30 million or so in tax from the two groups concerned.

The European Commissioner for Competition, Margarethe Vestager, ruled in October that the transfer-pricing arrangements in place between Fiat Finance and Trade and Luxembourg on the one hand, and Starbucks and the Netherlands on the other hand, constitute unlawful State Aid and has demanded that the two Member States concerned claim back the tax reliefs unlawfully given.

The Commission's rulings on similar arrangements enjoyed by Amazon (also with Luxembourg) and Apple (in Ireland) are expected soon.

evelyne.guillaume@moore-stephens.lu

McDonald's and Luxembourg next in EU firing line

The European Union's Competition Commissioner, Margarethe Vestager, announced in December that her office was opening a State-Aid investigation into the tax ruling given by Luxembourg to the multinational burger chain.

Specifically, the Commission will investigate two tax rulings under which McDonald's Europe Franchising, a Luxembourg company, pays virtually no corporate tax in Luxembourg despite recording substantial taxable profits (amounting to over EUR 250 million in 2013).

The majority of these profits are derived from the royalties that franchisees in Europe and Russia pay the company for the right to use the McDonald's brand and services. Besides its headquarters in Luxembourg, the company has a Swiss branch and a US branch. The royalties are attributed to the US branch.

Under Luxembourg law and the tax treaty between Luxembourg and the United States, the US branch constitutes a permanent establishment there on the grounds that it has sufficient activities in the United States; hence, no Luxembourg tax is due on the royalties attributed to the US branch. However, in the view of the United States tax authorities, the US branch's presence and activities are insufficient to give rise to a taxable trade or business in the United States, so no US tax is due on the royalties, giving rise to double non-taxation.

The Commission believes in particular that, by not requiring McDonald's to prove that the royalties are subject to tax in the United States before exempting them from tax in Luxembourg, the Luxembourg tax authorities may have conferred a selective advantage on McDonald's, not available to other companies in the same circumstances, which would be in breach of the treaty provisions on State Aid.

Luxembourg rejects the Commission's contention but will cooperate fully with the investigation.

This move follows the conclusion of two previous State-Aid investigations into the tax treatment by Luxembourg of Fiat Finance and by the Netherlands of Starbucks Manufacturing (see above).

evelyne.guillaume@moore-stephens.lu

Abolition of 80% patent deduction

Luxembourg is to abolish the previous 80% deduction for income and gains derived from most kinds of income from intellectual property (including software copyrights, patents and trademarks) – IP. Subject to transitional provisions, the abolition takes effect from 1 July 2016. The exemption from corporate net wealth tax of IP rights is also to be abolished, from 1 January 2017. However, IP rights acquired or developed before 1 July 2016 may benefit from a 'grandfathering' period of five years, expiring on 30 June 2021 (or 1 January 2022 for net wealth tax.

The grandfathering period for IP rights acquired after 31 December 2015 from a related party will be limited to 31 December 2016, unless the rights qualified for a similar régime in the hands of the transferor.

These reliefs and exemptions are to be replaced by BEPS-compliant régimes; further details are awaited.

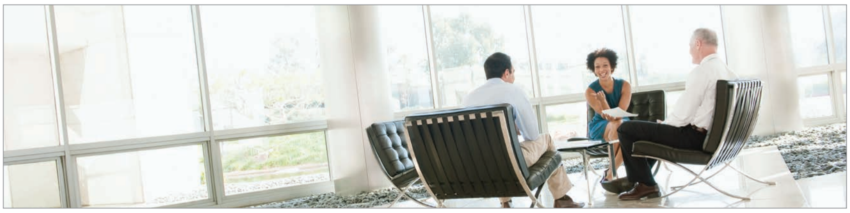
evelyne.guillaume@moore-stephens.lu

Moldova

Moldova set to introduce transfer-pricing rules

Moldova has published draft transfer-pricing rules, based broadly on OECD guidelines, which it intends to introduce no earlier than 1 April 2016.

andrei.stan@moorestephens-ksc.md



Netherlands

30% ruling: new minimum salaries

Under the favourable expatriate tax régime (known as the '30% ruling') operating in the Netherlands, one of the conditions is that the qualifying expatriate be paid a salary equal to or greater than a fixed minimum. For 2016, those minima are EUR 28 041 per annum for individuals under 30 and having a Master's or PhD degree, and EUR 36 889 per annum for all others.

r.vanden.brink@mth.nl

Netherlands to appeal EU Starbucks ruling

The Netherlands Government has confirmed that it will formally appeal against the EU Commission's ruling that the advance pricing agreement with Starbucks Manufacturing constituted unlawful State aid.

The Government cites the Commission's use of the comparable uncontrolled price (CUP) method instead of the transactional net margin method (TNN) and its non-application of the arm's length principle as the main grounds for its appeal.

The two methods concerned are alternative methods used to arrive at an estimate of arm's length prices for transfer pricing. In almost all developed economies, tax authorities have the right to adjust tax computations to reflect arm's length prices in transactions between taxpayers and related parties (however defined, and not necessarily only foreign related parties).

r.vanden.brink@mth.nl

Lack of substance may invalidate certain Netherlands tax rulings

Consequent upon the transposition into Netherlands domestic law of the general anti-abuse rule introduced into the EU Parent-Subsidiary Directive, the Netherlands tax authorities have warned that certain existing advance tax rulings may have become invalid on 1 January 2016.

The rulings involved are those where in certain situations a non-resident entity with a 5% or greater holding in an entity resident in the Netherlands or which is a member of a cooperative resident in the Netherlands does not have sufficient substance.

Unless entities affected contact the tax authorities before 1 April 2016 indicating their intention to comply with the substance requirements, the rulings will become invalid and dividends and gains from their participations will become taxable. Even where the affected entities comply with this requirement, any gains or distributions made or received after 31 December 2015 and the date on which the substance requirements are first met will be subject to tax in the Netherlands.

However, this does not necessarily mean that tax will actually be levied in these circumstances. In most of the tax treaties concluded by the Netherlands, the capital gains on shares are allocated to the state of residence of the taxpayer and not to the Netherlands.

r.vanden.brink@mth.nl

New transfer-pricing documentation requirements

As from 1 January 2016, Netherlands entities (and Netherlands permanent establishments) that are part of a group with a consolidated turnover of at least EUR 50 million are obliged to include a master file and a local file in their transfer-pricing documentation. The existing documentation requirements remain applicable for group members resident in the Netherlands and part of a group with a consolidated turnover of less than EUR 50 million.

The above obligation should be met within the term for filing corporate income tax returns in the Netherlands.

Failure to comply may result in administrative penalties and a shift in the burden of proof to the taxpayer.

Additionally, the ultimate parent entity of a multinational group resident in the Netherlands is obliged to file a country-by-country (CbC) report with the Netherlands Tax Administration (DTA) if the total consolidated group turnover is at least EUR 750 million.

In specific cases, this CbC obligation may also be incumbent on a Netherlands-resident group member that is not the ultimate parent of the group. This is e.g. the case if the ultimate parent is not obliged to file a CbC report in the jurisdiction in which the ultimate parent is resident.

The CbC report has to be filed within 12 months of the end of the reporting year for which the CbC report is filed. The reporting year is the annual reporting period for the commercial accounts of the ultimate parent. For example, if the reporting year ends on 31 December 2016, the CbC report has to be filed by 31 December 2017 at the latest.

A group member resident in the Netherlands is obliged to notify the DTA if it is the ultimate parent of the group. If the group member is not the ultimate parent, the group member is obliged to disclose the identity and the state of residence of the reporting entity (in most cases this will be the foreign ultimate parent). The Netherlands group member has to give the appropriate notice to the DTA before the end of each reporting year.

As from tax year 2016, Netherlands master files, local files and country-by-country reports have to include the information listed below, which is in line with the requirements of OECD BEPS Action 13.

Master file

In general, the master file is intended to provide a high-level overview in order to place the multinational group's ('MNE's') transfer-pricing practices in their global economic, legal, financial and tax context.

The master file should provide an overview of the MNE's business, including the nature of its global business operations, its overall transfer-pricing policies, and its global allocation of income and economic activity. The purpose of the master file is to assist tax administrations in evaluating the presence of significant transfer pricing risks.

The information required in the master file contains relevant information that can be grouped into five categories and may be written in either Dutch or English.

The categories are:
- Organisational structure
- A description of the MNE's business(es)
- The MNE's intangibles
- The MNE's intra-group financial transactions
- The MNE's financial and tax positions

Local file

The local file provides more detailed information relating to specific intra-group transactions of the taxpayer. The local file focuses on information relevant to the transfer-pricing analysis related to transactions taking place between a local country affiliate and associated enterprises in different countries. Further, it helps to substantiate that the transactions in which a Netherlands group company is involved take place under arm's length terms.

The information required in the local file contains relevant information that can be grouped into three categories and may be written in either Dutch or English.

The categories are:
- A description of the local entity
- Details of controlled transactions
- Financial information

Country-by-country reporting

The CbC-report must contain aggregate tax jurisdiction-wide information related to the global allocation of income, the taxes paid, and certain indicators of the location of economic activity among tax jurisdictions in which the MNE group operates. The purpose of the CbC-report is to enable tax authorities to perform a high-level transfer-pricing risk assessment. The CbC-report needs to be filed in XML format.

The information required in the CbC-report contains relevant information that can be grouped into two categories and may be written in either Dutch or English.
- An overview of the allocation of income, taxes and business activities by tax jurisdiction
- A list of all the constituent entities of the MNE group included in each aggregation per tax jurisdiction

jasperrijnsburger@wvdb.nl

Organisation for Economic Cooperation and Development (OECD)

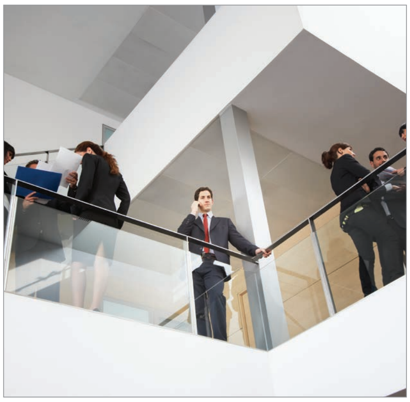
Nearly 90 countries working on BEPS multilateral instrument

The OECD has announced that nearly 90 countries are working on drafting the multilateral instrument, which will implement the changes needed in bilateral tax treaties to give effect to the relevant recommendations in the BEPS Action Plan.

Although the BEPS final package has the full endorsement of the G20 (see below), of which the United States is, of course, a leading member, it is believed that the United States has so far declined to participate in the drafting of the multilateral instrument.

Work on the multilateral instrument is scheduled to be complete by the end of 2016, during the course of which year it will be opened for signature by any interested country.

zigurds.kronbergs
@moorestephens-europe.com



G20 endorses BEPS package

At their meeting in Lima on 8-9 October 2015, the G20 countries announced that they 'fully endorse' the final BEPS package issued by the OECD on 5 October 2015.

Included in the BEPS package are:

- New minimum standards for country-by-country reporting
- Rules against treaty shopping, designed to eliminate the use of conduit companies
- Automatic exchange of tax rulings
- Measures to combat harmful tax practices, particularly with respect to intellectual property
- More effective mutual-agreement procedures
- A multilateral instrument to incorporate changes needing to be made to existing tax treaties

The G20 aim for implementation by the end of 2016.

zigurds.kronbergs@moorestephens-europe.com

Poland

Bank tax introduced

The new Polish Government has gone ahead with the introduction of a tax on financial institutions. The tax will be charged at 0.0366% of the total value of the assets of a financial institution, payable monthly. A threshold amount of assets will, however, be exempt from tax. In the case of domestic banks, Polish branches of foreign banks, credit institutions and cooperative savings banks, this will be PLN 4000 million (approx. EUR 900 million); in the case of insurance and reinsurance companies, the threshold will be PLN 2000 million.

The tax took effect on 1 February 2016.

p.kochanowski@msca.pl

Portugal

Budget includes changes to participation exemption

The new minority left-wing Portuguese Government, which has promised to unwind the austerity régime imposed by the previous centre-right administration at the behest of the 'troika' (the European Central Bank, the European Commission and the International Monetary Fund) as a condition of the bail-out loan it received in 2011 'responsibly', has now released the second version of its draft Budget.

Among the measures that the Budget contains are:

- The minimum shareholding required for application of the participation exemption for dividends and capital gains is to be increased from 5% to 10% but the minimum holding period is to be reduced from 24 months to 12 months
- The maximum carry-forward period for corporate tax losses is to be reduced from 12 years to 5 years
- Country-by-country reporting is to become mandatory for resident companies forming part of a multinational group
- The patent-box régime is to be modified to bring it into line with BEPS requirements
- The VAT rate on restaurant and catering services from the standard 23% to the reduced 13% rate

isabel.guerreiro@moorestephens.pt

New Madeira incentive tax régime

Companies licensed to operate within the Madeira International Business Centre no later than 31 December 2020 may enjoy a number of tax benefits guaranteed until 2027, including a reduced corporate tax rate of 5% – one of the lowest in the European Union.

The MIBC was created in the Portuguese island of Madeira, with the main goal of attracting foreign direct investment in order to diversify and modernise the island's economy.

As an integral part of Portugal, Madeira has full EU membership, and therefore companies licensed to operate in the MIBC are eligible to benefit from all EU Directives and double taxation treaties signed by Portugal.

The MIBC comprises an industrial free zone, an international services centre and an international shipping register and, as from 2015, an air transport register.

The new tax régime applies for companies licensed to operate in the MIBC from 1 January 2015 up to and including 31 December 2020.

The special 5% rate of corporate income tax is restricted to companies meeting the criteria in Figure 1 below.

Figure 1

Number of jobs created	Minimum investment	Maximum qualifying taxable income
1 to 2	€ 75,000	€ 2.73m
3 to 5	€ 75,000	€ 3.55m
6 to 30	N/A	€ 21.87m
31 to 50	N/A	€ 35.54m
51 to 100	N/A	€ 54.68m
Over 100	N/A	€ 205.5m

Other benefits include:
- Exemption from withholding tax on dividends paid to non-resident individuals, to the extent distributed from earnings arising from transactions with non-residents
- Qualification for the Portuguese participation-exemption régime, hence exemption from withholding tax on dividends and capital gains to the holders of a participation of at least 5% in the MIBC company held for at least 24 months who are resident in another EU or EEA state or in a jurisdiction with which Portugal has a double tax treaty
- Exemption from withholding tax on royalties, service fees and interest on foreign-shareholder loans
- Qualification for the patent-box régime and special tax depreciation for certain intangibles
- Licensed industrial companies can benefit from a 50% tax relief, provided certain conditions are met

Income that is not within the scope of the MIBC tax régime is taxed at the standard Portuguese corporate tax rate of 21%.

The overall tax benefits are capped at one of the following amounts:
- 20.1% of the annual gross value added
- 30.1% of the total annual labour costs
- 15.1% of the annual turnover

This régime is also available for entities licensed by 31 December 2014, for which the tax régime was available until 31 December 2027.

isabel.guerreiro@moorestephens.pt

Romania

Corporate tax amendments

A number of important changes have been made to the corporate tax code, effective as from 1 January 2016.

The changes include:
- Dividends received from other Romanian companies are now unconditionally exempt from corporate income tax. Previously, as is still the case with foreign dividends, the relevant shares had to have been held for an uninterrupted period of at least one year and to have constituted a holding of at least 10%.
- Staff-welfare expenses (e.g. funeral grants, gifts to newborns) are now deductible up to a limit of 5% (previously 2%) of payroll.
- The maximum rate of interest deductible in relation to foreign-currency loans has been reduced from 6% to 4%.
- The turnover ceiling for application of the micro-enterprise tax régime, under which qualifying companies pay a tax of between 1% and 3% on gross revenues instead of the 16% corporate income tax on taxable profits, has been raised from [the equivalent in Romanian leu of] EUR 65 000 to EUR 100 000. The single rate of 3% has been replaced by three rates, of which 3% applies to enterprises with no employees, 2% applies to enterprises with one employee and 1% to enterprises with two or more employees.
- The rate of withholding tax on dividends payable to both legal persons (e.g. companies) not qualifying for the participation exemption and natural persons (individuals) has been reduced from 16% to 5%. In the case of foreign recipients. a double tax treaty may stipulate a lower rate.

laura.stoica@auditone.ro

VAT rate reduced by four points

Romania's standard rate of VAT was reduced from 24% to 20% with effect from 1 January 2016, and is scheduled to be further reduced to 19% on 1 January 2017.

The reverse-charge procedure now applies to supplies of immovable property (buildings and parts of buildings, land of any kind), mobile phones, investment gold, integrated-circuit devices, games consoles, PC tablets and laptops, if certain conditions are met.

Mergers and spin-offs are now non-taxable operations from a VAT point of view without needing to meet any other conditions.

laura.stoica@auditone.ro

Russia

Russia to fall in line with EU VAT on e-services

The Russian Government has published a draft Bill imposing a charge to Russian VAT on foreign businesses supplying e-services to private consumers. Foreign businesses without a fixed establishment in Russia and making such supplies would be required to register for VAT in Russia.

The European Union already has such a charge (the place of supply for a B2C (business to private consumer) charge of e-services, and also TV and broadcasting and telecommunications services, is where the customer is located). Such an approach is recommended by the OECD and is also followed by e.g. South Africa and South Korea and is likely to be adopted shortly by Australia and New Zealand.

maksim.mischenko@moorestephens.ru

Slovenia

Corporate tax reliefs to be cut

Legislative proposals from the Slovenian government envisage reduction or abolition of a number of corporate tax reliefs. The measures include:

- Abolition of the deduction for donations to political parties
- Reduction of the R&D allowance from 100% to 50% of the amount invested
- Reduction of the investment allowance for plant & equipment from 40% to 20%
- Abolition of the exemption for capital gains from the disposal of a company's own shares

If enacted in their current form, all these measures would take effect from 1 January 2016.

zigurds.kronbergs@moorestephens-europe.com

Switzerland

Information to be exchanged automatically with chosen states

Switzerland has signed joint declarations with a number of jurisdictions committing to mutual automatic exchange of tax information.

The jurisdictions are: Australia, Guernsey, Iceland, Isle of Man, Japan, Jersey, Norway and South Korea. More will undoubtedly follow.

The declarations provide for data collection to begin in 2017 and the first exchange to take place in 2018.

However, the legal basis for this process must first be established by the parties involved.

hstaudt@ms-zurich.com

United Kingdom

Budget targets relief on small businesses

In his Budget speech on 16 March, the Chancellor of the Exchequer announced a series of measures that focused new tax reliefs on small businesses in particular, but he also introduced further anti-avoidance measures aimed at large multinational groups, in response to the OECD's BEPS (Base Erosion and Profit Shifting) Action Plan. The speech was given against a background of increasing economic uncertainty and a downward revision of growth forecasts for the United Kingdom, which nevertheless compare well with those of other G7 economies.

The new measures include:

- A further reduction in corporation tax: the rate as from 1 April 2020 will now be 17% and not 18% as previously planned. The reduction from the current 20% to 19% will take place as planned on 1 April 2017
- Capital gains tax rates are to be reduced from 28% and 18% to 20% and 10%, with effect from 6 April 2016; carried interest and residential-property gains will still be taxed at the previous rates, however
- Relief from business rates (a property tax on businesses) for small businesses will be considerably increased
- Replacement of the slab system of stamp duty land tax (SDLT), a tax payable by purchasers of property, by a progressive scale system for commercial property will result in lower SDLT for relatively low-value properties but increased liability for higher-value properties
- Abolition of Class 2 National Insurance Contributions for the self-employed as from 6 April 2018. These are a flat-rate social security contribution paid by the self-employed in addition to profit-based Class 4 contributions. Liability to the latter remains unchanged
- The oil & gas industry will benefit from the effective abolition of petroleum revenue tax. The rate is reduced from 35% to 0% for all chargeable periods ending after 31 December 2015. Oil & gas companies remain liable to corporation tax, but many are likely to be returning tax losses in the immediate future. The supplementary charge payable by these companies on their adjusted profits in addition to corporation tax is also reduced from 20% to 10% (it had already been reduced in 2015 from 32% to 20%)
- As from 1 April 2017, a company's relief from corporation tax for losses brought forward will be restricted. Whereas relief for the first GBP 5 million remains unrestricted, any further relief may not exceed 50% of the remaining current-year profits. Where a company is a member of a group, the GBP 5 million ceiling will apply across the whole group. However, streaming rules will be relaxed to allow brought-forward losses to be set against profits from other income streams
- Deductions of net interest expense above a GBP 2 million *de minimis* threshold will be limited to 30% of UK earnings as from 1 April 2017. The precise rules will be subject to consultation and the related legislation will be included in the Finance Act 2017

- The obligation to withhold 20% tax on royalty payments to non-residents will be extended and immediate action is taken to counter avoidance arrangements seeking to exploit double tax treaties to obtain relief from withholding tax on royalties
- With effect from 1 April 2017,new rules to counter loss of tax through the use of hybrid instruments and entities will have effect
- Measures will be introduced to ensure that all profits from developing and dealing in UK land are taxable in the United Kingdom. Currently, offshore vehicles are used to avoid UK tax liability in certain situations
- A sugar levy on the manufacturers of soft drinks with a high sugar content is to be introduced with effect from 2018

jacquelyn.kimber@moorestephens.com

Scotland follows England in increasing duty on second homes

Scotland will be imposing an additional 3% charge (‘the Additional Dwellings Supplement’) to land and buildings transaction tax (LBTT) (the duty payable by purchasers of an interest in land) on purchases of residential property by individuals who already own at least one residence (worth GBP 40 000 or over) and on most purchases of residential property by companies and other non-natural persons. The additional duty would apply to the whole of the consideration (if it exceeds GBP 40 000) even where the main duty payable would be zero (the threshold for LBTT is GBP 145 000).

The Additional Dwellings Supplement will take effect from 1 April 2016. It resembles the additional 3% charge to stamp duty land tax on second etc homes introduced by the UK Government for purchases in England, Wales and Northern Ireland.

paul.renz@scott-moncrieff.com

Scottish rate of income tax to be same as rest of United Kingdom

The Scottish Parliament has agreed to the Government’s proposal that the Scottish rate of income tax for the year 2016-17 should be 10%. This means in effect that Scottish taxpayers will pay the same rate of income tax as taxpayers in the rest of the United Kingdom.

Under the devolution of powers legislated by the Scotland Act 2012, the basic, higher and additional rates of income tax applicable in the rest of the United Kingdom are reduced by 10 percentage points for Scottish taxpayers, beginning from 6 April 2016. The Scottish Government may then set a Scottish rate of its own choosing. The 10% agreed by the Scottish Parliament will restore the overall rates to those applying in the rest of the United Kingdom.

paul.renz@scott-moncrieff.com

‘Non-dom’ status to be removed from certain individuals

Draft legislation published on 2 February would remove non-domiciled status from two classes of individuals. These are:

- Individuals who were born in the UK and have a UK domicile of origin that they have subsequently replaced by a foreign domicile of choice but who are resident for tax purposes in the UK in any year and
- Individuals who have been resident in the UK for tax purposes for at least 15 of the last 20 tax years (i.e. they would be deemed to be UK-domiciled from the beginning of the 16th year)

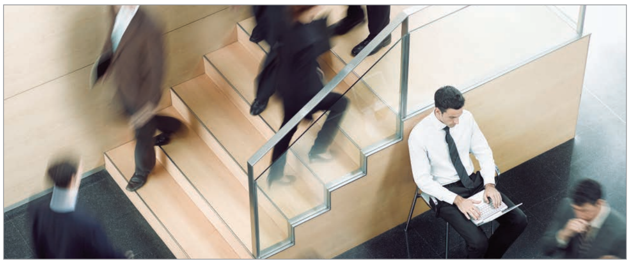
Under previously published legislation, where the first of these tests applies for the purposes of inheritance tax, there will be an additional condition, namely that the individual must also have been resident in the United Kingdom for at least one of the two tax years immediately preceding the tax year in question.

Non-domicile status has advantages for income tax, capital gains tax and inheritance tax. Principally, resident but non-domiciled individuals can elect to pay UK tax on income and capital gains tax only to the extent that the income and gains are remitted to or enjoyed in the UK.

The legislation is intended to apply from 6 April 2017.

gill.smith@moorestephens.com

Revenue publishes approach to taxing multinationals



The United Kingdom's tax authority, Her Majesty's Revenue and Customs (HMRC), has published a 'fact sheet' detailing its approach to negotiating settlements with and enforcing compliance by multinational corporations, in response to recent criticism, particularly of the GBP 130 million settlement with Google for 10 years of back tax (see below) involved.

tim.fussell@moorestephens.com

Google to pay UK GBP 130 million in back tax

Google has agreed to pay the UK Treasury GBP 130 million in back taxes for 10 years going back to 2005 in a settlement reached with the tax authority (HMRC).

The deal, the details of which remain confidential, has come under heavy criticism from many quarters in the United Kingdom and abroad as being too generous to the multinational IT giant. Google UK's reported revenues in 2014 were over USD 5000 million.

dominic.arnold@moorestephens.com

Criminal offence for offshore tax evasion confirmed

With draft legislation published on 9 December, the UK Government has signalled its intention to introduce a new 'strict-liability' criminal offence of offshore tax evasion, to be applied where the tax evaded is GBP 25 000 or more. Crucially, there will be no need for the authorities to prove intent.

The offence will be punishable by a fine and/or a prison sentence of up to 51 weeks (limited to six months in Scotland and Northern Ireland). It is not certain from which date the

offence is to come into effect, but the legislation containing it will not become law until July 2016 or thereabouts.

dominic.arnold@moorestephens.com

Stamp-duty rates on second homes to be increased

The existing rates of stamp duty land tax (SDLT) on the purchasers of second homes in England, Wales and Northern Ireland will be increased as from 1 April 2016.

SDLT is payable by the purchaser of land and buildings in England, Wales and Northern Ireland, at rates of between 0% and 15%, depending on whether the property is residential or non-residential, on its purchase price and on the identity of the purchaser.

From 1 April 2016, where the purchase is of an 'additional residential property' (i.e. where the purchaser already owns at least one residential property), the applicable rate of SDLT will be increased by three percentage points, so rates on relevant purchases will range from 3% to 18%. The measure is aimed principally at persons buying second homes or investing in properties for rent (so-called buy-to-let properties).

Exemptions will be provided for certain corporate purchasers and investment funds.

SDLT does not apply in Scotland, which has its own Land and Buildings Transaction Tax (LBTT).

This and other measures were included in the Autumn Statement delivered to the House of Commons on 25 November by the Chancellor of the Exchequer.

gill.smith@moorestephens.com

Tax treaty negotiations

The United Kingdom has announced that it intends to negotiate a first-time double tax treaty with Nepal and amendments to its existing treaties with Romania, Trinidad & Tobago and Uzbekistan.

It also intends to 'work on' treaties and protocols with:

- Colombia
- Fiji
- Ghana
- Guernsey
- India
- Isle of Man
- Israel
- Jersey
- Kazakhstan
- Kyrgyzstan
- Lesotho
- Malawi
- Portugal
- Russia
- Thailand
- Turkmenistan
- United Arab Emirates
- United States
- Uruguay

The United Kingdom has existing comprehensive treaties with all of these countries except Colombia, Kyrgyzstan and the United Arab Emirates.

kevin.phillips@moorestephens.com

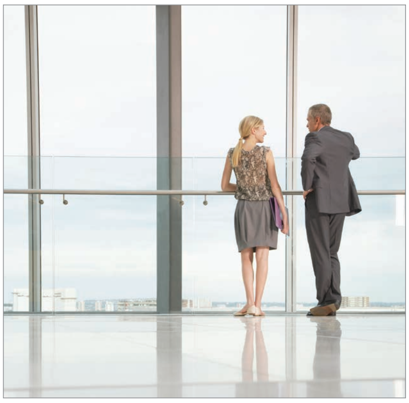
Northern Ireland to set 12.5% corporate tax rate in 2018

Following agreement between the UK Government and the Northern Ireland Executive (devolved government), Northern Ireland will now be able to set a special Northern Ireland rate of corporation tax of 12.5% on trading profits from 1 April 2018.

Such a measure would have to be enacted by the Northern Ireland Assembly (devolved parliament) but has the support of a majority of parties.

The proposed new rate matches the corporation tax rate in the Republic of Ireland. The rate of corporation tax in the United Kingdom, which will remain in force in Northern Ireland until the new rate is introduced is currently 20% but will reduce to 19% as from 1 April 2017 and to 18% from 1 April 2020.

nigel.thompson@msca.co.uk



45% tax on restitution interest to be introduced

The United Kingdom has introduced a special high rate of corporation tax on receipts of so-called restitution interest received by companies. Whereas the standard rate of corporation tax is 20%, the interest is charged at 45%.

Restitution interest is interest paid to taxpayers where a court has finally determined that repayments are due in respect of tax (wrongly) paid under 'mistake of law' or unlawfully collected by the tax authorities or where the parties have reached a final settlement to that effect.

This move follows a series of tax cases where the courts have held that the tax authorities must pay compound interest, and not simple interest, on certain repayments of tax going back in some cases for several decades. The European Court had previously overturned legislation attempting to impose a six-year time limit on the retrospectivity of claims for repayments on the grounds of mistake of law.

The measure was included in the Finance (No 2) Act 2015 and took effect from 21 October 2015. The tax will be collected by withholding and took effect for the purposes of withholding as from 26 October 2015.

tim.fussell@moorestephens.com

Currency table

For ease of comparison, we reproduce below exchange rates against the euro and the US dollar of the various currencies mentioned in this newsletter. The rates are quoted as at 23 March 2016, and are for illustrative purposes only.

Currency	Equivalent in euros (EUR)	Equivalent in US dollars (USD)
Euro (EUR)	1.0000	1.1187
Pound sterling (GBP)	1.2663	1.4164
Polish złoty (PLN)	0.2352	0.2631

Up-to-the-minute exchange rates can be obtained from a variety of free internet sources (e.g. http://www.oanda.com/currency/converter).

For more information please visit:
www.moorestephens.com