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Bahrain; Norway

Report from Sophia Akhtar, IBFD Tax Treaties Unit

Exchange of information agreement between Bahrain and Norway enters into force

The Bahrain - Norway Exchange of Information Treaty (2011) will enter into force on 12 July 2012. The agreement generally applies from 12 July 2012 for criminal tax matters and from 1 January 2013 for other tax matters.

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Belgium

Report from Dr. René Offermanns, IBFD Senior Research Associate

Tax conference on the application of new general anti-abuse provisions to various tax cases

On 7 June 2012, the University of Antwerp in cooperation with Tiberghien Lawyers held a first-time conference on taxation in Antwerp, Belgium. During the conference various cases studies were presented. One of the main issues was whether the new general anti-abuse provisions would be applicable.

*Estate planning: the future of the civil partnership (*burgerlijke maatschap*)*

Chair: Prof. dr. Bruno Peeters, University of Antwerp

Panel members:

Dhr Frank Buyssens, Notary

Mr Rik Deblauwe, Tiberghien Lawyers

Prof. dr. Caroline Vanderkerken, Hasselt University, Court of Appeal Brussels

Mr Alain Van Geel, Tiberghien Lawyers

Dhr Yann Van Rompaey, Advisor for Financial and Budgetary aspects of the Flemish Minister for Finance, Budget, Employment, Infrastructure and sport

Case 1:

A marital contract was changed by setting up a civil partnership. The assets of the civil partnership consisted of:

- the shares of a passive holding with four subsidiaries, whose place of effective management was located in Belgium; and
- investment stock.

Thereafter, the spouses donated the common participation certificates in the civil partnership to each other. Those gifts were made by notary deed made by a Dutch notary. After the death of the surviving spouse, the certificates and assets of the civil partnership will be inherited by a nephew.

Main conclusions:

Based on article 1096 of the Civil Code and various decisions of the Belgian Ruling Commission, (e.g. Ruling No. 2011.360 of 22 November 2011, Ruling No. 201.260 of 6 September 2011), the panel concluded that gifts between the spouses are valid.

The new anti-abuse provision of article 18(2) of the Registration Duty Code (RDC), was held not to be applicable. This view was based on a decision of the Ruling Commission of 6 December 2011, in which it was ruled that spouses may change their marital regime. Furthermore, abuse only exists if a construction is:

- contrary to the aim of a law; or

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- results in an advantage which was not intended by the law.

Due to the fact that gifts made before a foreign notary were never within the scope of the RDC, it was held that no abuse existed in the case concerned.

Finally, the panel held that the exemption for family businesses applied to civil partnerships, which are treated as a transparent vehicle if:

- certain listed activities are carried out; and
- a participation test is met. This was held to be the case because the individuals owning the participations in the civil partnership also owned a direct interest in the holding company

The convergence between fiscal and criminal investigations in the context of the (de facto) lifting of the bank secrecy

Chair: Prof. dr. Bruno Peeters, University of Antwerp

Panel members:

Mr Hubert Dubois, Dubois, Verlinden, Wauman Lawyers

Mr Gerd D. Goyvaerts, Tiberghien Lawyers

Prof. dr. Michel Maus, Professor at Antwerp, Gent, and Brussels University

Mr Filip Smet, Tiberghien Lawyers

Prof. dr. Caroline Vanderkerken, Hasselt University, Court of Appeal Brussels

Case 2:

An entrepreneur who was divorcing and running an international family business bought a costly house. Afterwards the company had financial problems. Thereafter a money laundering investigation took place and the tax administration requested a disclosure of banking information.

Main conclusions:

Since 1 July 2011, bank information can be requested in one of the following circumstances:

- clear indications exists that tax avoidance is taking place;
- the tax administration wants to issue an assessment based on indications (*aanwijzingen*); and
- a request for exchange of information is received from a foreign tax administration.

In addition, bank information can be requested only after the taxpayer was requested to submit bank information and refused to submit this information.

The panel discussed the following possible problems from the law to lift the bank secrecy:

- a possible infringement of the equality principle, because the tax administration does not have to prove the existence of abuse if an assessment is imposed on the basis of indications; and
- a possible infringement of the right to respect the privacy sphere which is only allowed if the legality, efficiency, proportionality and transparency principle is met.

A last discussion point concerned the resent proposal on the introduction of the "una via" principle (*see* Belgium-1, News 2 May 2012). One of the problems mentioned concerned the compatibility with the case law of the European Court of Human Rights because the bill does not always guarantee that an administrative penalty is not followed by a criminal prosecution.

80%-deduction for patent income: bottlenecks and solutions

Chair: Prof. dr. Bruno Peeters, University of Antwerp

Panel members:

Dhr Luc Batselier, Advance Ruling Commission

Prof. dr. Patrick Cauwenbergh, University of Antwerp, Int'l Tax Partner Deloitte

Mr Paul Maeyaert, Altius Lawyers

Dhr Geert Vuylsteke, Group Tax Director, Agfa Gevaert

Mr Anne Van de Vijver, Tiberghien lawyers, University of Antwerp

Case 3:

This case included the following four scenarios:

- a licence is granted with respect to a patent;
- patented products are sold;
- a patent is nullified; and
- the establishment of an R&D centre in Luxembourg to benefit from the more preferential tax regime.

Main conclusions:

The tax administration takes the view that a patented product must be registered in the country where it is produced and used or the country where it is commercialized. The consequences for the licensing of patent product were clarified in Ruling No. 900.296 of 17 November 2009, in which it was held that the 80%-deduction for patent income can only be applied if the patent is registered in the country where the licence holder is registered.

With respect to the sale of patented products it was observed that if patent products are produced by the selling company, the patent income is deemed to be equal to the compensation which a third company would have to pay if the products were produced by that company under a licence contract.

Regarding the consequences of a nullification of a patent, the following two possibilities were mentioned:

- an adjustment of the deduction of previous years; and
- no adjustment of the deduction of previous years if the tax assessment has become final, based on article 360 of the Income Tax Code (ITC).

The last situation discussed concerned a transfer of the R&D activities to Luxembourg to benefit from a more preferential because the 80% deduction there also applies to capital gains on patents. With reference to the decision of the European Court of Justice (ECJ) in *Cadbury Schweppes* (Case C-196/04) it was held that such transfer should not be within the scope of the new general anti-abuse provision of article 344(1) of the ITC because this would be incompatible with the freedom of establishment.

International: restructuring and de-localization of activities

Chair: Prof. dr. Bruno Peeters, University of Antwerp

Panel members:

Dhr Luc Batselier, Advance Ruling Commission

Mr Bernard Peeters, Tiberghien Lawyers, Deputy-Judge of the Court of Antwerp

Prof. dr. Patrick Cauwenbergh, University of Antwerp, Int'l Tax Partner Deloitte

Dhr Arie Geens, Director of the Administration for Fiscal Affairs of the Ministry of Finance

Mr Stijn Vastmans, Tiberghien Lawyers

Mr An Weyn, Tiberghien Lawyers

Dhr Wim Wuyts, Head of Tax, Bekaert Group

Case 4:

A Japanese company had two subsidiaries in Belgium, a production company and a sales company. The sales company purchased products which were sold to big retailers.

The production activities are transferred to a Polish PE, whilst in Belgium only an R&D centre will continue. Japanese engineers are seconded to the Belgian R&D centre.

Furthermore, the distribution agreement between the Belgian group company and the Belgian sales company was converted into a (stripped) commissionaire agreement between the Belgian sales company and a Polish PE. The Polish PE took over the sales risks, and the profit margin of the Belgian sales company was reduced.

Main conclusions:

Both the Belgian tax administration (Decision No. Ci.COM/013 of 15 June 1993) and the Belgian Advance Ruling Commission (Advance Ruling No. 600.254 and 2010.372) take the view that the attribution of equity and debt to the Polish PE does not imply a realization of capital gains. A point of discussion is whether the above view can be upheld after the modifications to article 7 of the OECD Model (2010) and its related commentary which further emphasizes the independence fiction of the PE and the inclusion of the arm's length principle in article 285(2) of the ITC in 2004.

The main consequences of the transfer of the manufacturing activity to the Polish PE are:

- by means of the significant people function and a comparability analysis it must be determined which profits must be allocated to the PE; and
- the profits of the Belgian subsidiary must be split in profits which can be attributed to the Polish PE and the profits which can be attributed to the Belgian research activities.

The main issue discussed concerning the secondment of the Japanese employees was whether the arm's length principle requires that compensation is paid because the employees have special know-how.

Finally, it was concluded that the new general anti-abuse provision will most certainly not apply to the case at hand because Belgian tax law contains various special anti-abuse provisions to adjust the compensation if it is deemed not to be at arm's length, e.g. article 26 of the ITC on the granting of abnormal and gratuitous advantages.

Corporate: fiscal loss management

Chair: Prof. dr. Bruno Peeters, University of Antwerp

Panel members:

Dhr Luc Batselier, Advance ruling Commission

Mr Claudine Bodeux, Tiberghien Lawyers

Prof. dr. Patrick Cauwenbergh, University of Antwerp, Int'l Tax Partner Deloitte

Prof. dr. Myriam Ghyselen, Antwerp University and Court of Appeal Antwerp

Mr Ben Van Vlierden, Tiberghien Lawyers

Dhr Wim Wuyts, Head of Tax, Bekaert Group

Case 5:

The following two scenarios were discussed:

- a parent company has a debt claim on a subsidiary in difficulties with transferred losses; and
- a sister company has a debt claim on another Belgian or foreign sister company.

Main conclusions:

A debt settlement may under scenario one constitute an abnormal or gratuitous benefit. The subsidiary benefiting from the settlement in that case may realize a taxable profit and its losses sustained cannot be offset against that profit. However, the Advance Ruling Commission has decided that no benefit is received if the settlement aims to avoid bankruptcy and is in the commercial or financial interest of the group. The same applies in case of a debt waiver if the agreement contains a termination clause in case the subsidiary becomes profitable again.

Unclear is whether the debt settlement constitutes abuse under the new general anti-abuse provision, because in some cases it may result in a taxable profit which can be reduced with losses sustained.

An argument that the abuse provision should not apply is that the debt settlement is not an artificial construction.

The anti-abuse provision could apply if the debt claim is not waived but brought in the subsidiary as a capital contribution because such contribution results in various tax advantages. This is only different if the taxpayer proves that the contribution was also based on other than fiscal motives.

In a relationship between sister companies, the conclusions are the same except for the fact that it may be more difficult to argue that a debt settlement is in the interest of the group and it is uncertain whether the benefiting sister company can deduct its losses.

If the loss-making sister company is established in a foreign county, a debt settlement may result in an adjustment of the profit of the Belgian sister company. In case of a contribution as capital, the claim must be valued at fair market value, which may result in a deductible loss.

HR fiscal law: wage strategies in case of cross-border employment

Chair: Prof. dr. Bruno Peeters, University of Antwerp

Panel members:

Dhr Dirk Deschrijver, General Legal Counsel, Bosal Int'l Management

Dhr Arie Geens, Director General fiscal Affairs of the Ministry of Finance.

Prof. dr. Herwig Verschueren, University of Antwerp

Mr Koen Van Duyse, Tiberghien Lawyers

Case 6:

A Norwegian holding company of a group with subsidiaries in the Netherlands and the UK wants to recruit a Belgian CEO, who is resident in Belgium. He works in Norway, the Netherlands and UK.

The scenarios discussed concerned the establishment of a management company and the receipt of employment income and fringe benefits by the CEO as an individual.

Main conclusions:

Tax treaties restrict the application of domestic fictions and the application of domestic anti-abuse provisions. This means that domestic provisions concerning the treatment of a management company as transparent entity (look through) do not always take full effect under a tax treaty.

In case of classification differences resulting from the fact that a manager in some countries is treated as an employee and in Belgium as a director, the view of the source state should be followed.

Belgium should generally follow an allocation of the fringe benefits to various countries as agreed in the employment contract if the management activities are carried out in several countries.

With respect to the application of social security rules it is unclear whether Belgium is obliged to follow the rules of the source state or may apply its own classification.

European fiscal law: transfer of seat

Chair: Prof. dr. Bruno Peeters, University of Antwerp

Panel members:

Dhr Luc Batselier, Advance Ruling Commission

Mr Koen Morbée, Tiberghien Lawyers

Prof. dr. Bart Peeters, University of Antwerp, Hogeschool-University of Brussels, Liège University

Prof. mr. F.P.G. Pötgens, VU Amsterdam, De Brauw, Blackstone, Westbroek Advocaten

Mr Ivo Vande Velde, Tiberghien Lawyers

Case 7:

The legal seat of a holding company owning 75% of the shares of a Spanish company will be transferred from Belgium to the Netherlands or Luxembourg. All shares of the Belgian holding company are owned by Belgian residents.

Main conclusions:

Since the decision in the *Van Heste* case of 29 June 1987, it is under Belgian international private law possible to transfer the legal seat of a company from Belgium to another country without loss of legal personality, if the new country recognizes the continuity of the legal personality.

Article 110 of the International Private Law Code provides that after a transfer of the seat to another company, the legislation of the new country applies unless that country applies the incorporation principle. This means that, in case of a transfer to Luxembourg, Luxembourg law will apply, whereas in case of a transfer to the Netherlands, Belgian law remains applicable.

At the time of transfer, the capital gains are deemed to be realized and subject to tax and the companies capital is deemed to be distributed as a liquidation bonus which is taxed at the rate of 10%. The Belgian rules seem to be incompatible with EU law because they do not provide for any deferral possibility. Belgian shareholders are also immediately taxed, despite Belgium maintaining its taxing rights and later value decreases of a participation not being taken into account.

Based on the decision of the ECJ in *National Grid Indus (Case C-371/10)* it was held that Spain may tax the capital gains of the shares owned by the Belgian holding after the transfer of its legal seat and Luxembourg or the Netherlands will have to grant a step-up.

If the sale of the holding to a company established in another EU Member State would be followed by a merger, the consequences are as follows:

- based on the Merger Directive (2009/133), Belgian could tax the capital gains of the company taken over, but such gains are exempt under Belgian domestic law;
- based on the Belgium - Spain Income and Capital Tax Treaty (1995), Spain may tax those gains; and
- the shareholders may not be taxed in Belgium unless abuse exists.

Questionable is whether the PE requirement is compatible with the freedom of establishment after the decision in *National Grid Indus (Case C-371/10)*.

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Canada; Norway

Report from Lori Beerman-Harrison, IBFD Tax Treaties Unit

Revision to social security treaty between Canada and Norway signed

On 20 June 2012, Canada and Norway signed a revision to the Canada - Norway Social Security Treaty (1985). Further details of the revision will be reported subsequently.

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European Union; Germany

Report from Aleksandra Bal, IBFD Research Associate

International VAT Conference – Overview

From 14 to 15 June 2012, an international VAT Conference took place at Lake Tegernsee, Germany. It was organized by küffner maunz langer zugmaier (German law office specializing exclusively in VAT and customs law) in cooperation with the VAT Forum