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Netherlands to redefine scope of dividend withholding tax act

The Netherlands Ministry of Finance published a consultation document on 16 May 2017 that details proposed changes to the dividend withholding tax (DWT) act. The document proposes to align the domestic DWT treatment of Dutch holding cooperatives with that of private limited liability companies (BVs)/public limited companies (NVs) and to expand the scope of the exemption from DWT to apply to active business structures.

The consultation document also includes proposed changes to the tax regime applicable to nonresident taxpayers in the Dutch corporate income tax act. The proposals effectively would mean that nonresident taxpayers generally would no longer be subject to Dutch corporate income tax on their Dutch-source dividend income, but only on their capital gains. To some extent, this narrowing of the tax base would be counterbalanced by the inclusion of an anti-abuse provision in the DWT act.

Holding cooperatives and DWT

Under current law, dividends distributed by a Dutch cooperative, in principle, are not subject to Dutch DWT, except in certain situations where abuse is present. By contrast, Dutch BVs/NVs, in principle, are required to withhold a 15% tax on dividends paid to shareholders.

The consultation document contains a proposal that would require a Dutch holding cooperative to withhold DWT where a member of the cooperative holds a "qualifying interest." A qualifying interest would exist where a member holds an interest in the cooperative and is thereby entitled to at least 5% of its profits and/or liquidation proceeds. In determining whether this quantitative test is met, the interests of related parties, including those of related individuals, also would be taken into account.

A holding cooperative would be defined as a cooperative at least 70% of whose activities comprise the holding of participations or the direct or indirect financing of affiliated entities. Whether a cooperative falls within the definition of a holding cooperative would be determined by taking into account factors such as the nature of the cooperative's assets, liabilities, turnover and profit-generating activities and how its personnel spend their time. A Dutch cooperative that actively manages its investments and has sufficient related substance (*e.g.* personnel, offices) in the Netherlands potentially would not qualify as a holding cooperative and, therefore, would not fall within the scope of the DWT act. In certain circumstances, some cooperatives in private equity-owned structures could qualify as non-holding cooperatives.

The activity and quantitative ownership criteria for cooperatives would not apply to BVs/NVs; such entities would continue to be within the scope of the DWT act. It should be noted that a Dutch BV/NV, similar to a Dutch holding cooperative, may benefit from a full domestic Dutch DWT exemption.

Broadened DWT exemption

In conjunction with the new withholding tax obligation that would apply to Dutch holding cooperatives, the consultation document also includes a proposal to broaden the scope of the domestic DWT exemption. The exemption would apply to distributions made by BVs/NVs and holding cooperatives ("Dutch entities") to parent companies that are tax resident in the EU/European Economic Area (EEA) or in a third country that has concluded a tax treaty with the Netherlands that contains "qualifying provisions" relating to DWT. In both instances, the interest in the Dutch entity would have to be an interest that would qualify for the Dutch participation exemption or participation credit if the recipient were resident in the Netherlands.

It should be noted that the full domestic DWT exemption would be applicable even in the case of residents of treaty countries where the relevant treaty provides for a reduced rate of withholding tax rather than a full exemption (*e.g.* where a treaty with a non-EU/EEA member state provides for a 5% DWT tax rate).

Anti-abuse rule

The consultation document also proposes the introduction of a new anti-abuse rule in the context of the Dutch DWT exemption. For the exemption to apply to recipients that are resident in the EU/EEA and/or in a tax treaty jurisdiction, a determination would need to be made as to whether the structure involves an active business (or "entrepreneurial") structure. This determination would be based on the existing rules in the Dutch corporate income tax and DWT acts. When the interest in the Dutch entity is considered a passive investment, Dutch DWT, in principle, would be levied.

In entrepreneurial structures, the domestic exemption would not be applicable if the structure or transaction is considered artificial and, at the same time, the (direct) interest in the Dutch entity is held with the avoidance of Dutch DWT as (one of) the main purpose(s). A structure and transaction would not be (deemed) artificial to the extent it is based on valid business reasons that reflect economic reality. This could be the case, for example, if the direct member or shareholder of the Dutch entity itself runs an active trade or business to which the interest can be allocated.

Since the passive/active distinction would be made by reference to the existing rules, a private equity investment fund could qualify as an active business and, thus, satisfy the valid business reason criterion. In addition, if the member or shareholder of a Dutch entity is a top tier holding company that carries out governance, management and/or financial activities with respect to the group, this could satisfy the valid business reason criterion. The criterion also could be satisfied by a foreign intermediary holding company with the requisite substance that performs a "linking function" between the business or head office activities of the (ultimate) shareholder and the lower tier companies (whether Dutch or non-Dutch).

The factors that would be taken into account in determining whether the foreign intermediary holding company has the requisite substance would be adjusted. In addition to the substance needed to obtain an advance tax ruling (*i.e.* at least 50% of the board of directors should be Dutch resident, bookkeeping must be maintained in the Netherlands, etc.), the foreign intermediary holding company would need to have wages of at least EUR 100,000 and an office, and premises of its own available and being used for its intermediary holding function.

If the DWT exemption does not apply, only treaty relief would be available (full or partial). However, it already has been announced that it is not intended that the ability to invoke the benefits of a tax treaty should result in a more favorable outcome than that which would occur under domestic rules.

Comments

Eliminating the different Dutch DWT treatment of Dutch holding cooperatives and BVs/NVs means that all such entities would be required to withhold tax on distributions, although an exemption likely would apply to active business structures where the recipient is tax resident in the EU/EEA or a tax treaty country.

The public consultation period will run through 13 June 2017, after which the Dutch parliament will begin to discuss the proposals. If the proposed measures are adopted, they likely would apply as from 1 January 2018.

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Czech Republic:
CbC reporting deadlines likely to be postponed

Legislative updates are in progress to incorporate the requirements of the EU directive on country-by-country (CbC) reporting and the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports into Czech domestic law (for prior coverage, see *World Tax Advisor*, 25 March 2016). Due to delays in approving the necessary amendments, another amendment was proposed to the pending legislation on 19 May 2017 that would postpone the deadlines for complying with certain obligations with respect to the 2016 taxable period for Czech companies that are members of multinational groups that will be required to file CbC reports.
URL: http://newsletters.usdbriefs.com/2016/Tax/WTA/160325_bc.html

The deadline to notify the tax authorities about the ultimate parent company of the multinational group and the company that will complete and file the CbC report on behalf of the group (if different than the ultimate parent) is likely to be no earlier than 31 January 2018 (the original proposal was 30 September 2017). The deadline to complete the CbC report and submit it to the Czech tax authorities (for the parent and group companies for the 2016 calendar year) is likely to be no earlier than 30 April 2018 (the original proposal was 31 December 2017).

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Germany:
Federal Constitutional Court finds change-in-ownership rules partially unconstitutional

In a taxpayer-favorable decision issued on 29 March 2017 (published on 12 May 2017), Germany's Federal Constitutional Court held that the change-in-ownership rules relating to loss carryforwards partially infringe the German constitution, and must be amended with retroactive effect.

Under the change-in-ownership rules, net operating loss carryforwards, interest carryforwards and current-year losses are forfeited if there is a "harmful change in ownership." A direct or an indirect transfer of more than 25% (and up to 50%) of the shares in a company that has loss carryforwards results in a pro rata forfeiture of the tax loss carryforwards, and a transfer of more than 50% of the shares results in a complete forfeiture of all available carryforwards. There are three exceptions to the application of the loss forfeiture rules: (i) the intragroup restructuring exception; (ii) the built-in-gains exception; and (iii) the business continuation exception. The intragroup restructuring exception and the built-in-gains exception are applicable as from 2010, and the business continuation exception applies as from 2016 (for prior coverage, see *World Tax Advisor*, January 2017).
URL: http://newsletters.usdbriefs.com/2017/Tax/WTA/170113_5.html

The case before the Constitutional Court involved a direct transfer of between 25% and 50% of a company's shares that resulted in a partial forfeiture of the taxpayer's tax loss carryforwards. The court concluded that the rules violate the constitutional principle that companies should be taxed on their financial performance. The legislative intent to prevent loss trafficking by using "empty loss companies" may be an acceptable justification for an exception to this principle, but a partial forfeiture of loss carryforwards where there is a change in shareholders of between 25% and 50% is considered too broad and cannot be used to deem the taxpayer's behavior to be abusive.

The Constitutional Court restricted its decision to transfers of between 25% and 50% of a company's shares. The court did not provide an opinion on the constitutionality of the rule resulting in a full forfeiture of loss carryforwards following a transfer of more than 50% of the shares; therefore, this decision will have no impact on those transfers. However, it should be noted that a separate procedure on transfers of more than 50% is pending before the federal tax court.

The court also clarified that the introduction of the intragroup restructuring and the built-in-gains exceptions to the change-in-ownership rules do not affect its analysis. However, the introduction of the business continuation exception as from 1 January 2016 potentially could change the analysis, because this exception may allow the taxpayer to demonstrate the absence of an abusive intent for the share transfer. The court, therefore, limited the scope of its decision to the period from 1 January 2008 through 31 December 2015. (The decision did not address whether the change-in-ownership rules are in line with constitutional principles following the introduction of the business continuation exception.)

The Constitutional Court has asked the German legislature to draft and implement an amended change-in-ownership rule that is in line with constitutional principles by 31 December 2018, and that would apply retroactively for the period from 1 January 2008 until 31 December 2015. If the rules are not amended within this timeframe, the change-in-ownership rules for ownership transfers of between 25% and 50% of the shares in a company automatically will become void on 1 January 2019 for the 2008-2015 period.

The court's decision should apply for both corporate income tax and trade tax purposes. Tax assessment notices that became final in the 2008-2015 period, and that are not considered preliminary pending a decision of the Constitutional Court, should not be able to be amended based on the court's decision. Only tax assessment notices that still are open may be affected.

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Greece:
Authorities issue guidance on application of mutual agreement procedure

A decision issued by the Director of the Independent Public Revenue Authority (IPRA) (formerly known as the General Secretary of Public Revenue), published in the government gazette on 7 April 2017, contains comprehensive guidance on the application of the mutual agreement procedure (MAP) in Greece's tax treaties. The decision is applicable for MAP requests filed as from the date of its publication.

The MAP was introduced in article 63A of the Tax Procedure Code in November 2016.

The MAP is a mechanism found in tax treaties that allows the competent authorities of the contracting states to engage with each other to attempt to resolve tax disputes arising under the treaty. The MAP can involve cases of double taxation, as well as cases concerning the interpretation and application of a treaty. The MAP is independent from any remedies provided under the national legislation for the resolution of tax disputes.

Greece currently has 57 tax treaties, which (except for the treaty with the UK) include MAP articles that are based on article 25 of the OECD model treaty. Before the decision of the IPRA, the MAP had been used sporadically in Greece because there were no relevant guidelines. The decision addresses all stages of the MAP process.

Scope of MAP

The IPRA decision provides that the MAP will be applicable only to taxes that are explicitly covered by the relevant tax treaty and to persons that are residents of one of the contracting states based on the provisions of the treaty.

A taxpayer may seek competent authority assistance under a MAP with respect to the following issues:

- Dual residence;
- Cases relating to the deduction of withholding tax in the source country, i.e. the application of a withholding tax rate that is higher than the rate provided for by the relevant treaty;
- Cases of taxation of a particular type of income in one contracting state, where the applicable treaty allocates exclusive taxing rights to the other state;
- Cases where both contracting states take the position that they have the right to impose tax;
- Conflicts arising from the characterization of income;
- Attribution of profits to permanent establishments; and
- Cases where a taxpayer is subject to additional tax in one country due to a transfer pricing adjustment made in the other country.

Where a MAP is invoked, any interest/surcharges and penalties arising from the actions that give rise to the MAP may be examined by the competent authorities within the framework of the procedure.

MAP process and requirements

Individuals or legal entities that are tax residents of one of the contracting states and that consider themselves not to have been taxed according to the provisions of an applicable treaty may submit a request to invoke the MAP. The request must be submitted in writing to the competent authority of the state in which the taxpayer is considered a national. A request submitted to the Greek competent authority must be in the Greek language. No fees are charged for submitting a MAP request.

The competent authority role in Greece is held by two departments:

- Tax Affairs Department (First Section) of the International Economic Relations Directorate of the IPRA, for issues other than those relating to intragroup transactions; and
- Special Tax Audits Department (Fourth Section) of the Audit Directorate of the General Directorate of Tax Administration of the IPRA, for issues relating to intragroup transactions.

Content of MAP request

To initiate a MAP request with the Greek tax authorities, a taxpayer must submit a written request to one of the above authorities, both electronically and in "hard copy," which must include at least the following information:

- The identity (*i.e.* name, address and tax identification number) of the taxpayer;
- A summary of the relevant facts of the case, including the tax years involved;
- The legal basis for the MAP request, *i.e.* the provision of the relevant treaty that the taxpayer considers has not been correctly applied by either or both contracting states;
- Information and supporting documentation (in Greek) that substantiates the taxpayer's claim regarding double taxation;
- Whether the taxpayer previously initiated a MAP request on the same or a similar issue to the competent authority of the other contracting state and, if so, a copy of that request together with the supporting documentation and the date of its submission to the foreign competent authority;
- Where a MAP request involves issues that are ongoing before the tax authorities or previously were decided, information on the means of resolving the dispute (*e.g.* tax amnesty, administrative resolution or administrative settlement);
- Where the issues are pending before the courts, documentation certifying that the case has not been heard; and
- A declaration by the taxpayer that the information in the MAP request and the supporting documentation is accurate.

Any hard copy supporting documents also must be submitted electronically.

The competent authority may request additional information from the applicant. In such cases, the applicant must respond to the request within two months from the date of the request, although the applicant can request an extension of this deadline. The applicant retains the right to voluntarily submit additional information at any stage of the procedure.

The relevant treaty will set out the deadline for submitting a MAP request; under Greece's treaties, the deadline typically is two or three years following the date of notification of the action that is alleged not to be in accordance with the treaty. If the treaty does not specify a deadline, it will be deemed to be three years.

Evaluation of MAP request

After receiving a MAP request, the competent authority will conduct a formal review, *i.e.* it will consider whether the request was submitted in a timely manner and whether all documentation was provided, and will ensure that the request concerns fiscal years for which the statute of limitations has not expired. If any of these conditions is not fulfilled, the competent authority will notify the taxpayer that the request will be rejected. No specific timeframe is provided for the acceptance or rejection of a MAP request.

Following the formal review, the competent authority will review the substance of the application, *i.e.* whether taxation complied with the treaty provisions. At this stage, consultation and the exchange of position papers with the foreign tax authority may take place.

If the Greek competent authority and its counterpart in the other contracting state are able to reach an agreement on the subject of the MAP request, the agreement will be provided to the taxpayer, who then has 60 days to accept or reject the agreement. If the taxpayer accepts the agreement, the minutes for the acceptance will be drafted and the MAP decision will be issued within a 30-day period. (In such a case, the taxpayer will be required to withdraw any pending judicial proceeding.) The decision will be signed by the director of the IPRA and delivered to all parties involved, as well as the other competent authority. MAP decisions will be published on the IPRA website, although all personal data of the taxpayer will be anonymized. If the taxpayer rejects the agreement, the minutes for the rejection will be drafted and the other competent authority will be notified.

A MAP decision is final and may not be appealed through an out-of-court petition or via recourse to the domestic courts.

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India:
Supreme Court rules that racing event creates PE in India

In a significant win for the tax authorities, India's Supreme Court issued a decision on 24 April 2017, concluding that a car racing championship held in India created a permanent establishment (PE) for the nonresident company that sponsored the event, with the result that the income attributable to the PE was taxable in India. In its decision, the Supreme Court set out the key principles for determining when a PE is created; taxpayers should take into consideration the principles set out by the court with respect to a fixed place of business PE in India.

Facts of the case

A UK resident company (Formula One World Championship Ltd., or FOWC); the *Federation Internationale de l'automobile* (FIA), an international body regulating motor sports events; and Formula One Asset Management Limited (FOAM) entered into agreements, under which FOAM licensed all commercial rights in the FIA Formula One World Championship to FOWC for a period of 100 years, with effect from 1 January 2011.

On 13 September 2011, FOWC entered into a race promotion contract with an Indian company, Jaypee Sports International Ltd. (Jaypee), under which FOWC granted Jaypee the rights to host, stage and promote the Formula One Grand Prix of India event at the Buddh International Circuit in Noida for consideration of USD 40 million. On the same day, the two parties also concluded an artwork license agreement, under which FOWC permitted Jaypee to use certain marks and intellectual property belonging to FOWC for consideration of USD 1 million. Various other agreements also were concluded between the parties to give effect to their understanding relating to racing events in India.

FOWC and Jaypee asked India's Authority for Advance Rulings (AAR) for a ruling on whether, based on the race promotion contract, the amounts received by FOWC outside India would be considered "royalties" under article 13 of the India-UK tax treaty and whether FOWC would constitute a PE in India under article 5 of the treaty. The AAR concluded that, based on the India-UK tax treaty, the consideration received by FOWC from Jaypee was in the nature of a royalty subject to withholding tax in India, and that FOWC did not have a fixed place of business PE in India.

FOWC, Jaypee and the Indian tax authorities disagreed with the AAR ruling (all for different reasons) and brought their arguments before the Delhi High Court. FOWC challenged the aspect of the ruling that the consideration received from Jaypee should be characterized as a royalty (if the amount was not a royalty, it would not be taxable in India in the absence of a PE of FOWC in India). The Indian tax authorities filed a writ challenging the aspect of the ruling regarding the existence of a PE. The Delhi High Court reversed the findings of the AAR on both issues and held that the amount received by FOWC from Jaypee should not be treated as a royalty, but that FOWC did have a PE in India and, therefore, the consideration it received would be taxable in India.

FOWC then appealed to the Supreme Court, arguing that it did not have a PE in India. According to FOWC, the Buddh International Circuit was not at its disposal – Jaypee was responsible for conducting the event and had complete control over it. Further, FOWC had access to the race venue for only a three-week period (two weeks before the event and one week after), so it argued there was an insufficient period of time to create the degree of permanence necessary to establish a fixed place of business PE in India.

Decision of the Supreme Court

The Supreme Court concluded that, based on the agreements with Jaypee and FIA, the Indian Formula One race venue was under the control and at the disposal of FOWC and, therefore, FOWC had a taxable presence in India under the India-UK tax treaty. As a result, the income received through the PE constituted business income, which is subject to tax in India. Under India's Income Tax Act, Jaypee was required to deduct the relevant tax from the payments it made to FOWC, but tax had to be withheld only on the portion of income attributable to the PE.

In reaching its decision, the Supreme Court relied extensively on the commentary to the OECD model treaty on what is needed to create a fixed place of business PE (and on which the India-UK tax treaty is based) and commentaries on the OECD model by international tax practitioners and luminaries, as well as leading domestic and foreign judicial precedent in adjudicating the PE issue.

The court noted that a PE must be a fixed place of business "through" which the business of an enterprise is wholly or partly carried out. The fixed place of business need not be owned or leased by the foreign enterprise, but it must be *at the disposal* of the foreign enterprise in the sense that the enterprise must have some right to use the premises for the purposes of its business.

Based on this analysis, the Supreme Court held that FOWC did have a PE in India:

- Buddh International Circuit clearly is a fixed place of business, since various races (including the Formula One Championship) are held on the track. This is the place where the commercial/economic activity of holding the race was carried out – it was a "virtual projection" of FOWC in India.
- The fixed place was at the disposal of FOWC, and it was through this place that FOWC conducted business by exploiting commercial rights in India. The court stated that it was necessary to look at the various agreements entered into by FOWC and its affiliates as a whole to determine the "real transaction" between the parties; based on this reading, the court concluded that the entire event was controlled by FOWC and its affiliates. FOWC exercised complete control over the Buddh track and derived income therefrom (the court noted that the fact that Jaypee constructed the track and Jaypee's ownership and organization of other events were not relevant in determining who controlled the racing event).
- Even though the race took place over the course of only three days in the year, FOWC had full access to the circuit for the entire duration of the event (i.e. two weeks before and one week after the race). As long as the place of business is fixed, the duration of the activities must be viewed in the context of the nature of the business. The actual duration of the activities is not decisive in determining whether a PE is created, as long as the nonresident has exclusive and ongoing access to the place of business.

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Korea:
Tribunal rules lease and maintenance fees for software constitute royalties

Korea's tax tribunal issued a decision on 13 February 2017, ruling that lease and maintenance fees paid for the use of software constituted royalties under the 1980 Korea-US tax treaty.

The case involved a Korean company that entered into a lease and maintenance contract with a US software developer for the use of software, and paid fees accordingly. The company did not regard the payment as a royalty, so it did not deduct or pay withholding tax. As a result of a tax audit, the Korean tax authorities determined that the lease and maintenance fees paid were royalties and, therefore, assessed additional corporate income tax. The company appealed the decision of the tax authorities to the tax tribunal.

The tax tribunal agreed with the tax authorities that the lease and maintenance fees paid should be treated as royalties, subject to the 15% withholding tax rate under the treaty, for the following reasons:

- The fees were significant, and the software was so sophisticated that the software developer either had to send its employees to install the software for the company or the installation process had to be carried out according to instructions of the software developer through video calls;
- The lease and maintenance contract was mainly for the provision of technical support to resolve issues that arose while the company was operating the software; and

- The software contained know-how of the developer, the core data of which was available to the Korean company.

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Netherlands:
Supreme Court rules on deductibility of interest

The Dutch Supreme Court issued two decisions on 21 April 2017 that clarify the circumstances in which interest expense will be deductible for tax purposes. The cases involve banking group structures intended to benefit from the mismatch between the Dutch participation exemption and the rules that generally permit the deduction of interest expense on loans used to acquire participations (*i.e.* the "*Bosal* gap").

Background

In 2003, the Court of Justice of the European Union (CJEU) ruled in the *Bosal Holding* case that the Dutch rules applicable at the time for the deduction of interest expense incurred on loans in relation to participations were contrary to EU law. At the time, the Dutch participation exemption prohibited the deduction of interest on loans used to finance the acquisition of a foreign participation, whereas no such limitation applied for domestic participations.

Dutch tax law was amended as from 2007 to allow the deduction of "financing interest" relating to foreign participations. Since that time, there has been a mismatch between the treatment of such interest expense (which is, in essence, deductible) and the income from qualifying participations (which is not taxable as a consequence of the Dutch participation exemption). Particularly in respect of foreign participations, this mismatch may create a risk of lost revenue for the Dutch treasury, since the profits of a foreign subsidiary generally are not taxable in the Netherlands, while the financing interest is, in principle, deductible in the Netherlands. This mismatch is referred to as the *Bosal* gap.

Facts of the cases

The two cases before the Supreme Court involve the same taxpayer and essentially the same structure.

A Swiss banking group set up a tax structure in an attempt to benefit from the *Bosal* gap. The first case involved a structure that basically was used to acquire third-party Dutch private limited liability companies that already had earned profits in the same year as that in which they were acquired, but before the actual date of acquisition (for example, by disposing of the assets that comprised their businesses). Once the companies were acquired, their assets mainly consisted of cash. The second case involved private limited liability companies that did not earn any profits before the acquisition.

Subsequently, funding from loans that existed within the group was transferred to the acquired companies through a UK-based permanent establishment (PE) of the group's Swiss parent company, *i.e.* the acquired companies became the borrowers on intercompany loans. The companies used the cash thus obtained to acquire foreign participations.

The objective of the structures was to set off the interest deductible on the loans against the profits already earned by the private limited liability companies. The interest payments were financed through dividend distributions (which were exempt under the participation exemption) by the foreign participations acquired. The Dutch tax authorities challenged the structures, resulting in several proceedings, which eventually reached the Supreme Court.

Supreme Court decisions

In the first case, the Supreme Court decided that there was an abuse of law based on the *fraus legis* concept, but such abuse was not found in the second case (although there was another issue, as discussed below).

If the *fraus legis* doctrine is applied, tax will be imposed by either disregarding a transaction or substituting the relevant transaction with another transaction. To be considered *fraus legis*, a legal act (*e.g.* a transaction) must be contrary to the aim and purpose of the tax law, and the prevailing purpose of the act must be to evade tax. The legal grounds provided in the court's decision indicate that using the *Bosal* gap to evade the levying of corporate income tax, in and of itself, does not automatically lead to the conclusion that the transaction is abusive. However, abuse may exist if a deduction of interest contrary to the aim and purpose of the corporate income tax rules (as they are to be interpreted following the *Bosal* decision) is taken with the definitive objective to evade tax.

The Supreme Court took exception to the fact that the interest deductions were to be offset against profits earned by the acquired companies before they became part of the group. For this reason, the court disallowed the interest deductions up to the amount of the "acquired profits." Acquired profits for this purpose relate to profits that were earned according to the sound business practice principle, up to the time the economic risk relating to the shares in the acquired company was transferred to the acquiring company. The remaining interest payments were, in essence, deductible, since the court did not consider the deduction of these payments to be contrary to the corporate income tax rules applicable after the *Bosal* decision.

A separate issue existed regarding the deductibility of interest because the tax inspector had disallowed the interest deductions under article 10a of the Corporate Income Tax Act 1969. Under this statutory provision, briefly, interest is not deductible if a "tainted" legal act has been financed with a loan from a group entity. Since 2007, article 10a has applied to external acquisitions of participations, such as those at issue in these cases.

In the cases, the PE that had granted the loan to the taxpayer had raised debt capital from third parties. The relevant legislative history indicates that article 10a does not purport to restrict the deduction of interest on an internal loan from a group entity if an external loan indirectly was used to finance the internal loan, as long as the internal loan and the external loan show "parallelism" (*i.e.* identical characteristics). The Court of Appeal had concluded that this condition was fulfilled since the taxpayer had drawn up a statement to that effect, and the tax inspector had not properly contested the statement. The Supreme Court accepted the lower tax court's finding and, thus, effectively ruled that the required parallelism existed.

The Supreme Court also clarified the scope of the exception to the application of article 10a for interest on an internal borrowing that ultimately was financed by an external borrowing. In this context, it is relevant that article 10a provides for a "safe harbor" to allow a taxpayer to avoid the application of article 10a by providing evidence that either the "business motive test" is satisfied or that there is a compensatory levy. The business motive test implies that both the debt and the related legal act (in this case, the acquisition of the shares) are predominantly based on business motives. The Supreme Court's decision clarifies that such an external loan, by definition (and, by extension, the related internal loan), complies with this test (*i.e.* that both the debt and the related legal act have a justifiable business motive). Therefore, article 10a is not applicable to internal borrowings that ultimately were financed by external borrowings.

The effect of the Supreme Court decision could be favorable to taxpayers because it may limit the application of article 10a.

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In brief

Brazil: The tax authorities published guidance on 5 May 2017 that contains the new manual for filing the corporate income tax return and that addresses the filing of a country-by-country (CbC) report for fiscal year (FY) 2016. The CbC report should refer to and follow the FY of the ultimate parent entity and should contain information relating to 2016 calendar year FYs. The manual clarifies that UPEs of multinational groups that follow a FY that did not end during calendar year 2016, or that ended during calendar year 2016 but began in calendar year 2015, are not required to file a CbC report with the tax return due on 31 July 2017.

Czech Republic: Amendments transposing the EU DAC III directive (directive on administrative cooperation) into Czech law entered into effect on 1 April 2017 (for prior coverage of the directive, see *World Tax Advisor*, 13 January 2017). In June 2017, the Czech tax authorities will begin exchanging information automatically with other EU tax authorities on certain tax rulings with cross-border implications, including the first exchanges of information on unilateral advance pricing agreements concluded in the Czech Republic.
URL: http://newsletters.usdbriefs.com/2017/Tax/WTA/170113_ib.html

European Union: The European Council announced on 22 May 2017 that it has adopted a decision authorizing the opening of Brexit negotiations with the UK and formally nominated the European Commission as the EU negotiator. The council also adopted negotiating directives for the talks with the UK. Both texts are based on a recommendation presented by the commission on 3 May 2017 and will build on the guidelines adopted by the council on 29 April 2017 (for prior coverage, see *World Tax Advisor*, 12 May 2017). The first formal meeting between the EU and the UK negotiators is likely to take place in June 2017.
URL: http://newsletters.usdbriefs.com/2017/Tax/WTA/170512_4.html

European Union: In a decision issued on 16 May 2017, the Court of Justice of the European Union (CJEU) ruled that the EU free trade agreement initialed with Singapore in 2013 cannot be ratified by the EU alone – it requires the approval of the EU member states. According to the CJEU, the EU lacks exclusive competence in two areas: non-direct foreign investment and the rules governing dispute settlement between investors and member states.

OECD: On 5 May 2017, the OECD announced the launch of a disclosure facility that interested parties can use to report potential schemes to avoid the application of the common reporting standard (CRS) relating to the automatic exchange of financial account information (AEOI). The OECD also announced that an additional 500 bilateral relationships for the automatic exchange of CRS information starting in September 2017 have been established between over 60 jurisdictions. Over 1,800 bilateral relationships have been activated for the AEOI, most of which are based on the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (CRS MCAA). Virtually all jurisdictions that will exchange information starting in September have activated the relationships under the CRS MCAA, and many relationships are in place regarding exchanges that will commence in 2018. An additional activation round that will allow jurisdictions to nominate the partner jurisdictions with which they will carry out the AEOI is planned for July 2017.

Trinidad and Tobago: As from 1 January 2017, the income tax rates for companies and individuals on taxable income in excess of TTD 1 million are increased from 25% to 30%. A 25% rate continues to apply to taxable income up to and including TTD 1 million.

United States: President Trump's proposed 2018 budget for the US government was submitted to congress on 23 May 2017. The tax provisions in the proposed budget adhere to the general principles for tax reform released by the Trump administration on 26 April (for prior coverage, see *World Tax Advisor*, 28 April 2017.)
URL: http://newsletters.usdbriefs.com/2017/Tax/WTA/170428_8.html

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BEPS corner

In each issue that provides updates on developments in the OECD BEPS initiative, the *World Tax Advisor* includes a "BEPS corner" covering these developments.

Brazil: The tax authorities have published guidance that addresses the filing of CbC reports for fiscal year 2016. See the article in this issue.
URL: http://newsletters.usdbriefs.com/2017/Tax/WTA/170526_ib.html#Brazil

Czech Republic: An amendment has been proposed to postpone the first CbC notification and filing deadlines. See the article in this issue.
URL: http://newsletters.usdbriefs.com/2017/Tax/WTA/170526_2.html

Mexico: The tax authorities have published the final rules regulating the contents and filing of the master file, local file and country-by-country report. See Global Transfer Pricing Alert 2017-017, 12 May 2017.
URL: https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-global-transfer-pricing-alert-17-017-12-may-2017.pdf

OECD: On 23 May 2017, the OECD released a discussion draft on the implementation of the approach to pricing transfers of hard-to-value intangibles described in Chapter VI of the transfer pricing guidelines. The final reports on actions 8-10 of the BEPS project mandated the development of guidance in this area. The discussion draft presents the principles that should underline the implementation of the approach to hard-to-value intangibles, provides examples illustrating the application of this approach, and addresses the interaction between the approach to such intangibles and the mutual agreement procedure under an applicable treaty. Comments on the draft must be submitted by 30 June 2017.

Portugal: The deadline to notify the tax authorities of which group entity will be the CbC reporting entity for FY2016 is 31 May 2017; however, the official electronic form to file such notification has not yet been made available. See Global Transfer Pricing Alert 2017-020, 23 May 2017.
URL: https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-global-transfer-pricing-alert-17-020-24-may-2017.pdf

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Tax treaty round up

At the end of each month, *World Tax Advisor* provides an update on recent tax treaty developments, with a focus on items that directly affect the withholding tax rates of the key jurisdictions covered by the Deloitte International Tax Source (DITS). Additional coverage may include stated negotiating priorities and other important tax treaty trends.
URL: http://www.dits.deloitte.com?id=us:em:na:wta:eng:tax

Unless otherwise noted, the developments discussed below are not yet in force.

Austria-Israel: When in effect, the treaty signed on 28 November 2016 to replace the 1970 treaty provides for a 0% withholding tax rate on dividends, including distributions by Austrian private foundations, paid to a company (other than a partnership) that holds directly at least 10% of the capital of the payer; otherwise, the rate will be 10%. A 15% rate will apply to distributions made by a real estate investment fund to a recipient that holds directly less than 10% of the capital of the fund; otherwise, the domestic rate will apply. A 0% rate will apply to interest paid to a pension fund "or similar arrangement" or on corporate bonds traded on a stock exchange in the state in which the issuing company is resident; otherwise, the rate will be 5%. Royalties will be taxable only in the state of residence of the recipient.

Cyprus-Barbados: When in effect, the treaty signed on 3 May 2017 provides that dividends, interest and royalties will be taxable only in the state of residence of the recipient.

Cyprus-Luxembourg: When in effect, the treaty signed on 8 May 2017 provides for a 0% withholding tax rate on dividends paid to a company (other than a partnership) that holds directly at least 10% of the capital of the payer company; otherwise, the rate will be 5%. Interest and royalties will be taxable only in the state of residence of the recipient.

Greece: See the article in this issue.
URL: http://newsletters.usdbriefs.com/2017/Tax/WTA/170526_3.html

India: See the article in this issue.
URL: http://newsletters.usdbriefs.com/2017/Tax/WTA/170526_5.html

Korea-United States: See the article in this issue.
URL: http://newsletters.usdbriefs.com/2017/Tax/WTA/170526_6.html

Lebanon: On 12 May 2017, Lebanon signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, becoming the 111th jurisdiction to join the convention, following United Arab Emirates and Kuwait. The convention and the amending protocol will enter into force for Lebanon on 1 September 2017. Also on 12 May, Lebanon became the 89th country to sign the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (CRS MCAA), with the first information exchanges scheduled to take place in September 2018.

Luxembourg-Ukraine: The 1997 treaty and 2016 amending protocol entered into force on 18 April 2017 and will apply as from 1 January 2018. When in effect, the treaty (as amended by the protocol) provides for a 5% withholding tax rate on dividends paid to a company (other than a partnership) that holds directly at least 20% of the capital of the payer company; otherwise, the rate will be 15%. A 5% rate will apply to interest paid on loans granted by a bank or other financial institution; otherwise, the rate will be 10%. A 5% rate will apply to patent and trademark royalties, and a 10% rate to copyrights.

Portugal-Ethiopia: The 2013 treaty entered into force on 9 April 2017 and will apply for withholding tax purposes as from 8 July 2017 for Ethiopia and as from 1 January 2018 for Portugal. When in effect, the treaty provides for a 5% withholding tax rate on dividends paid to a company (other than a partnership) that holds directly at least 25% of the capital of the payer company; otherwise, the rate will be 10%. A 10% rate will apply to interest, and a 5% rate will apply to royalties.

Turkey-Somalia: When in effect, the treaty signed on 3 June 2016 provides for a 5% withholding tax rate on dividends paid to a company (other than a partnership) that holds directly at least 10% of the capital of the payer company; otherwise, the rate will be 15%. A 10% rate will apply to interest and royalties.

Global tax alerts

Australia
Australia issues draft risk-assessment framework for related-party financing
The Australian Taxation Office (ATO) on 16 May 2017 released the draft practical compliance guide, which outlines the ATO's risk assessment framework for related-party financing arrangements. Although the guide has been anticipated for some time, it seems that the release of the framework was timed to follow the recent decision of the Full Federal Court in the *Chevron* case.
Issue date: 17 May 2017
URL: https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-global-transfer-pricing-alert-17-018-17-may-2017.pdf

European Union
CJEU rules Belgian "fairness tax" partly incompatible with EU law
On 17 May 2017, the Court of Justice of the European Union issued its decision on the Belgian constitutional court's preliminary ruling request relating to the compatibility of the fairness tax with primary and secondary EU law. The court essentially followed the opinion of Advocate General Kokott that the tax is partly incompatible with the EU parent-subsidiary directive.
Issue date: 19 May 2017
URL: https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-european-union-19-may-2017.pdf

CJEU rules French 3% dividend surtax on EU-source redistributions violates parent-subsidiary directive
On 17 May 2017, the Court of Justice of the European Union ruled that dividends distributed by a French company that represent a redistribution of dividends the company previously had received from its EU subsidiaries cannot be subject to the French 3% surtax on profit distributions.
Issue date: 18 May 2017
URL: https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-alert-european-union-18-may-2017.pdf

Mexico

Mexico publishes final master file, local file and CbC report rules

Mexico's Tax Administration Service on 12 April 2017 published on its website the final compliance rules regulating the contents and filing of the master file, local file and country-by-country report, as well as a report on the public consultation conducted by the Taxpayer's Ombudsman Office.

Issue date: 12 May 2017

URL: https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-global-transfer-pricing-alert-17-017-12-may-2017.pdf

Portugal

Portugal's CbC notification deadline approaches

The deadline to notify the Portuguese tax authorities of which group entity will be the CbC reporting entity for FY2016 is 31 May 2017; however, the official electronic form to file such notification has not yet been made available.

Issue date: 24 May 2017

URL: https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-global-transfer-pricing-alert-17-020-24-may-2017.pdf