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## ➔ Focus on: European Union Brussels Tax Forum 2009



László Kovács

On March 2009, 30<sup>th</sup> and 31<sup>st</sup> the Brussels Tax Forum took place. "Tax Systems in a Changing World" was the title of this third edition, hosted by László Kovács, the EU Commissioner responsible for Taxation and Customs Union. The Forum was attended by more than 600 participants from Europe and distinguished speakers from the academic, business and public sectors shared their expertise.

The discussion of the first day's sessions regarded the possible ways to ensure robust tax bases and the need for good governance in the field of taxation. The second day's discussions covered matters related to revenue-based and consumption-based taxes for the 21st century.

The following are the main points raised:

- New demand for state intervention, and the costs related to supporting the financial sector and stimulating the economy, have to be looked at together with the existing challenges posed by an aging population, climate change and globalization;
- The current crisis provides an opportunity to lay the ground-work for robust, efficient and fair tax systems which guarantee that governments have sufficient revenue in the future. There is also an opportunity to phase out inefficient tax measures;
- A partial shift of the revenue base from income taxes to less distortive taxes (such as property, environmental and consumption taxes) could be a viable option to be taken into account. Reducing red tape and eliminating double taxation are important elements to consider;
- National tax systems have reached their limits in dealing with the challenges of the 21st century. This calls for better international coordination and higher levels of involvement from a broader range of countries. Many lessons learned in the process of European integration can serve as a source of inspiration and model for the global community;
- The robustness of tax bases is considered as a central issue. Different methods of profit shifting by multinational companies were examined;
- Tax competition reduces source-based tax rates on mobile capital; at the same time, the problems of identifying the location of profits are increasing. A better coordination of source-based taxation of mobile capital, and an improvement of residence-based taxation, are required. The Savings Directive 2003/48/EC is a correct step towards this direction.

## DENMARK

### Amendments to Corporate Income Tax Law adopted with adjustments

The Danish Parliament adopted a Bill which adjusts the Corporate Income Tax Law, with effect partly as of the income year 2009 and partly as of the income year 2008. The adjustments are summarised as follows:

- The Bill implements adjustments and/or clarifications to the rules concerning limitations of interest deduction, CFC taxation, inter-company transfers of intangible assets, qualification of transparent entities, and the participation exemption regime;
- The Bill tightens tax-exempt restructurings in relation to dividend distribution following the restructuring;
- The Bill expands the applicability of the rules regarding investment companies in the Act on Taxation of Capital Gains on Sale of Shares. Accordingly, a company is, as a general rule, treated as an "investment company" if the following two conditions are met: (i) the company has eight or more shareholders, and (ii) it carries out investment

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activity and has 85% or more of its assets in securities. Banks, insurance companies and mortgage credit institutions may not qualify as investment companies even though they might have otherwise fulfilled the above conditions. Holdings in investment companies are taxed on a mark-to-market principle in the hands of the investors. Dividends as well as capital gains received by individuals are taxed as capital income.

## AUSTRIA

### Draft bill proposes changes to participation exemption regime

One of the most important suggested amendments of several tax laws by the Austrian Ministry of Finance is the extension of the current participation exemption to portfolio dividends from companies situated in EU/EEA countries.

Under the current law, qualifying dividends from, and capital gains on the sale of a substantial shareholding in, a company resident in an EU Member State are exempt under the Austrian law implementing the provisions of the Parent-Subsidiary Directive 90/435/EEC. Dividends and gains derived from subsidiaries resident outside the European Union are exempt under the same conditions if the subsidiary is comparable to a resident company. In order to qualify for the exemption, the parent company must hold directly or indirectly at least 10% of the equity of the subsidiary continuously for at least 1 year.

The bill drafted by the Ministry provides that the participation exemption is extended to portfolio dividends derived from companies situated in the EU, i.e. to shareholdings of less than 10% regardless of any holding period. The same will apply to dividends derived from companies situated in an EEA country, if an agreement on mutual assistance on the collection of taxes is applicable between Austria and the relevant EEA country. Dividends derived from companies situated in third countries outside the EU/EEA remain subject to the requirements under the old participation exemption.

The issue was brought already before the Independent Tax Senate, Linz and the Austrian Supreme Administrative Court. Based on the decision of the Austrian Supreme Administrative Court, the Austrian Ministry of Finance issued official guidelines in order to revise the current participation exemption regime. On 3 October 2008, the Independent Tax Senate of Linz referred the initial case to the European Court of Justice (ECJ) for a preliminary ruling (*Österreichische Salinen AG v. Finanzamt Linz (C-437/08)*). In addition, reference was made to ECJ by the same court for a preliminary ruling in the case of *Haribo Lakritzen Hans Riegel v. Finanzamt Linz (C-436/08)* with similar facts.

## CZECH REPUBLIC

### Changes to thin capitalization rules approved by Lower Chamber of Parliament

On 3 March 2009, the Lower Chamber of the Parliament approved an amendment to the Income Tax Law which introduces important changes to the thin capitalization rules. In order to enter into force and become effective as of 1 January 2009 (with retroactive application for tax year 2008), the approval of the Senate and the signature of the President are required. The main amendments concern the debt-equity ratio which would be relaxed from 2:1 (3:1 for banks and insurance companies) to 4:1 (6:1 for banks and insurance companies). The scope of the thin capitalization rules would be extended to include back-to-back arrangements, i.e. credits and loans between related parties arranged through a third-party intermediary. The thin capitalisation rules would not apply to financing costs of credits and loans between unrelated parties, even if such credits and loans were secured by a related party. Furthermore, the non-deductibility of financing costs in respect of subordinated debt would be abolished.

## INTERNATIONAL MODELS

### The new Aruba limited liability company regime

Under an Ordinance issued at the end of 2008, which will enter into force on a date to be set by decree, the limited liability company regime was published. A limited liability company (VBA which stands for *Besloten vennootschap met beperkte aansprakelijkheid*) is established by a notary deed by one or more shareholders, has legal personality, must be registered in the trade register, has a capital which is divided into shares (no minimum capital requirements apply) and can issue different types of shares.

A joint-stock company, an Aruba exempt company and a comparable foreign legal entity can be converted into a VBA and such conversion does not result in dissolution. A VBA can be converted into a joint-stock company or a



comparable foreign legal form. A VBA may merge with a joint-stock company or an Aruba Exempt Company or a comparable foreign legal entity if the company law of the foreign state allows. The same entities may also be part of a split-up.

From a tax standpoint, the VBA is subject to profit tax, although can carry out certain listed activities which are exempt, and may opt to be taxed as a partnership. The main characteristics are summarised as follows:

- If a foreign company is transferred to Aruba or converted into a VBA its assets are valued at fair market value;
- if a foreign company is transferred to Aruba or converted into a VBA its assets are valued at fair market value. profits of a VBA include non-distributed profits of an Aruba Exempt Company which are attributable to such company, unless the VBA opts for the application of the imputation system;
- The profits of an NV or VBA include gains derived upon liquidation, merger, split-up and conversion into a foreign legal entity followed by transfer of the place of establishment to a foreign country;
- shares received upon the transfer of an independent part of a company are valued at book value if (i) the shareholders may apply the imputation system in case of dividend distributions; and (ii) the shares are not – within 3 years after the transfer – transferred to a third person (this third person not being a shareholder of the transferring company) at higher value than that of the transferred assets;
- companies incorporated under Aruba law are deemed to be established in Aruba for purposes of the dividend withholding tax and the imputation payment ordinance;
- the dividend withholding tax and imputation tax ordinance applies to liquidation profits resulting from (i) a merger with a foreign company, as a result of which a company no longer is established in Aruba; (ii) conversion into a foreign legal entity; and (iii) the transfer of the legal seat to a foreign country;
- a refund of dividend withholding tax will not be granted to an exempt VBA.



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