



International news and analysis to help you in your international tax strategy.



Focus on: France

Capital gains taxation on individuals



French tax legislation provides for a 18% income tax and 12,1% social contribution on capital gains realized by individuals and derived from the sale of securities or shares in companies which are subject to corporate income tax, provided that the total amount of the gain exceeds the threshold of EUR 25,000 for 2008.

As of 2009, some relevant amendments are into force. The mentioned threshold is established up to EUR 25,730 for capital gains derived from the sale of securities or shares in 2009 and it will be annually revised to align with the upper limit of the first bracket of the individual income tax applicable for the year preceding the sale.

Losses incurred on the sale may only be offset against gains made during the same year or during the following 10 years.

Opportunities for taxpayers: new opportunities for long-term tax planning

SWITZERLAND AND CHINA

New opportunities for investment

On 27 January 2009 Switzerland and the People's Republic of China signed a new investment protection agreement, which mainly deals with the treatment of foreign investment by the host country, the transfer of capital and investment income, compensation for expropriation as well as the dispute settlement procedures.

The new agreement, which replaces the existing one concluded in 1986, will give greater legal protection to Swiss investors than previously granted by China to investors from other nations.

Both countries also agreed on the preparation of a joint feasibility study of a free trade agreement. For this purpose, they will set up a working group which is expected to commence its work in the second half of 2009.

GERMANY

A bill to fight tax evasion

The Ministry of Finance issued a draft bill which deals with the combating of harmful tax practices and tax evasion. The draft bill provides for an authorization of the Federal Cabinet to issue statutory ordinances necessary for the implementation of German tax laws with the consent of the Federal Council.

According to the draft, the Federal Cabinet shall issue ordinances providing for:

- the denial or limitation of deductibility of payments to individuals or partnerships which are resident, or have their place of effective management, in a non-cooperative state. The deductibility of such payments may also be subject to increased burden of proof requirements concerning the legal basis and appropriateness of such payments. A state is considered non-cooperative if, regardless of whether there is a treaty between Germany and that state, there is no exchange of information between Germany and that state in the manner envisaged by Art. 26 of the OECD Model Convention (2005);

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- the denial or limitation of withholding tax relief for non-resident corporate entities, if their shareholders are resident or have their place of effective management in a non-cooperative state;
- the non-applicability or partial non-applicability of certain provisions of the Income Tax Act (e.g. flat rate taxation of capital investment income or partial income system), if the respective income is derived directly or indirectly from shareholdings in a foreign company whose seat or place of effective management is situated in a non-cooperative state; and
- the denial or limitation of the general tax exemption of dividends received by a resident corporate shareholder, if the dividends are derived directly or indirectly from a non-resident company whose seat or effective place of management is situated in a non-cooperative state. The same applies to capital gains derived from the sale of participations in such companies.

The respective ordinances will contain a list of states which are considered non-cooperative. The draft bill further provides for amendments to the General Tax Code such as:

- taxpayers using the net income method have to keep the relevant documentation and receipts for 6 years in the case that their annual income exceeds EUR 500,000. In addition, a tax audit is generally allowed if the taxpayer's income exceeds EUR 500,000 annually; and
- if there are indications for business relations with financial institutions situated in a non-cooperative state, the taxpayer is obliged upon request by the tax authorities to fill out an official questionnaire on the form, and state the nature of his business relations with those foreign financial institutions. Additionally, the taxpayer is required to release those financial institutions from their secrecy obligations towards the German tax authorities.

FINLAND

Amendments to CFC legislation

As of tax year 2009, some amendments to Finnish controlled foreign companies (CFC) legislation are into force. They are hereinafter summarised:

- the minimum holding amount is increased from 10% to 25%. CFC legislation may therefore apply if a resident of Finland (individual or company), holds directly or indirectly at least 25% of the capital or the yield of the assets of the entity;
- the scope of the legislation is widened to include permanent establishments (PEs), if (i) the PE would fall under the CFC legislation were it to have been established as an independent corporate entity; (ii) the PE is located in a different country from the head office; and (iii) the income relating to the PE is not taxed in the country of residence of the head office. In general, this applies to PEs from tax year 2009. PEs existing already on 31 December 2007 will be affected from 1 January 2015;
- losses originating from CFC activities may be carried forward for 10 years (previously 5 years); and
- relevant foreign tax paid may be credited against the Finnish tax attributable to the income. The credit is computed separately for each country and each source of income. Upon request of the taxpayer, unused credits may be carried forward to the following tax year.

The CFC legislation does not apply:

- to an entity resident in a country with which Finland has a tax treaty, provided that, (i) the entity has its place of residence in that country; (ii) the tax treaty applies to the income in question; (iii) the entity is subject to a tax burden that does not differ significantly from the Finnish tax burden; and (iv) the entity has not benefited from a special tax relief in its home country. The foreign tax burden is deemed to differ significantly from the Finnish tax burden if the general average effective tax rate in the country is below 19.5% (three quarters of the Finnish corporate income tax rate of 26%). The Ministry of Finance will issue a decree on those countries. The so-called "black list" is proposed to include Barbados, Bosnia and Herzegovina, Georgia, Macedonia, Malaysia, Montenegro, Serbia, Singapore, Switzerland, the United Arab Emirates and Uzbekistan. The current black list includes Barbados, Malaysia, Malta, Pakistan, Singapore, Switzerland and the United Arab Emirates.
- if the entity has its place of residence in an EEA country or does not fulfil all the requirements under (1) above. The CFC legislation does not then apply, provided that the Mutual Assistance Directive 77/799/EEC or a treaty concerning mutual assistance in the field of direct taxation is applied in the taxpayer's country of residence, and that the domestic law of that country provides for the exchange of information. Finland has a separate treaty with Norway and Iceland, and thus Liechtenstein is, in practice, the only EEA country that does not fulfil this requirement. Additional conditions require that the entity is genuinely established in its country of residence and carries on

genuine business activities there, evaluated on the basis of factors such as the entity's premises, equipment, and personnel.

INTERNATIONAL MODELS

Cost sharing agreements in China

On 9 January 2009, the State Administration of Taxation issued the implementation rules on special tax adjustments, which are designed for the tax administration with regard to, *inter alia*, cost-sharing agreements, and apply retroactively from 1 January 2008.

A taxpayer may enter into a cost sharing agreement with its related parties to jointly develop and assign intangibles, or to provide or receive services. The costs shared must be consistent with the costs paid by an unrelated enterprise for the same benefits under comparable conditions. The participants do not need to pay royalties for the use of intangibles developed or transferred under the cost sharing agreement.

The enterprise shall have reasonable and measurable expected benefits from the intangibles or services covered by the cost sharing agreement. The expected benefits must be based on the reasonable commercial assumptions and general rules of business practices.

A cost sharing agreement on services generally applies to procurement and marketing campaign of the group companies. In principle, a cost sharing agreement is subject to approval of the Tax Administration in respect of the compliance with the arm's length principle.

The tax treatment of a cost sharing agreement is as follows:

- costs allocated according to the cost sharing agreement are deductible in the tax years covered by the cost sharing agreement;
- in the case of compensation adjustment, the amount of adjustment shall be included in the taxable income in the year during which the adjustment is made; and
- the buy-in and buy-out payments, and allocation of results from the agreement on intangibles due to termination, must be taxed as purchase or disposal of assets.

An enterprise can use an Advance Price Agreement to reach a cost sharing agreement. The costs under a cost sharing agreement are not deductible, if a cost sharing agreement:

- lacks commercial purposes and economic substance;
- is not consistent with the arm's length principle; and
- does not match the costs and benefits shared;
- has not prepared, maintained and provided contemporaneous documentation of the cost sharing agreement;
- has an operation period of less than 20 years from the date of the signing of a cost sharing agreement.



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