

INTERNATIONAL TAX NEWS

4/2009

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International Tax News

Welcome to Issue No. 4 of WTS Alliance International Tax News which provides you with recent tax developments across the globe. If you seek more information about a specific topic raised in this issue please contact the person named under the respective article. International Tax News is published on a quarterly basis by WTS AG in Germany. If you have any comments or suggestions concerning WTS Alliance International Tax News, please contact Silke Koehler, by email at silke.koehler@wts.de or by phone on +49 (0) 89 286 462 24.

Contents

Argentina			
LF Abogados	Tax incentives in the province of Buenos Aires		2
France			
WTS Seseke France	Foreign companies holding real property in France		3
Mexico			
Despacho Parás , S.C.	1. Changes in Mexico seek increase in tax collection		4-5
	2. Other Notable Amendments of 2009		
The Netherlands			
WTS World Tax Service BV	Dutch Budget 2010 in Parliament		6-7
Nigeria			
WTS ADEBIYI & Associates	Key fiscal changes proposed under the Petroleum Industry Bill		8
Taiwan			
WTS Consulting (Taiwan) Ltd.	1. Guidelines for determination of Taiwan-sourced income		9-10
	2. Corporate and individual income tax rates decrease		
	3. Individual offshore income to be taxable under Income Basic Tax Act		
Turkey			
Çelen SMMM Ltd. Şti.	Harmful tax jurisdictions withholding tax		11

This information is intended to provide general guidance with respect to the subject matter. This general guidance should not be relied on as a basis for undertaking any transaction or business decision, but rather the advice of a qualified tax consultant should be obtained based on a taxpayer's individual circumstances. Although our infoletters are carefully reviewed, we accept no responsibility in the event of any inaccuracy or omission. For further information please refer to the authors.



Argentina

4/2009

Tax incentives in the province of Buenos Aires

Promotion of investments in the province of Buenos Aires & tax amnesty

Decree No. 523/08 regulatory of Law Number 13,656 of Industrial Promotion in the Province of Buenos Aires provides tax incentives for the development of new investment projects. Moreover, it extends the concept of industry (including logistics and software) and stipulates a new dynamic system regarding new businesses.

This scheme provides tax exemptions in local taxes (stamp tax, real state tax and turnover tax), council taxes for SMEs (small and medium enterprises or “Pequeñas y Medianas Empresas”) and other benefits such as preferences in any submission of bid in response to all of the competitive tender offers in which the SMEs participates, access to financing with preferential conditions and discounts in public services, among others. Benefits range from a minimum of 3 to a maximum of 10 years, depending on the characteristics of the project (area, export market, etc.). Once they have been submitted, the enforcement authority will evaluate the technical feasibility of projects, the economic standing of the applicant and the economic impact of the investment.

The promotion scheme created a fund in order to grant subsidies for the construction, equipment of industrial plants, credits to SMEs and employees training programs among others. In addition, the Warranty Fund of the Province of Buenos Aires (“FOGABA”) gives financing and high quality warranties to individuals and SMEs.

Finally, the province of Buenos Aires offers significant benefits for taxpayers with local taxes (real estate, stamp tax and turnover tax) liabilities originated before December 31st 2008. Term of acceptance of the tax amnesty regime may be made only once, till September 30st 2009. Significant tax exemptions for interests and extinction of the infringements and installment of payments plans up to 60 quotas are one of its main benefits.

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France

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Foreign companies holding real property in France

A recent decision of the French Conseil d'Etat (high court for tax matters) seems to question the taxation of companies holding real property in France.

Personal and territorial scope of application of French corporate income tax is determined by articles 206 and 209 of Code Général des Impôts, "CGI" (French tax act). Article 206 par. 1 CGI states that legal entities having a business undertaking or a lucrative activity are liable to corporate income tax. Due to article 209 I CGI the territorial scope of application is limited to enterprises located in France or enterprises whose income is taxable in France in accordance to a double tax treaty. In the past, companies having real property in France which was not rented – but put at the disposal of its shareholders, their family or third persons – were taxed on the basis of the hypothetical rental with the argument that a "normal" manager would have rented the real property. The justification for the taxation was based only on article 206 par. 1 CGI. The Conseil d'Etat stated that the company had a (potential) lucrative activity and was consequently tax liable in France (Conseil d'Etat, decision as of January 18th, 1984, n° 24343; Conseil d'Etat, decision as of March 18th, 1985, n° 38104; Conseil d'Etat, decision as of February 24th, 1986, n° 54253 and 54256; Conseil d'Etat, decision as of January 26th, 1990, n° 64211). Article 209, which normally rules the territorial scope of application, was not mentioned.

In its decision as of July 31st, 2009, the Conseil d'Etat had to judge a situation where a British company owned real property which was used for horse training and put at the disposal of horse trainers and owners. The Conseil d'Etat stated (1) that the company concerned is a company subject to corporate income tax – this point was not contested – , (2) that the fact to put real property at the disposal of third persons cannot be qualified neither as French permanent establishment for the purposes of the French-British double tax treaty nor as an enterprise operated in France but that the French-British double tax treaty attributes the taxation right concerning income deriving from French real property to France and (3) that consequently the income of the company deriving from the real property situated in France was liable to French corporate income tax. The justification was not based only on article 206 par. 1 CGI – in which case it would have been sufficient to state that the company is a legal entity carrying out a lucrative activity – but on a combination of article 206 par. 1 CGI, article 209 I CGI and article 5 of the French-British double tax treaty. Even if the Conseil d'Etat did not clearly change its jurisprudence, the rationale chosen permits the conclusion that the high court abandons its former jurisprudence.

This would lead to the astonishing conclusion that companies established in countries not having concluded a double tax treaty with France holding French real property put at the disposal of third persons would not have a taxable activity while companies established in a country with existing double tax treaty would.

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1. Changes in Mexico Seek Increase in Tax Collection

Finding itself between the effects of the economic crisis, decreasing oil revenues and an inability to spike its national debt, Mexico has in part turned to increasing taxes as a way of limiting its fiscal deficit for 2010. The most relevant aspects include:

- **Income Tax Rate:** The corporate rate, and the maximum rate applicable to individuals as per the tariff, goes from 28% in 2009 to 30% for the 2010-2012 period, and to 29% for 2013.
- **Interest Income:** Interest income derived from different financial instruments, both for corporations and individuals, will be taxed separately from other types of income by the income tax. Accrued real interest, rather than nominal interest, will be taxed at the withholding rate of 30%.
- **Fiscal Consolidation:** Income tax consolidation, which allows for the combination of profits and losses of a group of companies to determine a single taxable base for the group, is the object of important amendments. These amendments now limit the maximum deferral of tax generated as a consequence of the application of losses to a five year term. Until now, the maximum deferral was of 10 years. These amendments have a retroactive effect, so the effect of a tax deferral existing through 2004 with continuing effects through 2009 will have to be paid in partial payments due between 2010 and 2014.
- **Savings Plans (Insurance Policies):** A number of insurance products identified with savings plans currently offered by insurance companies will see the manner in which income tax is determined for the account of the beneficiaries significantly modified. These amendments will come into effect until 2011.
- **VAT Rate:** The general VAT rate will be of 16% as of 2010, instead of the 15% currently in force. Certain border zones will see the VAT rate increase from 10% to 11%.
- **Tax on Cash Deposits:** This tax, recently established to combat tax evasion from the so-called "informal sector", which is creditable against federal taxes, will as of 2010 tax cash deposits made in excess of \$15,000.00 pesos, instead of the current limit of \$25,000.00, at the rate of 3% instead of the current rate of 2%.
- **Flat Tax:** The possibility of offsetting the income tax for one tax year for the account of the taxpayer by applying the negative flat tax base of the same year is suppressed. It is yet possible, and remains to be seen whether this change will be applicable as of 2009 or as of 2010.

2. Other Notable Amendments of 2009

Additionally, 2009 has seen the following amendments enter into effect:

- **Outsourcing:** In an effort to curb the abuse of certain personnel outsourcing practices, the Income Tax Law was amended, and certain joint and several liabilities were established as of June with respect to companies that benefit from the work of persons provided by an outsourcing service provider, including social security liabilities.
- **Documenting Exports:** The Fiscal Code of the Federation now requires that taxpayers document exportations, not only with export declarations filed with customs, but also with further documentary proof of the exportation, such as warehousing and transportation files.

Mexico

4/2009

- **Publication of Financial Statements:** The obligation of companies operating under the modality of “sociedad anónima” of publishing their annual financial statements subsists. However, the obligation of depositing such statements at the public commercial registry has been suppressed.

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The Netherlands

4/2009

Dutch Budget 2010 in Parliament

On Tuesday 15 September 2009 the Dutch Budget for 2010 was introduced to Parliament. Below we summarize the most notable items of the legislative proposals with respect to Dutch taxation which we believe are of interest for (corporate) businesses.

Changes in the corporate income tax

- The participation exemption will be more flexible and easier to apply by (re-)introduction of a motive test besides the objective asset and taxation tests. This issue was already discussed in the Consultation Paper of June 2009, when the Ministry of Finance published a discussion paper on this topic as well as the mandatory interest box and some further changes regarding the deduction of interest. Legislation regarding these two latter points will be forthcoming in autumn this year.
- Companies will be allowed to choose whether they want to carry back losses three years instead of the regular carry back to the previous year. In return for the additional carry back the carry forward of the loss is shortened to 6 years instead of the regular 9 years. The additional carry back possibility is maximized to EUR 10 million per loss-making year and will only be available for years starting on or after 1 January 2009 and before 1 January 2011.
- The Patent box will be reformed into an “Innovation box” by allowing the box regime to apply to qualifying assets without any restrictions on amounts. Wide application of the box will be open for assets (e.g. software, trade secrets) that are based on qualifying R&D-activities but not based on patents. Besides expanding the scope of the box, the effective rate will be cut from 10% to 5%.
- As a measure to increase liquidity and stimulate investment it is currently allowed to use accelerated depreciation on qualifying investments made in 2009, with a maximum of 50% depreciation in 2009 and 50% in 2010. This facility will now be continued for investments made in 2010 (maximum depreciation of 50% in 2010 and 50% in 2011).
- The scope of the tonnage tax, which taxes qualifying shipping activities based on ship’s tonnage, will be broadened to include activities from cable ships, pipe-layers, research vessels and crane barges. Implementation will be subject to approval by the European Commission. Another change for which approval by the European Commission –although with additional terms– has already been granted, is the implementation of a lower rate for ships with tonnage higher than 50,000 that had been proposed in the 2009 Budget last year.

Changes regarding wage tax/social security

- Introduction of a common base for determining wage tax and social security obligations.
- Simplification of non taxable allowances and issued goods by introducing a discretionary amount (“werkkostenvergoeding”) of 1.5% of total wages without the current tests and requirements for qualification as non-taxable item. Certain specific non-taxable items decrease the discretionary amount. The current rules regarding a big part of the specific non-taxable items and goods are not replaced, but stay in force.

Changes regarding interest, fines and levying additional taxes

- It will become possible to levy additional VAT in cases where in first instance VAT has been repaid ex officio due to a request by the tax payer.

The Netherlands

4/2009

- Interest on corporate income tax due (“heffingsrente”) will be calculated from the end of the year regarding which the tax is due for tax years starting on or after 1 January 2010. This is a restoration of the situation as it applied up to 2006.
- Maximum amounts of fines (“verzuimboetes”) for late filing of corporate income tax returns will be increased from EUR 1,134 to EUR 4,920.
- A fine for late payment of corporate income tax will be introduced with a maximum of EUR 4,920.

Changes in the dividend withholding tax

- The dividend withholding exemption for corporate shareholders will be simplified. Currently, only shareholders within the EU with a legal form that qualifies for application of the EU Parent-Subsidiary Directive qualify for the exemption. This restriction will be lifted so the exemption would apply to any entity that in its (EU) country of residence is regarded as non transparent for tax purposes, unless the entity has a similar function as a tax exempt Dutch investment fund.
- The dividend withholding tax exemption will also become available for corporate shareholders in Iceland and Norway.

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Nigeria

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Key fiscal changes proposed under the Petroleum Industry Bill

The Nigerian Petroleum Industry has been regulated by a myriad of laws and regulations which many find unclear and sometimes difficult to navigate. Many of the Nigerian Petroleum laws are also considered obsolete and not in line with global best practices. Consequently, in the year 2000, the Federal Government of Nigeria, set up a committee to carry out a comprehensive reform of the Industry. The reform process has resulted in a draft petroleum industry bill ("PIB" or the "Bill") which is currently before the Nigerian National Assembly.

The PIB contains significant changes to the existing tax regime applicable to oil and gas companies in Nigeria. The government through the PIB intends to significantly increase government take, especially in the event of windfall profits resulting from high oil prices. In this regard, the PIB has introduced higher rates of royalties and rents. The royalties are designed in a way that ensures automatic adjustment to economic circumstances with two sliding scales based on production (5%-25%) and price (0%-25) respectively. Different royalty rates continue to apply to companies depending on whether they operate in shallow waters, onshore, deep offshore or inland basins.

Another key amendment to the existing tax regime under the PIB, is the introduction of Companies Income Tax ("CIT") to upstream oil & gas companies. Currently, such companies are not required to pay ("CIT"), but only petroleum profits tax (PPT) which varies between 50% to 85% depending on the nature of the oil companies agreement with government and whether or not it has been in production for over 5 years. However, under the PIB, the companies are required to pay CIT in addition to the Nigerian Hydrocarbon Tax ("NHT") which was also introduced under the Bill. The HCT is an additional tax to CIT as it is not deductible from CIT. Although the total of HCT and CIT may result in an equivalent of the PPT currently payable by upstream companies, the imposition of both taxes has been frowned upon by industry operators as double taxation.

The PIB further extends the applicability of CIT to oil and gas companies by providing that such companies shall now be required to withhold tax on dividends at the rate of 10%.

Many basic costs which are allowed as deductions under the current tax regime are disallowed under the PIB. These include interest expenses and head office shared expenses. Also a 20% and 80% cap have been placed on deductions relating to costs incurred outside Nigeria, and cost recovery for PSCs respectively. The PIB also removes practically all investment incentives currently applicable to oil and gas companies. These include the petroleum investment allowance, investment tax credits (50%) and investment tax allowance (50%).

Taken together, the fiscal changes to the existing oil and gas regime have caused some worry in the Nigerian oil industry. Oil and gas companies, in particular, the IOCs have complained that the cumulative effect of the changes would render most of their projects uneconomic and consequently reduce investment in Nigeria.

Various submissions by industry bodies were made to the National Assembly during the public hearing held in July. These submissions are still being reviewed by the relevant committees of the National Assembly. There are indications that the draft PIB may not be passed in its current form. It remains to be seen what changes would be made to the Bill before its passage into law.

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Taiwan

4/2009

1. Guidelines for determination of Taiwan-sourced income

Article 8 of the Income Tax Act stipulates eleven types of income that should be considered as Taiwan-sourced and subject to 20% withholding tax if the income receiver has no domicile or no fixed business place within Taiwan. However, the tax administrations historically has always taken a more than broad view for interpretation of these eleven types of income, resulting in a general principle close “all is taxed” regardless of the literal meanings in the article, and thus caused a large number of disputes with taxpayers.

In order to avert controversies, and upon strong lobbying by the various business chambers, the Ministry of Finance, on September 3rd, 2009, promulgated the “Guidelines for Determining of Taiwan-sourced income under Article 8 of the Income Tax Act” (the “Guidelines”), which provides several significant new principles. First, whether remuneration for services is Taiwan-sourced shall merely be determined by the location of “rendering”. The place of “utilization” does not affect the decision (as was the case in the past, which lead to an overly broad taxation). Therefore, as long as the service is rendered and accomplished outside Taiwan and the fixed business place in Taiwan (if any) is not involved, the remuneration for the service is not considered Taiwan-sourced income. Second, for business profits, where the business operations are partly carried out onshore and offshore, only the profits attributed to the onshore part is deemed as Taiwan-sourced income if the enterprise is able to provide evidential documentation. Third, the fees for R&D cost sharing may not be considered as Taiwan-sourced income, if all participants jointly own the intellectual property, obtain reasonably anticipated profits and no payment of royalties or tax avoidance is involved. Fourth, the Guidelines provide a chance to foreign enterprises, whose incomes are subject to withholding tax in Taiwan, to apply for tax refunds by way of deduction for costs and expenses within five years of the dates of payments.

2. Corporate and individual income tax rates decrease

Currently the corporate income tax rate is 25%; and the individual progressive income tax rates are 6%, 13%, 21%, 30% and 40% respectively. Beginning 2010, the corporate income tax rate will decrease to 20%; and the individual progressive income tax rates will (very slightly) decrease to 5%, 12% and 20% respectively, while the income tax rates for the higher brackets, i.e. 30% and 40% will remain the same.

With the decrease of the corporate income tax to 20%, Taiwan strives to remain competitive in the region, having a lower tax rate than China, while still being slightly higher than the two low-tax jurisdictions Singapore and Hong Kong.

3. Individual offshore income to be taxable under Income Basic Tax Act

According to Article 2 of the Income Tax Act, individual income tax shall be levied only on the income derived from sources in Taiwan. However, in view to increase perceived tax equity as well as in order to (hopefully) increase tax revenues, the Income Basic Tax Act was promulgated in December 2005, whereas offshore income would be included, under certain circumstances and subject to certain thresholds as listed below, into the total amount of individual’s income, by the year 2010.

Taiwan

4/2009

In the Income Basic Tax system, if the aggregate of offshore income in a filing unit is less than TWD 1 million, it may be excluded from the basic income. Further, the basic income with a deduction of TWD 6 million and then multiplied by the tax rate of 20% is the basic income tax amount. Where the basic income tax amount is greater than the regular income tax amount, the taxpayer shall pay up the balance.

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Turkey

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Harmful tax jurisdictions withholding tax

According to the article 30/7 of the Corporation Tax Code numbered 5520, a withholding tax at a rate of 30% is applied on all types of payments extended to the harmful tax jurisdictions.

Turkey has enacted new transfer pricing regulations under the new Corporate Tax Code (CTC) which became effective in January 2007. The new law brings Turkish transfer pricing regulations in line with OECD guidelines. The so-called standard methods (OECD 5) have priority. Transactional profit methods as well as tax payers' own methods may only be used if the application of the standard methods would not yield satisfying results.

In addition to transfer pricing regulations, thin capitalisation, harmful tax jurisdictions applications and controlled foreign corporation regimes were addressed under the new CTC. The corporate tax rate was reduced from 30% to 20%.

The Government has also adopted a 'harmful tax jurisdictions withholding tax' at a rate of 30% over all types of payments extended to the so called harmful tax jurisdictions in order to prevent the erosion of taxable profits.

According to the article 30/7 related to regulation concerning harmful tax jurisdiction withholding tax, all types of payments made to corporations that are established or operate in countries which do not have a taxation capacity and ability of exchange of information as Turkey has, and that are regarded and declared by the Council of Ministers (including branches in these countries of resident corporations in Turkey), will be subject to taxation in Turkey irrespective of the fact that the payments are subject to tax or not and the corporation receiving the payment is a taxpayer or not. Accordingly, withholding tax at the rate of 30% will be levied over these sorts of payments. However, the application of this withholding is bound to a list compiled by the Turkish Government that will clarify those jurisdictions that are accepted as harmful tax jurisdictions according to a formula that takes into account the effective income tax burden of the jurisdiction concerned. This list is yet to be declared.

Article 30/7 also declares exemptions of interest and dividend payments and other payments in similar nature with interest paid over loans procured from the finance institutions residing abroad. Insurance and reinsurance payments shall not become subject to withholding tax at the rate of 30% even if they are extended to the countries determined as tax havens by the Council of Ministers.

In addition, the article 30/7 states that the Council of Ministers is authorized to determine the withholding tax rate for payments of purchased goods on arm's length basis and participation stocks, for the payments extended in consideration of the leasing of sea transportation and aircraft on fair market value and the payments that are mandatory for the completion of the work such as passage fees or harbour charges.

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