Taxand
Global Alliance

Newsletter

No. 1 January, 2006

Index

Foreword from the Editor 1

Legal developments 2

LEGISLATION

1. Argentina
2. Belgium
3. France
4. Germany
5. India
6. Indonesia
7. Luxembourg
8. Malta
9. Mexico
10. Poland
11. Spain
12. United Kingdom
13. United States

COURT CASES AND RULINGS

A) European Union

1. Marks & Spencer case
2. Investment fund industry
3. Cross-border mergers

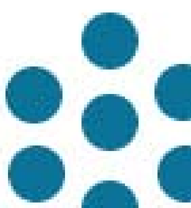
B) Countries

1. Germany
2. India
3. Spain
4. United States

Taxand news 18

Luxembourg Taxand Conference

Contact information 19



Foreword from the Editor

Dear Reader,

With the creation of Taxand, we have achieved our goal of forging an alliance that allows its firms to share tax knowledge and provide clients with a leading independent international tax network.

Consistent with this philosophy, to ensure the highest quality of service to international clients and in an effort to keep clients informed of tax developments in the Taxand countries, we have the pleasure of presenting you this first-ever issue of our Newsletter.

We hope you find this publication useful in your daily work and we welcome any feedback or comments that you may have in this regard.

LEGISLATION

1. ARGENTINA

1.1 Capital control rules reach financial trusts

Regulation No. 637 issued by the Ministry of Economy on 17 November 2005, sets forth that the current restrictions on capital inflows, namely a minimum stay period of one year[1] and a mandatory 30% deposit[2], will be applicable to inflows of funds into the local exchange market for the primary subscription of securities issued under a financial trust, provided that such restrictions are applicable to the purchase (through the local exchange market) of the trust's underlying assets (*i.e.* when inflows of funds from non-residents are for the purpose of purchasing financial debt or assets or investing in government bonds in the secondary market). The regulation affects all financial trusts, irrespective of the public offering and the listing on one or more exchange markets of the issued securities.

1.2 New regulation for technical assistance and transfer of technology agreements

Regulation P 328/2005 issued by the National Institute of Industrial Property of Argentina ("INPI") on 19 October 2005, sets forth restrictions and requirements related to technical assistance and technology agreements by: (i) specifying certain agreements that do not qualify as "technology agreements", and therefore, cannot be registered with the INPI; (ii) mentioning certain agreements and services that do not qualify for a reduced withholding income tax rate that would otherwise have been applicable to royalty payments made thereunder; (iii) introducing a definition of "technical assistance" that narrows the former criteria; and (iv) imposing new requirements to be met in the registration procedure.

The registration of the technology and technical assistance agreements with the INPI is required (if applicable): (i) to apply reduced withholding tax rates (provided both by domestic law and by international tax treaties ratified by Argentina) to royalty payments to be made by Argentinean residents to foreign parties, and (ii) to allow the local taxpayer to treat royalty payments as deductible costs for Argentinean income tax purposes.

These new regulations bear out and confirm the aim of the Argentinean authorities to control more closely payments made by Argentinean residents to foreign parties, as well as their income tax deductions. However, it is still uncertain what impact this resolution will have on the provisions included in certain tax treaties ratified by Argentina relating to royalty payments.

2. BELGIUM

2.1 New Belgian tax deduction for equity capital

A new law introducing a tax deduction for equity capital ("the Law") was passed by the Belgian Parliament on 22 June 2005 and published in the Belgian State Gazette of 30 June 2005. A Royal Decree of 3 October 2005 has further implemented the application of the new Law.

The Law creates a new tax deduction for Belgian resident companies and Belgian branches of non-resident companies for a fictitious or deemed "notional" interest expense ("notional interest deduction") on their adjusted equity, in order to mitigate the different tax treatment between equity and debt financing of corporate taxpayers in Belgium. The purpose of the new Law is to offer a favorable tax regime to both domestic as well as foreign investors, which complies with EU state aid rules because of its general and non-discriminative nature.

In this respect, it should be noted that the EU Commission previously declared that the favorable Belgian tax regime for coordination centers was not in accordance with EU state aid rules, as a result of which the Belgian Government accepted that all the existing coordination centers would cease to benefit from the privileged tax regime as soon as their special licenses expire. The new Law offers

---

[1] Stay-period restrictions mean that capital inflows must remain in Argentina for a minimum term of 365 calendar days with time starting to run on the day they were traded on the local exchange market.

[2] This direct control measure requires the creation of a nominative non-transferable deposit denominated in U.S. Dollars for an amount equal to 30% of the relevant transaction proceeds. The deposit will be established for a period of 365 calendar days, does not bear interest (nor yield any other type of income) and may not be used as collateral in any credit transaction.

existing coordination centers a tax regime that is sufficiently attractive to continue to operate in Belgium once their licenses expire.

The new Law applies however to all corporate taxpayers in Belgium, and offers a new opportunity to reduce the overall corporate income tax burden. The Law seeks to attract new capital-intensive businesses as well as finance businesses to Belgium.

The notional interest applies to both domestic and foreign corporate taxpayers and has no impact on a taxpayer's ability to qualify under any bilateral tax treaty concluded by Belgium and a foreign corporate taxpayer's home country. Individual taxpayers and other non-corporate taxpayers are, however, not entitled to the notional interest deduction.

For foreign corporate taxpayers, the notional interest deduction will be important for reducing their taxable Belgian-source income which is subject to Belgian corporate tax by applying the notional interest deduction on the equity attributed to their Belgian establishment(s) or on any immovable property located in Belgium. As an alternative to a Belgian branch or establishment, foreign taxpayers may wish to consider incorporating a Belgian subsidiary with extensive share capital, in order to take advantage of the substantial notional interest deduction which can be used to offset any taxable income the subsidiary earns (e.g. as a result of intra-group financing operations).

The following types of company or taxpayer are excluded from the application of the notional interest deduction:

- Coordination Centers.
- Taxpayers established in a so-called "reconversion zone".
- Investment companies having a special tax status and acting as collective investment funds (e.g. SICAVs, SICAFs, SICs).
- Cooperative participation companies.
- Shipping companies that enjoy the so-called "tonnage tax regime".
- Small or medium-sized enterprises (SMEs) that opt for the creation of a tax-exempt investment reserve.

The applicable interest rate is determined by a number of rules, but in general is based upon the average interest rate on 10-year bonds issued by the Belgian Treasury (the so-called "OLO's"). The present rate is approximately 3.5%. The applicable rate will be revised on an annual basis, but may not vary by more than 1% from one period to another. The maximum deductible interest rate is 6.5%.

The amount of the notional interest deduction must be booked and maintained in a non-distributable reserve account for three consecutive fiscal years, during which period the amount will not be available for distributions nor will it be considered for determining the amount of distributable dividend income.

Any unused portion of the notional interest deduction is carried over and can be utilized for seven years following the year in which the interest deduction was generated.

No special ruling or any individual recognition by the tax authorities is required.

The notional interest deduction will be effective for the 2007 tax year and thereafter. For a taxpayer whose fiscal year is not identical to the calendar year, the 2007 tax year is the fiscal year that ends in the 2007 calendar year.

2.2 Capital tax rate reduced to 0 percent

As an additional investment incentive and in order to encourage shareholders to contribute new share capital to Belgian companies, contributions of share capital as well as capital increases will be subject to a zero-rated capital tax (the previous capital tax rate was 0.5%). This new rule applies as from 1 January 2006.

3. FRANCE

Reform of the French thin capitalization rules (Art. 212 of the French Tax Code)

The purpose of the reform of the French thin capitalization rules, introduced by the Finance Bill for 2006, is to bring the regime into line with international tax treaties and EU law. This reform will apply to fiscal years beginning on or after 1 January 2007.

This reform should be viewed in perspective with the 95% exemption of the amount of long-term capital gains relating to equity securities which will be generated with regard to fiscal years beginning on or after 1 January 2007.

This reform consists of the following main measures:

a) *Enlargement of the scope of application of the limitation on interest deductions to all directly or indirectly related companies*

It should be noted that, within the scope of the current tax regime, the limits on interest deduction only apply to loans granted by partners or shareholders.

From now on, these limits will apply to interest on all loans granted by directly or indirectly related entities (loans granted by a parent to its subsidiary, by a subsidiary to its parent, by a company to another company when both companies are controlled by the same persons, etc.).

b) *Interest will only be deductible up to the limit of arm's length rates*

The deduction of interest paid to a related entity will be limited to interest calculated on the basis of a rate that "the borrower could have obtained from independent financial institutions or organizations under similar conditions."

c) *Three limits apply to interest deductions in respect of a fiscal year*

The reform bill provides for three limits for the calculation of the amount of tax-deductible interest paid in respect of a fiscal year by one company to its related entities:

- The first limit results from the application to the amount of this interest of a ratio equal to one and a half (1.5) times the amount of the shareholders' equity assessed, at the election of the company, either at the beginning or the end of the fiscal year and the amount of average debt with regard to the related entities.
- The second limit is equal to 25% of current pre-tax income, plus interest paid to related entities and amortization and depreciation taken into account to determine this income.
- The third limit is equal to the amount of the interest paid to the company by related entities.

The fraction of the interest paid by the company to related entities exceeding the highest of these three limits will not be tax-deductible, unless this fraction is less than € 150,000.

d) *Carryforward of the deduction of the fraction of interest that is not deductible in respect of one fiscal year to the following fiscal years*

The non-tax-deductible fraction of the interest paid to related entities in respect of a fiscal year can be deducted:

- during the following fiscal year as regards the amount of this fraction exceeding the second limit referred to above calculated in respect of such fiscal year,
- then, where applicable, in the following fiscal years under the same conditions, net of a 5% reduction applied in respect of each of such fiscal years.

e) *Safeguard clause: group debt/equity ratio higher than the borrower's own debt/equity ratio*

If the company can prove that the debt/equity ratio of the group to which the borrower belongs is higher than the company's own debt/equity ratio, the limits described above will not apply.

A "group" is defined in this connection as a number of French and foreign companies placed under the control of the same company.

In order to calculate the group debt/equity ratio, all the debts owed by the group to third parties are taken into account, accordingly with the exclusion of debts owed to companies belonging to the same group. On the other hand, in order to calculate the company's debt/equity ratio, all of the company's debts are taken into account, including those to related entities.

f) *Activities that are outside the scope of application of the limitation*

The limitation on interest deduction will not apply:

- to companies responsible for a group's cash pooling system within the scope of a cash management agreement; or
- to credit institutions.

g) *Special cases*

There are special rules applicable in the case of mergers and tax consolidated groups.

4. GERMANY

4.1 Coalition agreement

In its coalition agreement the new German government agreed, inter alia, on the following changes in tax law which will take effect in a multi-level process:

- Tax changes for 2006:
  - Individuals will face several changes concerning their Income Tax assessment.
  - Restricted deductibility of losses for tax deferral arrangements, e.g. media funds (retroactively as from 11 November 2005).
- Tax changes for 2007:
  - The VAT rate will increase from 16% to 19%.
  - Inheritance tax reform.
- Tax changes for 2008: Reform of corporate taxation.

4.2 Thin capitalization rules pursuant to Sec. 8a Corporate Income Tax Act

German thin capitalization rules deem recourse rights of the lender against the shareholder or a related party as being harmful. The Federal Ministry of Finance issued a decree on 22 July 2005 stating in more detail which recourse rights will lead to a harmful loan. According to the decree, a loan is regarded as harmful "back-to-back financing" if the lender has a recourse right against the shareholder and the shareholder provides as security a deposit with a bank. However, guaranteeing the repayment of a loan and pledging shares or granting a land charge is not considered harmful.

This is a step into the right direction as the finance authorities narrowed the wide scope of application of Sec. 8a Corporate Income Tax Act by way of decree.

4.3 Transfer pricing documentation

With the implementation of Sec. 90 para. 3 General Tax Act, which obliges taxpayers having dealings with related parties outside Germany to provide documentation for these transactions, the issue of transfer pricing documentation has become more important. As the government did not provide any documentation guidelines, the Federal Ministry of Finance issued a decree on 12 April 2005 regarding such transfer pricing documentation. Among others, the following issues are covered in the decree:

- Documentation of ongoing obligations.
- Transactional Net Margin Method.
- Determination of transfer prices based on budget data.
- Comparability and adjustment possibilities.
- Subsequent price adjustments.
- Aggregation of transactions and transfer pricing guidelines.
- Usability or non-usability of documentation.

In the decree, the finance authorities attempted to make the statute in relation to documentation more specific, yet by doing so they went slightly too far and imposed a heavy burden on the taxpayer.

5. INDIA

Special Economic Zones

The much awaited Special Economic Zones Act, 2005 provides for the creation and operation of Special Economic Zones ("SEZs"). The SEZs have been conceptualized as delineated duty free enclaves and deemed foreign territories for the purposes of trade operations, duties and tariffs. The SEZ legislation envisages host of fiscal incentives to both the developer of a SEZ and the units set up therein, and aims at providing a long term stable policy framework with minimum regulatory regime. The key fiscal benefits available to the developer of the SEZ and to the units operating in the SEZ are corporate tax exemption for a period of 10/15 years (on a staggered/conditional basis), dividend tax exemption for the developers, customs and excise duty exemption for goods used in the SEZ and service tax exemption on services provided to the developer and the units.

Proposals for setting up SEZs will require prior approvals and the approvals will be granted based on the fulfillment of the prescribed conditions.

6. INDONESIA

Implementation of the proposed amendments to Indonesian tax laws postponed to 2007

The draft amendments to the Indonesian tax laws were submitted to the House of Representatives for deliberation last August 2005 and were expected to be implemented starting 1 January 2006. However, last November, the House of Representatives' Special Committee Chairman requested the government for the new amendments to take effect starting 2007, the reason being that the discussions regarding the substantial amendments are not expected to be finished before April 2006.

The proposed amendments are the third major amendments to the General Taxation Provision and Procedures Law (enacted in 1984), Income Tax Law (enacted in 1984) and the Law on Value Added Tax on Goods and Services and Luxury Sales Tax (enacted in 1991).

The Indonesian business community and the public have many concerns regarding the draft amendments. The Indonesian Chamber of Commerce (KADIN) has called on the government to make the amendments "business-friendly" so as to maintain the competitive edge of Indonesia's business climate and to attract more investors. KADIN has also asked that the modifications must adhere to tax laws commonly practiced worldwide, which acknowledge tax neutrality with competitive rates, and equality between tax officials and taxpayers. Moreover, KADIN wants income tax rate cuts implemented earliest and not after five years, in order to maintain the country's competitive edge and to attract more investors.

Given the new developments regarding the draft tax law amendments and the uncertainty of when the new ones will take effect, it is for the best interest of the Indonesian taxpayers and those who have business interests in Indonesian to study the proposed amendments and anticipate the implications so that they will be prepared and will not be caught unguarded when the new tax law modifications are ratified and become effective in 2007.

7. LUXEMBOURG

7.1 Taxation of individuals: Introduction of a 10% final withholding tax on savings income

On 21 December 2005, the Luxembourg Parliament adopted a new tax law introducing a final withholding tax on interest income for individuals.

In accordance to the law, any Luxembourg paying agent that pays interest to a Luxembourg resident beneficial owner, must apply a final withholding tax of 10%. The withholding is final in the sense that:

- no further tax is payable on the income;
- the income is not required to be reported in the tax payers tax return;
- the income is not taken into account when calculating the average rates of tax on the income.

The 10% withholding tax will apply to income as defined in article 6 of the Luxembourg Law of 21 June 2005 incorporating the Savings' Directive, to the extent the income is paid or allocated by a Luxembourg paying agent to an individual Luxembourg resident. Certain items are out of the scope of the law, among others interest income distributed by UCITS and income arising from the sale/repurchase/reimbursement of shares/units in such UCITS.

No withholding tax will apply up to an amount of EUR 250 of interest paid once a year on fixed or on demand deposits. The EUR 250 exemption applies per year, per person and per paying agent.

Implications:

- Luxembourg residents should review the structure of their savings to ensure that they gain maximum benefit from the provisions.
- Banks and other paying agents will have to modify their systems in order to handle these withholding obligations and communicate this to their clients, since the law is applicable from 1 January 2006.

7.2 Taxation of individuals: Abolition of the Luxembourg 0.5% Net Wealth Tax for individuals

According to a law adopted on by the Luxembourg Parliament 21 December 2005, some of the provisions of the Luxembourg law of 16 October 1934 regarding individuals will be abolished so that the Luxembourg 0.5% Net Wealth Tax will no longer apply to individuals as from the tax year 2006, but will remain applicable to companies.

Implications: Luxembourg will become a very attractive jurisdiction, in which for High Net Worth Individuals to establish residence in Luxembourg.

7.3 VAT: Luxembourg, a place to be for communication and information technology players

During the speech introducing the 2006 budget, Luxembourg Prime Minister, Jean-Claude Juncker, reminded the general willingness of the government to strengthen Luxembourg position as one of the leading locations for the communication and information technology industry.

In accordance with this policy, the Prime Minister announced that the VAT rate applicable to digital TV services would be reduced from 15% to 3%. This measure is applicable from 1 January 2006.

The 3% VAT rate should apply to digital TV services provided by broadcasters established in Luxembourg to private individuals residing all over the European Union. The precise scope of application of this provision should be made public within the coming weeks.

8. MALTA

The Prime Minister and Minister of Finance presented his Budget for 2006 on 31 October 2005. In his review of Malta's economic performance, he indicated that the budget deficit will be reduced from 5.1% of GDP to 4% of GDP in 2005, so that the Government will be able to meet the target of a budget deficit of less than 3% of GDP by the time it introduces the Euro on 1 January 2008.

During the first nine months of 2005 economic growth was equivalent to 1.7% in real terms and there was an increase in local consumption, notwithstanding that the Government had reduced its expenditure by 3.8% in real terms.

According to the Harmonized Retail Price Index, inflation reached 2.2% which is at the same level as the EU average. The unemployment rate of 5% of the labor force also compares well with the EU average.

Apart from looking at various sectors of the economy the Prime Minister and Minister of Finance announced a series of measures for 2006.

Our review of some of the main budget tax features are included hereunder.

8.1 Capital gains tax on transfers of immovable property

The capital gains provisions contained in the Income Tax Act are amended to reflect the following changes:

- A reduced rate of Capital Gains Tax (CGT) on the transfer of immovable property acquired "mortis causa" after 1992.
- The introduction of a Final Withholding Tax (FWT) on the transfer of immovable property.

8.2 Tax incentives

Companies who pay for the studies of their employees will be entitled to tax credits whilst those individuals who pursue their studies in science subjects will be entitled to tax credits calculated on the study costs.

These two measures have already been included in the legal notices published on 11 October 2005 on various tax credits under the Income Tax Act.

The six legal notices contain a number of tax credits and incentives for companies that set up back office operations, operate in a free zone, are involved in eBusiness activities in Malta, incur qualifying expenditure in research and development or reinvest their profits in particular projects. The Prime Minister and Minister of Finance announced that the Government is allocating Lm 4 million in tax credits as incentives associated with research and development, Lm 500,000 in tax credits for companies that set up back office operations in Malta and another Lm 500,000 in tax credits for companies that set up eBusinesses in Malta. Most of the tax incentives included in the said legal notices were effective from 1 January 2005.

The Government is committing itself to explore the possibility of establishing business parks that cater for particular market sectors such as science and technology, pharmaceutical and laboratory research, financial services and back office operations.

Apart from these areas the film-making industry also stands to benefit from certain tax incentives. Persons who invest in the facilities and services for the production of films may claim certain tax credits; indeed every film production may benefit from a refund of up to 20% of the expenses incurred in Malta.

9. MEXICO

The Mexican Congress has approved amendments to the Income Tax Law that enter into force on 1 January 2006 and which are summarized below.

9.1 Corporate tax rate

Although this amendment has been approved since 1 January 2005, it is important to remember that the 30% corporate income tax rate in force during 2005 will be reduced to 29% during the 2006 fiscal year, and will be reduced to 28% for 2007 fiscal year and subsequent years.

9.2 Withholding on interest

During 2006 a 4.9% income tax withholding on interest paid to Foreign Banks by Mexican residents applies, provided that the lending banks which are the beneficial owners of such interest, reside in a country with which Mexico has entered into a taxation treaty, and such banks are registered on the Mexican tax authorities' *"Register of Foreign Banks, Financial Institutions and Foreign Pension and Retirement Funds".*

9.3 Thin capitalization rules

As from 2005, Mexican taxpayers who have loans from related parties or from abroad (from related or unrelated parties), are generally not able to deduct, from the income tax base, interest paid to lenders in excess of a 3:1 debt-equity ratio.

Congress has approved a legislative amendment for 2006, whereby loans obtained by Mexican taxpayers that are subject to terms and conditions: (i) limiting the borrower's ability to a) distribute dividends, b) reduce capital, c) sell fixed assets, d) enter into new loans, or (e) transfer the majority of the entity's capital stock; and (ii) allowing the lender a say in the determination of the use of the proceeds from the loans, will not be considered for the purpose of determining the 3:1 debt-equity ratio, and therefore the interest thereon will be deductible from the income tax base.

Although it will be inforce from 1 January 2006, its application is allowed for the 2005 annual income tax return. This legislative modification originates from a Presidential Decree of November 2005, which basically contained the same relief for fiscal year 2005.

9.4 Transfer pricing methods

As from 2006, the Comparable Uncontrolled Price Method ("CUP") must be used first. If such method is not appropriate, the following methods may be used: (i) Resale Price Method; (ii) Cost Plus Method; (iii) Profit Split Method; (iv) Residual Profit Split Method; or (v) Net Profit Margin Method. Preference for the Resale Price Method and for the Cost Plus Methods must be given when the CUP method cannot be used.

Taxpayers must be able to prove that the method utilized is the most appropriate or a more reliable method, according to available information.

10. POLAND

Advance Pricing Agreements in Poland

As from 1 January 2006, Advance Pricing Agreements ("APAs") are available in Poland. In principle, the ability to reach an APA offers certainty in transactions executed by related parties regarding the transfer pricing methodology adopted by them. Since the APA is binding on the relevant tax authorities/ tax administrations until its conditions are met / or expiration date, it reduces the risk of dispute or litigation with the tax authorities.

The scope of APAs is broadly defined by the law and depends on the number of tax administrations involved in the process:

- A unilateral APA is an agreement regarding transactions taking place between related parties resident or not residents in Poland which requires the consent of the Polish Minister of Finance.

- A bilateral APA requires both the consent of the Polish Ministry of Finance and the foreign tax administrations with jurisdiction over the foreign party involved.
- A multilateral APA is an agreement concerning more than one foreign entity; the approval of all the foreign tax administrations with jurisdiction over the entities involved in the process is necessary.

The scope of the APA is of importance as it determines the extent of the protection to be given to the related parties.

The procedure leading to the conclusion of an APA is based mostly on the OECD guidelines, i.e. it provides for so-called preliminary meetings aimed at clarifying all the issues which are crucial when deciding whether to conclude the APA (purpose of the APA, scope of the APA, pricing methodology to be introduced, time needed to conclude the APA, etc.). The procedure should be closed within 6 (unilateral APA), 12 (bilateral APA) or 18 (multilateral APA) months. The execution fee is 1% of the transaction value, subject to the following limits:

- PLN 50,000 (approx. EUR 12,500) in case of unilateral APA concerning a domestic entity.
- PLN 100,000 (approx. EUR 25,000) in case of unilateral APA concerning a foreign entity.
- PLN 200,000 (approx. EUR 50,000) in case of bilateral/ multilateral APAs.

The APA may be concluded for a term of up to 3 years. It can be further extended for up to another 3 years.

11. SPAIN

11.1 Reform of transfer pricing legislation

According to press reports, the Government is preparing a reform of the transfer pricing legislation currently set forth in Article 16 of the Revised Corporate Income Tax Law (the “TRLIS”), through a piece of legislation, which the Government intends to have on the statute books in the medium term.

The reform announced seeks to bring Spanish transfer pricing legislation even closer into line with the OECD transfer pricing guidelines.

According to unofficial sources, the proposed changes might take the following form:

- Valuation of intercompany transactions on an arm’s-length basis, even if it does not lead, as a whole, to lower taxation or a deferral of taxation in Spain.
- Specific obligations concerning documentation on transactions with related parties, in line with the conclusions reached in this regard by the EU Joint Transfer Pricing Forum.
- Application of the arm’s-length principle to transactions between companies resident in Spain, including those in the same consolidated tax group, and to transactions with foreign permanent establishments or between permanent establishments in Spain and foreign related entities.
- The scope of the limitation on the deduction of expenses relating to contributions to shared projects ("cost-sharing agreements") is expanded to cover all kinds of projects (currently, it only refers to expenses relating to research and development activities).

The new transfer pricing legislation will have a markedly “anti-avoidance” flavor (transactions with entities located in tax havens, or with countries with which Spain does not have a tax treaty).

11.2 Proposed reduction in corporate income tax

The Government has announced a corporate income tax reform that will be geared towards increasing the competitiveness of companies established in Spain.

Noteworthy among the main measures announced are a cut in the tax rate (currently 35%) and a simplification of the rules on existing tax credits.

This reform, the draft legislation for which will be ready by early 2006 for passage through parliament, will come into force foreseeably in 2007.

12. UNITED KINGDOM

12.1 UK Real Estate Investment Trusts ("UK REITs")

The UK REIT regime will be introduced from 1 January 2007, and will be available to any publicly listed UK resident company whose activity is at least 75% a property rental business, and that distributes at least 95% of its net rental income to investors. UK REITs will not pay corporation tax on rental income, nor capital gains tax on the disposal of real estate.

UK REITs will however be subject to an interest-cover test whereby a tax charge will be imposed if interest paid exceeds 2.5 times profits. REITs will also be required to withhold 22% tax on profit distributions, and investors will treat distributions as income arising from a UK rental business rather than as dividend income. Details of the conversion charge for UK companies electing to become REITs will be announced in March 2006.

This could represent the most significant change in UK property company taxation for decades. However, for existing property companies, the amount of the conversion charge will be crucial in determining whether they will convert to REITs. In addition, the interest-cover test will reduce the attractiveness of REITs to anyone with more than a moderate level of debt. Finally, the withholding tax, and the treatment of distributions as UK rental income, will greatly reduce the attractiveness of REITs to UK tax-paying and overseas investors. We therefore anticipate that UK REITs may not prove as popular as originally planned.

12.2 Disclosure of Tax Avoidance Schemes

The Disclosure of Tax Avoidance Scheme ("DOTAS") rules were introduced in 2004, and require "promoters" of certain tax avoidance schemes to disclose them to the UK tax authorities within 5 days.

The UK Government has now announced that the DOTAS rules will be extended to cover the whole of Income Tax, Corporation Tax and Capital Gains Tax from April 2006. In addition, companies who devise tax avoidance schemes in-house will now be required to disclose these within 30 days.

It is clear that the UK Government regards the introduction of the DOTAS rules as a great success. Tax advisers have been complying with the DOTAS rules since 2004, and although companies with in-house tax specialists were included in the original regime, their timescale for reporting has now been hugely accelerated.

12.3 Treasury consent legislation

The UK Government has announced that it may reform the Treasury consent legislation, which requires UK companies to seek the permission of the UK Government to carry out certain transactions relating to their overseas subsidiaries. Any failure to obtain the required permission is a criminal offense, with up to 2 years in prison.

This is welcome news as the legislation is a historical anomaly: it was originally introduced to restrict overseas investment after WW2 in order to prevent the UK from going bankrupt. The legislation should therefore have been reformed many years ago as it continues to hinder the global movement of capital for UK multinationals.

12.4 Oil taxation

Effective from 1 January 2006, the supplementary tax levied on North Sea oil groups has been doubled. The UK Government justified this tax increase by highlighting the record profits of oil companies caused by the high price of oil. The UK Government however agreed to not impose any further increases in oil taxation for the remainder of its current term (likely to be until 2009 or 2010).

This is unwelcome news for North Sea oil companies because they will now effectively pay UK corporation tax at a rate of 50%, compared to 30% in other sectors. The UK Government's assurance that oil taxation will not rise again this decade will be of little consolation.

12.5 Tax risk profiling

The UK tax authorities have announced that they intend to evaluate the tax risk profile of every major UK company. The companies identified as being aggressive tax planners will be categorized as high risk, and will be subject to an intense level of scrutiny, including the presence of tax investigators at the companies' offices for up to 3 months at a time.

This is worrying news. The UK tax authorities appear to be moving towards the U.S.model of tax compliance, which has many unwelcome features such as tax audits without end, the permanent stationing of tax investigators at a company's premises, and the employment of staff whose only role is to handle the tax investigators. We believe

that many large UK companies will therefore be faced with a costly additional compliance burden as the UK tax authorities begin to implement this initiative.

13. UNITED STATES

Do you have all the information you need on your international transactions to comply with the tax shelter reporting requirements?

As you are no doubt painfully aware, there has been a substantial amount of time/effort focused lately on ensuring compliance with the tax shelter reporting/reportable transaction disclosure requirements and also in completing form 8886 (Reportable Transaction Disclosure Statement). However, we are now finding that, in spite of all this attention, many companies may not have adequately developed the systems necessary to identify and then report timely the reportable transactions in which they are considered to participate as a result of their shareholding in a foreign corporation. This release will briefly summarize the reportable transaction requirements (and penalties) as they apply to shareholdings in a foreign corporation and then discuss three of the more common issues we have repeatedly encountered in practically applying these rules.

a) *Reportable transactions*

A U.S. person is generally considered to participate in a reportable transaction (and thus has a reporting obligation on form 8886) with respect to any reportable transaction entered into by a foreign corporation in which it is a shareholder if the U.S. person is either a) a U.S. Shareholder (as defined in section 951(b)) in a controlled foreign corporation (a CFC), or b) a 10% shareholder (using either a vote or value test) in a passive foreign investment company that has elected to be a qualified electing fund (a QEF). We have referred to these U.S. shareholders as reporting U.S. shareholders. Practically any U.S. individual, corporation, partnership, or trust will be considered to participate in a reportable transaction if they have a sufficient ownership in a foreign corporation even though there is no controlling interest in the foreign corporation.

A reportable transaction with respect to a foreign corporation for this purpose is generally the same transactions that must be reported by a U.S. domestic corporation. Specifically, a transaction undertaken by a foreign corporation will be a reportable transaction to its reporting U.S. shareholder if it is any one of the following: (i) a listed transaction or any transaction substantially similar to a listed transaction, (ii) a confidential transaction, (iii) a contractually protected transaction, (iv) a loss transaction, or, (v) a transaction with a brief asset holding period. Transactions involving a significant book/tax difference (i.e. generally a book tax difference exceeding $10 million) will also be reportable transactions as they are for domestic U.S. corporations, but only in the instance where the significant book/tax difference has the effect of reducing or eliminating a U.S. income inclusion under the subpart F income or qualified electing fund rules.

b) *Penalties*

The penalty for failure to supply the information with respect to each reportable transaction is $50,000 for a corporate taxpayer. This increases to $200,000 for the failure to report a listed transaction. This failure to report penalty is applicable whether or not the failure to report the transaction results in any underpayment of tax. However, in certain instances, the penalty can be rescinded by the IRS unless there is a failure to report a listed transaction.

c) *Practical impact of these rules: Common issues*

The practical impact of these rules is that a reporting U.S. shareholder in either a CFC or a QEF must perform a detailed review of the income, expenses, and transactions each year within the CFC or QEF to determine whether the foreign company has entered into a reportable transaction. An analysis must also be made as to whether there are any significant book/tax differences that had the effect of reducing or eliminating subpart F income or income from a QEF.

Such a review will generally require a much more detailed analysis and information gathering process than is usually done by most companies currently. For example, it may not be readily apparent from the normal information solicited now that a CFC has entered into a transaction with a brief asset holding period which must be reported. As a result, annual information reporting packages may need to be expanded (or site visits implemented) to ensure that the appropriate information can be

gathered timely to allow preparation of the form 8886 each year.

In addition to the comments above, we have identified three relatively common situations where it looks like reporting will be required, but where the traditional information flows from outside the U.S. will not necessarily capture the data required to complete form 8886. These three involve confidential transactions, significant book/tax difference transactions and listed transactions.

With respect to confidential transactions, we have found that, unlike their U.S. counterparts, many foreign professional advisors routinely include confidentiality clauses in the standard terms and conditions section of their engagement letters. These clauses generally prohibit disclosure of the tax advice that has been rendered to any party, including tax authorities and could also encompass the preparation of a foreign tax return. Consequently, if the fee for the work performed exceeds $250,000 (in the case of a corporation) the transaction will likely need to be reported on form 8886.

Secondly, any reduction in either subpart F income or income from a QEF in any year will need to be investigated in detail to ascertain whether there would have been a greater amount of taxable income in the U.S. in the absence of a significant book/tax difference. In particular, the book/tax difference which must be tracked is generally the difference in the U.S.GAAP income for the entity and its earnings and profits (E&P), as calculated on a U.S. tax basis. Such a requirement may now force companies with large CFC's to undertake a much more detailed E&P calculation each year than is currently made during preparation of the form 5471. In other words, in order to comply with the reportable transaction rules, companies will now need to not only ascertain that their CFC's does or does not have any subpart F income for the year, but they will also need to know whether a significant book/tax difference has reduced or eliminated a potential U.S. tax liability.

Finally, a determination will need to be made of whether a CFC or QEF has entered into a listed transaction outside of the U.S. While it may be reasonable to conclude that listed transactions are generally only those involving U.S. tax matters, the regulations expand the concept of a listed transaction to include any transaction that is substantially similar to one of the types of transactions that the IRS has identified as a tax avoidance transaction. Unfortunately, the language in the regulations does not differentiate either between U.S. and foreign transactions or U.S. and foreign taxpayers. Therefore, a transaction undertaken primarily for foreign tax reduction purposes, but which is substantially similar to a listed transaction in the U.S. would appear to be "tagged" as a listed transaction for purposes of the reportable transaction rules. Such an anomaly could readily arise in certain countries (such as Canada and the UK, etc.) where sophisticated tax planning is routinely undertaken.

Unfortunately, the type of information needed to determine whether reporting is required on form 8886 is not usually contained in the data many companies routinely gather from their foreign subsidiaries. It may also be especially difficult to obtain the necessary data where the U.S. person is a U.S. Shareholder of a CFC, but does not control the CFC. In order to avoid penalties, companies must now seriously consider the establishment of reasonably reliable procedures to ascertain if any foreign transactions must be reported on form 8886 and then to obtain the appropriate information to complete the form. In addition preparation of detailed E&P calculations should be considered for all substantial CFC's as part of the form 5471 process to determine whether any significant book/tax differences may exist.

COURT CASES AND RULINGS

A) EUROPEAN UNION

1. MARKS & SPENCER CASE

1.1 The case

Marks & Spencer plc ("M&S"), a UK tax resident company, had subsidiaries in the UK and in certain European member states. M&S claimed group relief against UK profits for losses incurred in its Belgian, German and French subsidiaries.

Under UK tax law, losses may be group-relieved between UK resident companies but not if the losses are incurred by non-UK resident subsidiaries. The ECJ was asked whether certain aspects of the EU treaty (Articles 43EC and 48EC) precluded this distinction.

On 13 December 2005, the ECJ issued its judgment. It ruled that a UK company may only claim UK group relief for the losses of an overseas EU subsidiary if:

- It has exhausted the possibilities of utilizing the losses in the overseas country in both the current year and in previous years; and
- There is "no possibility" of utilizing the losses in the overseas country in future years either by the subsidiary itself, or by selling the subsidiary to a third party.

The judgment therefore severely limits the circumstances in which such loss claims can be made both in the UK and elsewhere in the EU. This is because the home tax authorities are likely to require proof that the losses cannot be utilized in the overseas country before agreeing to a claim. The judgment also allays fears that a wholesale review of the UK's group relief rules will take place.

The "no possibility" test is expected to be very challenging. Proving a negative is always extremely difficult, and proving a future negative where circumstances could change is even harder. Given that almost every western European country permits the carry-forward of losses, it could, and most certainly will, be argued that, however remote the chances are, it is always possible that a loss-making subsidiary may move into profitability, or that a third party may purchase the losses.

1.2 Wider implications – a "Euro-General Anti-Avoidance Rule ("GAAR")?

In the M&S case, the ECJ reaffirmed that member states are free to adopt law that has the specific purpose of preventing wholly artificial arrangements whose purpose is to circumvent national tax law. The ECJ's stance on this case, taken with recent moves towards tax harmonization, could be viewed as creating the conditions for a Europe-wide GAAR.

1.3 Future developments

Attention now turns to the ECJ's judgment in the Vodafone and Cadbury Schweppes cases, where the taxpayers are contending that the UK controlled foreign company ("CFC") rules should not be applied to low-taxed subsidiaries in Luxembourg and Irish subsidiaries because the rules are contrary to EU law.

The judgment is expected in 2006, and if the ECJ upholds Vodafone and Cadbury Schweppes' arguments, then there could be a loss for the UK government of hundreds of millions of pounds of tax revenues.

The cases detailed above demonstrate that the entire corporate tax arena within the EU is therefore shifting, and advisers, companies, governments and regulators will be watching the outcome of these cases very closely.

2. INVESTMENT FUND INDUSTRY – TWO MORE VAT CASES BROUGHT BEFORE THE EUROPEAN COURT OF JUSTICE

After the BBL case (decided in October 2004) and the Abbey National case (still pending), two more cases dealing with VAT in the investment fund industry are being brought before the European Court of Justice (ECJ).

These VAT cases deal with the scope of the VAT exemption applicable to the management of investment funds. This exemption is not always interpreted homogenously throughout the EU.

A reference for a preliminary ruling has been made to the ECJ by a Direction of the VAT and Duties Tribunals in the proceedings between J.P. Morgan Fleming Claverhouse Investment Trust plc, the Association of Investment Trust Companies and Commissioners of HM Revenue and Customs.

In the meantime, the Dutch Supreme Court has referred questions to the ECJ in a case also

dealing with the VAT treatment of services rendered in an asset management context.

These two cases arise from different backgrounds and could turn out to be of special interest. Notably, the "JP Morgan" case addresses issues that are unlikely to be settled in the long-awaited Abbey National case.

There is no doubt that the issue of VAT for investment management models is becoming even more important, and will require special attention in the coming months.

For your information, we turn below to the questions referred to the ECJ in the JP Morgan case.

- Are the words "special investment funds" in Article 13B(d)(6) of the Sixth Directive capable of including closed-end investment funds, such as ITCs?
- If the answer to the first question is in the affirmative, does the phrase "as defined by Member States" in Article 13B(d)(6):
  - allow Member States to select certain of the "special investment funds" within their jurisdiction to benefit from the exemption of the supply of management services and exclude others from the exemption, or
  - does it mean that the Member States are to identify those funds within their jurisdiction which fall within the definition of "special investment funds" and that the benefit of exemption should extend to all such funds?
- If the answer to the second question is that Member States can select which "special investment funds" benefit from the exemption, how do the principles of fiscal neutrality, equal treatment and the prevention of distortion of competition affect the exercise of that discretion?
- Does Article 13B(d)(6) have direct effect?

3. CROSS-BORDER MERGERS

In its judgment of 13 December, 2005 (case C-411/03) the European Court of Justice ruled that it is contrary to freedom of establishment if registration in the national commercial register of the merger is being refused in general in a Member State where one of the two companies is established in another Member State, whereas such registration is possible, on compliance with certain conditions, where the two companies participating in the merger are both established in the territory of the first Member State.

The issue was referred to the ECJ for a preliminary ruling by the Landgericht Koblenz as the Local Court (*Amtsgericht*) Neuwied rejected the application for registration of a merger between a German and a Luxembourg company in the commercial register, arguing that Sec. 1 para. 1 no. 1 of the German law on the transformation of companies (*Umwandlungs-gesetz*) provides only for mergers between legal entities established in Germany.

This ECJ decision is welcome news as it has opened the way to cross-border mergers and has anticipated the implementation of the Directive on cross-border mergers of companies with share capital.

B) COUNTRIES

1. GERMANY

Substance requirements for holding companies

Sec. 50d para. 3 Income Tax Act denies foreign holding companies withholding tax relief in cases where the shareholder of the company would otherwise have no right to withholding tax relief and the interposing of the entity lacks economic purpose or substance. However, in its judgment of 31 May 2005 (I R 77, 88/04) the German Federal Finance Court held that the insertion of a holding company is not regarded as treaty shopping for withholding tax relief purposes pursuant to Sec. 50 para. 1a Income Tax Act 1990/1994 provided that valid business reasons for interposing the holding company exist.

2. INDIA

2.1 Special Bench of Indian tax Tribunal decides on PE constitution

A Special Bench of the Income-tax Tribunal in India recently delivered a decision in a tax case involving three telecom companies, viz, Ericsson, Motorola and Nokia. The judgment has been passed principally on two issues: the constitution of a Permanent Establishment ("PE") under the relevant tax treaties and the characterization of software income, when software is embedded in the

hardware. The three telecom companies had supplied hardware with embedded software to telecom operators in India. The installation contracts were entered into between these operators and the respective Indian subsidiaries of the telecom companies. The Indian tax authorities had argued that all the three telecom companies had a PE in India and that the sale of the digital network equipment and embedded software to telecom operators in India was, therefore, liable to tax in India.

Having regard to the facts of each case, the Tribunal ruled in the case of Ericsson that the contract was an independent one between the subsidiary and the telecom operator and that there was nothing to indicate that the employees of Ericsson had a place available at their disposal that they could use, so there is no fixed-place PE in India. In the case of Motorola, which had received certain services from its Indian subsidiary, the Tribunal ruled that since the services were "preparatory and auxiliary in nature", the company did not have a PE in India under the exclusions provided in the tax treaty between India and the US. In the case of Nokia, whose subsidiary had an installation agreement, a service agreement and a technical support agreement with the telecom operators, the Tribunal ruled that the company had access to a fixed place and that it had complete control over the activities of its Indian subsidiary. It, therefore, ruled that Nokia had a PE in India and that 20% of profits from the arrangements were liable to tax in India.

In relation to taxability of the payment for the software embedded in the hardware, the Tribunal distinguished a “copyrighted article” from that of “copyright” and concluded that the embedded software was akin to a “copyrighted article” and that the payment for software is not “royalty” and accordingly not liable to tax in India.

The decision was much awaited and has a far reaching impact on the Indian taxability of offshore supplies and the constitution of a PE under the relevant tax treaties.

2.2 Indian tax Tribunal rules on withholding requirement on payments for software

The Bangalore Bench of the Indian Tax Tribunal has passed a series of rulings on the requirement to withhold tax on payments for purchase of off-the shelf software, in the case of an end-user as well as a re-seller. The Indian Revenue authorities have been contending that payment for software is “royalty” under the domestic law and also that such payments would also fall within the meaning of “royalty” under most of tax treaties.

In deciding the matter, the Tribunal relied on an Indian Supreme Court decision wherein it was held that software is goods (the Supreme Court decision was in the context of sales tax and not income-tax). The Tribunal also noted that although the importers (both end-users and re-sellers) had obtained a license, the license pertained to the “copyrighted program” and not to the “copyright” itself. Therefore, the payment not being towards a “copyright”, it could not be “royalty”. The Tribunal held that in the absence of a PE of the software vendors in India, the payments received by them were not taxable in India and there was no withholding requirement.

This ruling is consistent with international jurisprudence on the subject and though it is subject to further appeal by the Indian Revenue authorities, it is expected to bring considerable relief to numerous end-users and re-sellers of software in India.

3. SPAIN

3.1 Deductibility of financial goodwill

Spanish legislation provides that the difference between the acquisition cost and the underlying book value on acquisition date of holdings in qualifying nonresident entities that is not allocable to the assets and rights of the entity (that is, the financial goodwill) is deductible up to an annual limit of 5%.

In this connection, an issue arises over the possible impact on deductibility of the financial goodwill of the various business restructuring alternatives under the tax neutrality regime established in the EU Directive on the common system of taxation applicable to mergers, divisions (i.e., spin-offs), transfers of assets and exchanges of shares concerning companies of different Member States.

In binding ruling V1316/05 dated 4 July 2005, the Directorate-General of Taxes (“the DGT”) considered a case where, a Spanish company had acquired three different companies that were merged later on. As a consequence of the restructuring process, three different amounts of

goodwill were combined into one, that is to say, there was one single amount of goodwill, equal to the value of the sum of the three amounts of goodwill corresponding to the three companies acquired and subsequently merged.

The DGT ruled that the value and deductibility of the goodwill arising on the acquisition of the three foreign companies should be preserved, under the principle of universal succession governing restructuring transactions under the special tax regime.

3.2 Application of withholding tax exemption to interest paid to Swiss finance branches

The Nonresident Income Tax Law provides that interest and other income from the transfer to third parties of own capital received by residents of an EU Member State, or by a permanent establishment ("PE") of such entities situated in another Member State, will be tax exempt if paid by entities or PEs resident in Spain.

Traditionally, there was an issue over the applicability of the exemption to interest paid by an entity resident in Spain to a Swiss PE of an EU-resident entity.

In a case involving a profit-participating loan granted by a Luxembourg-resident entity, but the interest on which was assigned and paid to a Swiss finance branch, the DGT has handed down a ruling clarifying that it is necessary for both the lender (a Luxembourg-resident entity) and the beneficial owner of the interest (a PE) to be situated in a Member State, and that accordingly, interest paid to a PE situated in Switzerland would not qualify for the exemption.

3.3 Claim for refund of excess withholding taxes. Change of judicial interpretation

The Spanish Supreme Court has handed down a judgment that changes the established position on claims for refunds of excess amounts of tax withheld or prepaid pursuant to a tax treaty.

The problem arose with respect to the legal provision existing before 2003, which stipulated that claims of this type had to be made "*within a maximum period of two years from the date of payment of the tax.*"

The Supreme Court's position had hitherto been that this provision prevailed over the general rule on refunds of amounts incorrectly paid over (4 years), since it was a specific provision with a specific time period for these specific cases.

However, in a recent judgment dated 18 May 2005, the Supreme Court examined the refund of excess amounts withheld pursuant to the Spain-U.S. tax treaty.

The Court held that the manifest discrimination entailed by the fact that Spanish-resident citizens had longer time periods for claiming refunds than nonresidents could not be overlooked. Accordingly, the Court concluded that the time period applicable to refunds of this type should also be the standard 4-year period, pursuant to the nondiscrimination provision in Article 25(1) of the Spain-U.S. tax treaty.

4. UNITED STATES

Are Delaware intangible holding companies becoming extinct?

One of the most popular state tax planning techniques of the past 15 years has been the Delaware intangible holding company structure. Briefly, this structure involves transferring valuable intellectual property (e.g., trademarks, trade names, copyrights, etc.) to a Delaware holding company, and having said company charge a royalty to the operating companies for the right to economically exploit the intellectual property. The result is a royalty deduction for the operating company, while the royalty income earned by the Delaware holding company goes untaxed thanks to Delaware's favorable taxation laws or its location in a unitary, combined or consolidated state.

In recent years, states, spurred on by staggering budget deficits, have gone on the offensive, hoping to curtail such tax favored structures. The assertion of economic nexus is one manner by which the states have attacked. The seminal case in the economic nexus area is *Geoffrey, Inc. v. South Carolina Tax Commission*, 313 S.C. 15 (1993), in which Geoffrey, Inc. was a Delaware company holding trademarks and trade names that it licensed to Toys R Us, Inc. for use in South Carolina. Geoffrey, Inc. had no physical presence in the state, but was still deemed to have nexus for South Carolina income tax purposes. The primary

rationale was that the licensing of intangibles for use in South Carolina and the receipt of income in exchange provided the minimal connection with the state required by the Due Process Clause. In addition, the court held that this business activity provided a substantial nexus with South Carolina and satisfied the requirements of the Commerce Clause. There have been several recent decisions that indicate more states are getting on board with the economic nexus doctrine. This issue will highlight those cases.

a) *Lanco, Inc. v. Director of Taxation, No. A-3285-03T1 (N.J. Super. Ct. App. Div. 2005)*

The facts in *Lanco* show the basic Delaware intangible holding company structure described above in which the taxpayer did not have any physical presence in New Jersey. In the original decision, the New Jersey Tax Court ruled in favor of the taxpayer, emphasizing that a state may not assert nexus absent a physical presence.

However, the Tax Court's decision was reversed on appeal. The New Jersey Superior Court stated that the physical presence standard set forth in *Quill* Corp. v. North Dakota, 504 U.S. 298 (1992) "does not apply to taxes other than sales and use taxes."

Quill has been at the center of the economic nexus issue for some time. The controversy stems from the fact that *Quill* sets forth a bright-line test for nexus from a sales and use tax context and there has been considerable debate as to whether or not this same litmus test can be used for other taxes, namely state income and franchise taxes. As indicated above, the New Jersey Superior Court makes it clear that, at least in New Jersey, *Quill* applies to sales and use taxes only.

b) *A&F Trademark, Inc. v. Tolson, COA03-1203 (N.C. Ct. App. No. 2004)*

A&F Trademark reflects nearly indistinguishable facts from both *Geoffrey* and *Lanco*, with Delaware trademark companies licensing trademarks, trade names, and service marks to related entities (retail clothing stores) in exchange for royalty payments. In fact, Lanco, Inc. is one of the petitioners in this case as well, as Lanco, Inc. and A&F Trademark, Inc. were both subsidiaries of The Limited, Inc.

Similar to the New Jersey Superior Court, the North Carolina Court of Appeals indicated that the *Quill* physical presence test does not apply to taxes other than sales and use taxes. The taxpayers submitted a writ for certiorari, asking the United States Supreme Court to rule, once and for all, whether or not the *Quill* physical presence standard applies to all state taxes or just sales and use taxes. However, as it has in the past, the Supreme Court denied certiorari. We would like to see the Supreme Court take a case of this nature to help clear up the ambiguity surrounding this subject.

c) *Secretary, Department of Revenue, State of Louisiana v. GAP (Apparel), Inc.*, 886 So.2d 459 (La. Ct. App. 2004)

This is yet another case featuring a clothing retailer that has implemented the basic Delaware intangible holding company structure. The taxpayer had no physical presence in the state, but, as with the two cases discussed above, the court ruled against the taxpayer, indicating that the licensing of intangible property into Louisiana will give the intangible holding company nexus, and thus make it subject to Louisiana income tax. While the court did not explicitly state that the *Quill* physical presence standard does not apply to income taxes, the fact that the taxpayer was deemed to have nexus in Louisiana would seem to indicate that the court has taken this position.

LUXEMBOURG TAXAND CONFERENCE

On December 1 and 2, nineteen Taxand Firms met in Luxembourg for the third Tax Conference.

During this Conference, in addition to participating in numerous technical sessions on current developments of interest to our clients in the different jurisdictions, we took the opportunity of holding meetings between the members of the different service lines (real estate, VAT, transfer pricing and venture capital) and of the Knowledge team.

The Tax Conference, like previous events (which were held in Paris and Madrid), has been a great success and has helped the 140 participants to hone their tax and "networking" skills.

Contact information

Argentina
Bruchou, Fernández Madero, Lombardi & Mitrani

Ing. Enrique Butty, 275, 6th Floor
C1001AFA-Buenos Aires
www.bfmlym.com

Matías Olivero
E. matias.olivero.vila@bfmlym.com
Analia Miqueri
E. analia.miqueri@bfmlym.com
T. +54 11 5 288 2308
F. +54 11 5 288 2301

Belgium
AB Partners BVBA

Avenue Louise, 240
1050 Brussels

Geert De Neef
E. gdn@ab-partners.be
Marjorie Voltas
E. m.voltas@ab-partners.be
T. +32 2 600 52 08
F. +32 2 600 52 01

Brazil
Barbosa, Müssnich & Aragão Advogados

Avenida Almirante Barroso
52 – 29º e 32º andares
20031-000 Rio de Janeiro
www.bmalaw.com.br

Silvania Conceiçao Tognetti
E. sct@ bmalaw.com.br
Débora Bacellar
E. dba@bmalaw.com.br
T. +55 (21) 3824 5875
F. +55 (21) 2262 5536

France
Arsene

5, rue Soyer
92523 Neuilly-sur-Seine Cedex
www.arsene.fr

Frederic Donnedieu
E. frederic.donnedieu@arsene-avocats.com
Roland Scheneider
E. roland.schneider@arsene-avocats.com
T. +33 (0)1 70 38 88 00
F. +33 (0)1 70 38 88 10

Germany
Goutier & Partner GbR

Schumannstrasse 34b
60325 Frankfurt am Main
www.goutier.de

Dr. Klaus Goutier
E. goutier@goutier.de
Arno Bermel
E. bermel@goutier.de
T. +49 69 97 557 100
F. +49 69 97 557 199

India
BMR & Associates

The Great Eastern Center, 1st floor
70, Nehru Place
New Delhi 110 019
www.bmrtax.com

Mukesh Butani
E. mukesh.butani@ bmrtax.com
Gokul Chaudhri
E. gokul.chaudhri@bmrtax.com
T. +91 11 3081 5000
F. +91 11 3081 5001

Indonesia
PB & CO

Menara Imperium, 27th Floor
Jl. H.R. Rasuna Said Kav. 1
Jakarta 12980
www.pb-co.com

Prijohandojo Kristanto
E. prijohandojo@pb-co.com
T. +62 21 8399 9919
F. +62 21 8379 3939

Italy
Fantozzi & Associati

Via Privata Maria Teresa n. 11
20123 Milano
www.fantozzieassociati.it

Alfredo Fossati
E. afossati@ fantozzieassociati.it
Guido Arie Petraroli
E. gpetraroli@fantozzieassociati.it
T. +39 02 7260591
F. +39 02 72605950

Luxembourg
Atoz

Aerogolf Centre
1B, rue Heienhaff
L-1736 Senningerberg
www.atoz.lu

Alex Sulkowski
E. alex.sulkowski@atoz.lu
Olivier Remacle
E. olivier.remacle@atoz.lu
T. +352 26 940 1
F. +352 26 940 300

Malaysia
VS ON TAX Sdn Bhd

Suite 16.09, 16th Floor
Wisma MPL, Jalan Raja Chulan
50200 Kuala Lumpur
www.vsontax.com

Singh Veerinderjeet
E. vs@vsontax.com
T. +60 3 788 03 162
F. + 60 3 787 78 112

Malta
Avanzia Tax Advisors

Cobalt House – 2nd Floor
Notabile Road, Mriehel QRM09
www.avanzia.com.mt

Walter Cutajar
E. walter.cutajar@avanzia.com.mt
Michelle Sant
E. michelle.sant@avanzia.com.mt
T. +356 2149 3313
F. +356 2149 3318

Mauritius
Multiconsult Limited

10, Frère Félix de Valois Street,
Port Louis
www.multiconsult.mu

Uday Kumar Gujadhur
E. uday.gujadhur@multiconsult.mu
Pamela Balasoupramanien
E. pamela.bala@multiconsult.mu
T. +230 202 3000
F. +230 212 5265

Mexico
Mijares, Angoitia, Cortés y Fuentes, S.C.

Montes Urales, 505, 3er Piso
Lomas de Chapultepec, 11000
Mexico DF
www.macf.com.mx

Marcela Fonseca
E. mfonseca@ macf.com.mx
Manuel Tamez Zendejas
E. mtamez@macf.com.mx
T. +52 55 5201 7400
F. +52 55 5520 1065

Poland
ACCREO Sp. z o.o.

Ul. Krakowskie Przedmiescie 47/51
00-071 Warszawa
www.accreo.pl

Andrzej Puncewicz
E. andrzej.puncewicz@taxand.pl
Mariusz Machcinski
E. mariusz.machcinski@ taxand.pl
T. +48 22 444 65 15
F. +48 22 444 49 01

Puerto Rico
Zaragoza & Alvarado LLP

104 Acuarela Marginal Street
Martínez Nadal Expressway
Guaynabo. PR 00969
www.zatax.com

Juan Zaragoza
E. jzaragoza@zatax.com
T. +787 999 4400
F. +787 999 4646

Spain
Garrigues Abogados y Asesores Tributarios

José Abascal, 45
28003 Madrid
www.garrigues.com

Ricardo Gómez
E. ricardo.gomez@garrigues.com
Vicente Bootello
E. vicente.bootello@garrigues.com
T. +34 91 514 52 00
F. +34 91 399 24 08

Sweden

Skeppsbron Skatt AB

Skeppsbron 20
SE-111 30 Stockholm
www.skeppsbronskatt.se

Niklas Bang
E. niklas.bang@skeppsbronskatt.se
Martin Larsson
E. martin.larsson@skeppsbronskatt.se
T. +46 8 440 41 40
F. +46 8 23 63 30

Switzerland

Tax Partner AG

Talstrasse, 80
8001 Zürich
www.taxpartner.ch

David Ryser
E. david.ryser@taxpartner.ch
T. +41 44 215 77 77
F. +41 44 215 77 70

Turkey

ERDIKLER, Yeminku Mali Müsavirlik Ltd. Sti

Dr. Orhan Birman Is Merkezi
Barbados Bulvari No: 121 Kat: 12
34349 Balmuncu, Istanbul
www.erdikler.com

Saban Erdikler
E. saban.erdikler@erdikler.com
T. +90 212 337 0000
F. +90 212 347 5789

United Kingdom

Chiltern PLC

3 Sheldon Square
London, W2 6PS
www.chilternplc.com

John Willmott
E. willmottj@chilternplc.com
Andrew Shilling
E. shillinga@chilternplc.com
T. +44 0(20) 7153 2428
F. +44 0(20) 7153 9022

United States

Álvarez & Marsal Tax Advisory Servies, LLC

600 Lexington Avenue
6th Floor
New York, NY 10022
www.alvarezandmarsal.com

Bob Lowe
E. blowe@alvarezandmarsal.com
Kristin Fonseca
E. kfonseca@alvarezandmarsal.com
T. +(212) 759 4433
F. +(212) 759 5532

Disclaimer

The information contained in this document is intended only to be a guide. It must not be relied on in, or applied to, specific situations without previously seeking proper professional advice. Even if all reasonable care has been taken in its preparation, Taxand and all the members of this Alliance do not accept any liability for any errors that it may contain or lack of update before going to press, whether caused by negligence or otherwise, or for any losses, however caused, or sustained by any person. Descriptions of, or references or access to, other publications within this publication do not imply endorsement of them.

As provided in the U.S. Treasury Department Circular 230, this Tax Newsletter is not intended or written by any Taxand Firm or to be used, and cannot be used, by a client or any other person or entity for the purpose of avoiding tax penalties that may be imposed on any taxpayer. The Taxand Firms have produced this Tax Newsletter in connection with the marketing of our tax services relating to matters discussed therein. Each taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.