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Editorial

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In October 2019, the OECD published a consultative paper to advance international negotiations on taxation of highly profitable multinational enterprises (MNEs). The approach suggests taxing MNEs wherever they have significant consumer-facing activities from which profits are generated. In other words, the OECD proposal is aimed at reallocating some profits and corresponding taxing rights to countries and jurisdictions where MNEs have their markets.

Summary of the proposal

- **Scope:** The approach covers highly digital business models, but extends more widely – broadly focusing on consumer-facing businesses with further work to be carried out on scope and carve-outs. Extractive industries are assumed to be out of the scope.
- **New nexus:** For businesses within the scope, it creates a new nexus that is no longer dependent on physical presence but largely based on sales. The new nexus could have thresholds including country-specific sales thresholds calibrated to ensure that jurisdictions with smaller economies can also benefit. It would be designed as a new self-standing treaty provision.
- **New profit allocation rule going beyond the arm's length principle:** A new profit allocation rule will be applied to taxpayers within the scope, irrespective of whether they have an in-country marketing or distribution presence (permanent establishment or separate subsidiary) or sell via unrelated distributors. At the same time, the approach largely retains the current transfer pricing rules based on the arm's length principle, but complements these with formula-based solutions in areas of the current system where tensions are highest.
- **Increased tax certainty delivered via a three-tier mechanism:** The approach increases tax certainty for taxpayers and tax administrations and consists of a three-tier profit allocation mechanism:
  - Amount A – a share of deemed residual profit allocated to market jurisdictions using a formulaic approach (i.e., the new taxing right)
  - Amount B – a fixed remuneration for baseline marketing and distribution functions that take place in the market jurisdiction
  - Amount C – binding and effective dispute prevention and resolution mechanisms relating to all elements of the proposal, including any additional profit where in-country functions exceed the baseline activity compensated under Amount B.

Many countries, including India, have already unilaterally amended their domestic laws to include the concept of significant economic presence to tax such MNEs, and for such countries it is a vindication of their stand. I express my gratitude to all the member firms that have contributed to this edition of the newsletter. I sincerely hope that the contents are useful to members and their clients. Feedback and suggestions are always welcome, by e-mail to sachin.vasudeva@scvindia.com.

I also take this opportunity to wish each one of you a wonderful festive season and a healthy and happy 2020.

Sachin Vasudeva

Country Focus
UNITED STATES

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Tax implications you can expect from the new lease accounting standards

It's no surprise that the long-awaited changes to lease accounting standards have caused quite the ruckus in recent years, particularly as businesses scramble to understand and implement the complex new rules. In addition to understanding the new rules' impact on an operational level, it's also important for businesses to prepare for the various tax implications that are likely to ensue.

Background

The new lease accounting standards (formally referred to as ASC 842) require businesses to record all leases greater than 1 year on the balance sheet. This will require businesses to collect and analyse their lease agreements to identify leases and ultimately separate non-lease components from lease agreements. Affecting virtually every industry in the United States, the increase in liabilities on the balance sheet will inherently change the way those numbers are perceived and understood. Public companies were required to implement the new standard by December 2018, while the changes come into effect for private companies as of 15 December 2019.

Tax implications

Here are seven of the major areas impacted by the new lease accounting standard:

Accounting methods

There is no question that the new standards will affect the accounting methods of nearly every business. Businesses may need to revisit certain aspects of their taxes, particularly with respect to characterisation of leases, timing of income under IRC 467, treatment of tenant allowances, and treatment of lease acquisition costs.

Deferred taxes

The new rules require operating leases to be recorded as right-of-use (ROU) assets with a corresponding lease liability, consequently grossing up the balance sheet. This will result in additional recordkeeping to track book-to-tax items. Book and tax basis items need to be reconciled to ensure that deferred tax liability (DTL) and deferred tax assets (DTA) are recorded correctly. Note that this is a temporary difference that will reverse over the life of the lease term. Furthermore, valuation allowance may also need to be considered.

State and local taxes

Many states take account of a company's property when determining the amount of income tax to be allocated to the state. Because the new standard requires ROU assets related to operating leases to be recorded on the same line item as underlying assets, property factors (such as plants and equipment) may appear to be increased on a company's balance sheet. Ultimately, this will affect state apportionment for companies that have activity in states that include property factors when calculating apportionment percentage. It will also affect state filings where a net worth-based tax is implemented.

Transfer pricing

The new standard will affect companies with related party leasing arrangements, as transfer pricing arrangements may need to be revised to reflect the arm's length standard. The arm's length standard relies on financial ratios and profit level indicators, which may change when companies begin to record all leases on their statements of financial position.

Foreign taxes

In addition to its effect on state and local income tax, the new standard will also have an impact on foreign country income tax. The extent of the impact will depend on the particular tax jurisdiction and how income tax is calculated within that country.

Property taxes

Depending on the tax jurisdiction, ROU assets may be considered tangible personal property and will therefore need to be included in property tax filings.

Sales and use tax

Going forward, companies will need to determine whether a state will treat a lease transaction as a taxable purchase.

ASC 842 will have a wide-sweeping impact on virtually every business, and it's best to prepare for the changes as soon as possible.

Country Focus
MALTA

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The consolidation of corporate groups for taxation purposes in Malta

By virtue of Legal Notice 110 of 2019, introduced in May 2019, Malta has implemented fiscal unity rules that for the first time allow the establishment of a tax group for Maltese income tax purposes. These 'Consolidated Group (Income Tax) Rules, 2019' shall come into force as from year of assessment 2020. Notably, the consolidation of corporate groups for taxation purposes is by no means a recent global phenomenon, with the first occurring more than a century ago in Denmark.[1] Therefore, the introduction of this Legal Notice represents a significant step to put Maltese tax rules on the same footing as those of larger jurisdictions.

A corporate group can be defined as the incorporation of a number of companies which, while preserving their own and separate legal personality, are connected to one another by common or interrelated shareholdings to such a degree as to grant effective control to the shareholders.[2] In Malta, the 'control' requisite for the formation of a fiscal unit[3] is delineated through the requirement that in order for a parent company and its subsidiary/ies (whether these subsidiaries are Maltese or foreign) to form such unit, the parent company must meet any **two** of the following requirements:

- It must hold at least 95% of the voting rights in the subsidiary company/ies.
- It must be beneficially entitled to at least 95% of any profits available for distribution to the ordinary shareholders of the subsidiary company/ies.
- It must be beneficially entitled to at least 95% of any assets of the subsidiary company/ies available for distribution to its ordinary shareholders on a winding up.

If this condition is met, and the accounting periods of all companies involved are the same,[4] then the parent company will carry out an election; this is the last stepping-stone before a tax group is formed. If the subsidiaries are not wholly owned by the parent company, such election shall be subject to the consent of the minority shareholders. But a company cannot form part of more than one fiscal unit at any one time.

After a fiscal unit is successfully formed, the parent company shall then be referred to as the 'principal taxpayer' and its subsidiaries as 'transparent subsidiaries'.

When a fiscal unit is registered, the principal taxpayer will assume all the rights, duties and obligations under the Income Tax Act[5] relative to that fiscal unit. This effectively means that companies constituting the fiscal unit shall no longer be considered as separate entities for tax computation purposes, and the chargeable income of a fiscal unit for a year of assessment will be computed as if such income was derived by the principal taxpayer.[6]

All transactions[7] that occur between companies forming part of the fiscal unit will be deemed as if they have not occurred. Consequently, this shall prevent potential tax planning that may otherwise occur through the shifting of income between members of the fiscal unit.[8] This rule is, however, subject to two exceptions:

- Transactions involving property transfers[9] or the transfer of shares in a property company[10]
- Dividends distributed by a subsidiary to its parent company out of taxed profits that it derived prior to it becoming a transparent subsidiary.

The latter dividends shall be deemed to be dividend income derived by the principal taxpayer of the fiscal unit.

Subject to certain conditions, all outgoings and expenses incurred by companies forming part of the fiscal unit in the year preceding the year of assessment, and which are not ignored transactions, shall be deemed to be incurred by the principal taxpayer and are thus deductible against income attributable to the principal taxpayer.

Subject to substance requirements,[11] any income or gains derived by a transparent subsidiary that is not resident in Malta shall be deemed to be attributable to a permanent establishment of the principal

Notably, one of the main takeaways of this Legal Notice is the cashflow advantage that becomes apparent when one compares the current operation of the partial shareholder tax refunds to the scenario contemplated under the Legal Notice

taxpayer situated outside Malta. On the other hand, where

- the income or gains are derived by a transparent subsidiary resident in Malta, or
- a transparent subsidiary not resident in Malta derives income or gains arising in Malta,

these income and gains shall be deemed to arise in Malta and shall be attributed to the principal taxpayer, provided that such principal taxpayer is a person to whom the remittance basis of taxation applies.[12] Any interest held by a transparent subsidiary in any company not forming part of the fiscal unit and any foreign tax suffered by a company forming part of the fiscal unit shall also be attributed to the principal taxpayer.

Notably, one of the main takeaways of this Legal Notice is the cashflow advantage that becomes apparent when one compares the current operation of the partial shareholder tax refunds to the scenario contemplated under the Legal Notice. These rules will now enable the fiscal unit to pay only the effective tax, which essentially amounts to the difference between the corporate tax payable by the subsidiary and the refunds that may be claimed by its shareholder.

Notwithstanding the benefits that these new rules seek to procure, there are still some compliance obligations that need to be respected. For instance, the principal taxpayer shall be duty bound to prepare annually a consolidated balance sheet and a consolidated profit and loss account covering all the companies in the fiscal unit of which it is the principal taxpayer. These must then be accompanied by a report carried out by a certified public auditor.

There is also the duty to file the income tax return, which shall fall upon the principal taxpayer. That said, the principal taxpayer and its wholly owned transparent subsidiaries shall be jointly and severally liable for the payment of any tax. The tax due may also be apportioned wholly or in part to a transparent subsidiary that is not wholly owned by the principal taxpayer if an agreement was reached between the principal taxpayer and all of the persons holding the remaining shareholdings in the subsidiary.

While seeking to avoid excessive or inappropriate taxation in regard to the overall income of the group in comparison with a single company in the same conditions, the Malta's newly introduced group taxation regime also seeks to ensure that no less tax is collected than would otherwise have been collected if the activities were carried on by a single company. This is ascertained through an anti-abuse measure that disallows situations where the tax payable by the principal taxpayer is lower than 95% of the aggregate of the tax that would have been payable by all the companies forming part of the fiscal unit on their chargeable income. In such cases, there would be deemed to be an advance to shareholders[13] that shall be equal to the difference between the tax payable by all members of the fiscal unit and the tax payable by the principal taxpayer divided by 35%.[14]

The implementation of these rules is yet another effort by the Maltese legislators to achieve an ideal tax system that embraces and promotes principles of efficiency, equity and simplicity. By looking at a group of companies as a tax unit, and thus determining the actual effective income received by the whole group, these rules seek to promote economic reality over the companies' legal form and to ensure that economic choices are not distorted on the basis of the organic structure chosen to carry on a certain activity. Moreover, the possibility of excessive or inappropriate taxation is – for the most part, if not completely – eliminated, since the income which shall be subject to taxation is the overall income of the group as one single tax unit. Lastly, through the filing of a single income tax return for the whole fiscal unit, these rules also strive to reduce compliance costs. All in all, one can say the consolidation of corporate groups for taxation purposes in Malta continues to enhance the attractiveness of the Maltese taxation system, which is continuously amended to become more business-friendly and attract foreign investors.

FOOTNOTES

1. Wesley Maurice Hamilton-Jessop, 'Accounting for tax consolidation: an investigation into the development and associated reporting requirements under the Australian group taxation system' (MPhil, University of Sydney, 2014) 17.
2. B. Farinha Aniceto da Silva, 'The impact of tax treaties and EU law on group taxation regimes' (PhD, University of Amsterdam, 2016) 11.
3. 'Fiscal unit' is the term used by Maltese law to indicate the formation of a tax group for Maltese income tax purposes.
4. This means that the accounting periods must begin and end on the same dates.
5. Chapter 123 of the Laws of Malta.
6. It shall be charged at the relevant rates of tax.
7. These transactions include but are not limited to: receipts, payments, revenues, expenses, transfers of assets, distributions or accruals.
8. Antony Ting, 'Australia's Consolidation Regime: A Road of No Return?' (2010) 2 British Tax Review 165–166, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1629103> (accessed 1 September 2019).
9. These transactions are dealt with in article 5A of the Income Tax Act.
10. In terms of the Income Tax Act, a 'property company' means a company that owns immovable property situated in Malta or any real rights thereon or a company that holds, directly or indirectly, shares or other interests in any entity or person, which owns immovable property situated in Malta or any real rights thereon where 5% or more of the total value of the said shares or other interests so held is attributable to such immovable property or rights.
11. In terms of the proviso to Article 6(1)(f) of the Legal Notice, the transparent subsidiary needs to maintain sufficient substance in terms of physical presence, personnel, assets or other relevant indicators, as is commensurate with the type and extent of activity being carried out in the relevant jurisdiction.
12. Robert Attard, *Principles of Maltese Income Tax Law* (1st ed, Malta Institute of Management 2019) 628.
13. Such advance will fall under the purport of Article 64 of Malta's Income Tax Act.
14. Attard (n 11) 631.

Country Focus AUSTRALIA

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Amendment to proprietary company reporting thresholds in Australia

The Australian Securities and Investments Commission (ASIC; https://asic.gov.au) is an independent government body and serves as the corporate, financial services and consumer credit regulator in Australia. Companies operating in Australia are generally required to prepare and lodge audited financial reports with ASIC for each financial year. In certain circumstances, some companies are exempt from these reporting requirements.

Broadly, all public companies must prepare financial reports in accordance with Chapter 2M of the Corporations Act 2001 and lodge the independently audited financial report, director's report and an auditor's report with ASIC for each financial year, unless relief has been granted by ASIC.

On the other hand, requirements relating to financial reporting and audit for an Australian proprietary company depend on whether it is classified as a "large" or a "small" company. The proprietary company will be considered as "large" if it meets at least **two** of the three thresholds contained in section 45A of the Corporations Act.

The Corporations Amendment (Proprietary Company Thresholds) Regulation 2019 received Royal Assent on 4 April 2019 and has officially doubled the three thresholds for defining "large" proprietary companies effective for financial years commencing on or after 1 July 2019 – i.e., 30 June 2020 financial year ends; see Table for a summary. These thresholds have not been adjusted since 2007.

A proprietary company will be classified as "large" if the company and all its controlled entities satisfies at least **two** of the three criteria above; it will otherwise be classified as a "small" company.

"Small" proprietary companies are generally not required to lodge financial reports with ASIC. They are merely required to maintain adequate written financial records.

However, a "small" proprietary company may still have to lodge or audit financial reports with ASIC if:

- directed by ASIC to lodge
- requested by at least 5% of its shareholders
- it is being controlled by a foreign company.

According to the Treasurer's Explanatory Statement, as a result of the increased thresholds from 1 July 2019, many small to medium-sized proprietary companies would have fallen below the thresholds and be relieved from preparing and lodging audited financial reports with ASIC. This change will ensure that financial reporting obligations target companies with significant economic influence, while reducing financial reporting and audit burden for the smaller companies and keeping in line with current inflation and economic growth in Australia.

Thresholds for defining "large" proprietary companies

	OLD THRESHOLDS	NEW THRESHOLDS
Criteria	**Financial years on/before 30 June 2019**	**Financial years commencing on/after 1 July 2019**
Consolidated revenue of the company and all entities it controls	Au$ 25 million or more	Au$ 50 million or more
Value of consolidated gross assets at the end of the financial year of the company and all entities it controls	Au$ 12.5 million or more	Au$ 25 million or more
Number of employees and all entities the company controls at the end of the financial year	50 or more	100 or more

Country Focus
GERMANY

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Assumption of tax consulting costs in case of net wage agreements

If companies second employees to other countries, additional salary components are agreed in many cases. Many employers are especially willing to cover the costs of tax returns in the home and host countries of their employees. From a German perspective, such payments for tax declarations have been treated as taxable wages by the tax authorities.

But this issue has been discussed for quite a long time. Employers and employees tend to agree that assumed tax consulting costs are not additional taxable wages. Especially in the case of net wage agreements, it has been argued that the assumption of these costs is in the interest of the company itself. Nevertheless, the tax authorities have not shared this view in the past.

Against this background, a domestic subsidiary of a globally active group filed a lawsuit. The company had concluded net wage agreements with several employees sent to Germany, who therefore assigned their tax refund claims to the employer. The employer bore the tax advisor costs and did not treat these payments as taxable wages. The German tax authorities did not agree and finally, an action was brought before the lower tax court. The fiscal court of Rheinland-Pfalz (decision of 21 December 2016, ref. 1K 1605/14) gave right to the employer and likewise indicated that it does not concern additional taxable wages. This decision contradicted the tax office, but as it had yet to be confirmed by the Federal Fiscal Court, there remained some legal uncertainty.

Confirmation by the Federal Fiscal Court

With the decision of 9 May 2019 (VI R 28/17), the Federal Fiscal Court rejected the appeal by the tax office and confirmed the decision of the lower tax court.

In the opinion of the Federal Fiscal Court, the employer had not assumed the tax consultancy costs to remunerate the employees, but acted in its own interest. Due to the net wage agreements concluded with the employees, the employer needed to find the most efficient solution to the income tax treatment of these employees. Through the involvement of tax consultants, the employer wanted to achieve as far as possible a reduction in the income taxes of the employees and thus its own wage costs. Since the employees had assigned their tax refund claims to the employer, only the employer could benefit from the economic result of the tax consultancy.

In cases such as these, the Federal Fiscal Court is of the opinion that the assumption of the costs for the preparation of the income tax returns does not constitute wages. Furthermore, the Federal Fiscal Court points out that the fact that the employees were sent from abroad in the specific dispute was of no significance for the decision. The decision in favour of a purely domestic case would have been the same.

Please be aware that the decision has not yet been published in the Federal Tax Gazette. It remains to be seen how the tax authorities will react to the decision.

Country Focus BELGIUM

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Major changes further to new Belgian Company Code

In a nutshell: Simplification, flexibilization and modernisation

On 28 February 2019, the new Belgian Company Code (the "New Code") was adopted by parliament. The New Code will drastically change the Belgian corporate landscape. It will have an impact on all companies that have a presence in Belgium, from both a legal and a tax point of view.

The objective of the New Code is twofold: it achieves modernisation and simplification of the Belgian corporate law, while also making the Belgian corporate landscape more attractive and competitive for foreign investors and businesses.

As from when?

… 2019, 2020 or 2024? The New Code entered into force on 1 May 2019. As of this date, all new companies, associations and foundations will fall under the New Code.

Existing companies, associations and foundations should comply with the New Code as of 1 January 2020, even if they have not yet amended their articles of association. Companies, associations and foundations always have the possibility to voluntarily choose ('opt in') to apply the New Code prior to this date. For many companies, this may be advisable, since the new Code offers them some interesting opportunities.

As of 1 January 2020, the rules of the New Code apply to all new and existing companies, associations and foundations. Existing companies, associations and foundations must adapt their Articles of Association to the New Code before 1 January 2024.

Since the New Code has also reduced the amount of the legal forms, some existing companies will have to change their legal form in case they operate under an abolished legal form. If a company has not been converted into a new legal form, these companies will be converted automatically into a legal form determined by the legislator.

Some of the most important changes

- **Reducing corporate forms** – The New Code reduces the 17 corporate forms to just four basic forms. The private limited liability company (BV) should become the 'standard' legal form in the Belgian corporate landscape. However, the public limited liability company (NV) will probably remain the corporate form of choice for larger companies. Existing companies whose legal form is abolished will have to adopt into another legal form before 2024.
- **Single-headed incorporation** – Both the BV and NV can now be incorporated by a single legal entity or individual. This will give some company groups the opportunity to simplify the current group structure. Currently, the shareholdership of a company is often spread (e.g. 1–99%), with the sole reason to comply with the 'old' condition to incorporate the company (NV) with at least two (legal) persons/legal entities. Only the CV still requires a multi-head with at least three directors.
- **No capital** – The most notable and important change in the New Code is the abolition of the minimum capital for the BV. This minimum capital requirement will be replaced by initial net assets. These can be a contribution in cash, a contribution in kind, or and/a contribution of labour. These changes to the funding of a company will also have an accounting and tax impact.
- **Financial plan** – The New Code preserves the obligation of a financial plan, which the founder must submit to the notary, but tightens the regulation. The New Code provides a regulatory minimum that must be included in the financial plan.
- **Distribution of profits** – The net asset test is replaced by a double test: a balance test and a liquidity test. Both tests apply to all distributions in the broad sense of the BV.
  - The balance test, performed by the general meeting of shareholders, is quite similar to the net asset test. A distribution should not take place if

  - the company's equity is negative or would become negative as result of the distribution.
  - The liquidity test implies that the profits may only be distributed if it can be reasonably expected that the company will be able to pay the debts payable in the period of at least 12 months after said distribution. If the directors unjustifiably distribute profits, they will be held jointly liable with respect to the company and third parties for all damages resulting from their decision.
- **Multiple voting rights** – In the NV and BV, it is possible to issue shares with a multiple voting right. The company's articles of association should be amended/drafted accordingly.
- **Limitation of director's liability** – Director's liability will be limited by law, depending on the size of the company. The limitation of liability does not apply if there is fraudulent intent or unpaid social contributions, VAT or company withholding taxes.
- **Statutory seat theory** – The 'real seat' theory has been changed to the 'statutory seat' theory. Companies, associations and foundations will submit to the Belgian corporate law if their statutory seat is located in Belgium, regardless of whether they actually operate in Belgium. However, this is only the case from a legal point of view. From a tax point of view, the real seat theory is still applicable: a company can still be considered as a tax resident of Belgium when there is substance present in Belgium.

Reminder: UBO Register

Based on the European Directive, Belgium requires companies to register and file accurate information about their ultimate beneficial owner (UBO).

The UBO can be defined as any natural person(s) who ultimately own or control the legal entity. This is the natural person(s) who:

- ultimately own or control a legal entity through direct or indirect ownership of a sufficient percentage of the shares or voting rights or ownership interest in that entity. Any ownership of more than 25% of the shares or voting rights will be regarded as an indication of a sufficient percentage;
- exercise control over the legal entity through other means.

The required information must be provided by 30 September 2019. If the members of the managing body fail to meet this obligation, they expose themselves to fines ranging from €50 to €5,000.

International Tax Cases

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Tax rate applicable to a permanent establishment of a Japanese entity

Recently, the Calcutta High Court in the case of ***M/s Bank of Tokyo Mitsubishi Ltd v. Commissioner of Income tax*** [2019] 108 taxmann.com 242 has held that a permanent establishment (PE) of a foreign bank in India was liable to pay tax at the same rate as an Indian company carrying on similar activities, in view of the provisions of Article 24 (non-discrimination) of the India–Japan tax treaty. The decision is explained in detail below.

Facts of the case

The taxpayer in this case was a Japanese bank having a PE in India. For the assessment year (AY) 1991–92, the Kolkata Income Tax Appellate Tribunal (ITAT) held, in an order dated 31 March 1997, that the tax rate applicable to the taxpayer should be 65% – which is the rate applicable to foreign companies (for AY 1991–92), not the lower rate applicable to domestic companies in India. The taxpayer appealed the ITAT's order before the Calcutta High Court.

Decision of the Calcutta High Court

The High Court held that:

- There was no justifiable reason for the tax authorities to apply the provisions of article 24(2) of the India–Japan tax treaty or for the tribunal not to appropriately interpret and give effect to the treaty provisions since:
  - There was no dispute that a tax treaty existed between India and Japan.
  - Article 24(2) of the treaty clearly provides that a PE of an entity of one of the contracting states in the other country may not be subjected to less favourable terms than a taxpayer carrying on similar activities in the other country.
  - Section 90 of the Income-tax Act, 1961 ('the Act') permits the central government to enter into tax treaties with other jurisdictions, recognises such treaties for the purposes of granting double tax relief, and creates a special status for PEs.
  - Section 90(2) of the Act states that the provisions of the act will apply to an assessee (in the case at hand, the Indian PE of a Japanese entity) 'to the extent they are more beneficial' to that assessee.
- The Court also relied upon the treaty between India and the Netherlands, where a similar clause was interpreted by the Central Board of Direct Taxes (CBDT) in the case of ABN AMRO Bank and a circular to that effect was issued thereupon. Hence, the Court could not accept the approach taken by the ITAT that the benefit agreed to be available to a PE of ABN AMRO Bank in India, in accordance with a letter issued by the CBDT based on the CBDT's interpretation of a similar clause in the India–Netherlands tax treaty, could not be extended to the taxpayer, since no similar letter had been issued in the case in hand.
- The Court, accordingly, held that the ITAT was incorrect in holding that the tax rate applicable to the taxpayer was 65%. The Tribunal should have held that the appropriate rate was the rate that applied to a domestic company carrying on similar activities.

Editorial comments

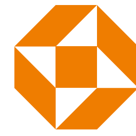
The High Court's decision relates to AY 1991–92. The Court has referred to and mainly relied on the letter issued by the CBDT to ABN AMRO Bank in the year 1994 in the context of the India–Netherlands tax treaty but, with due respect to the High Court's decision, it has seemingly not considered certain important aspects here:

- The CBDT had issued a letter on 21 November 1994 to the Chief Commissioner of Income Tax-II, expressing the view that ABN AMRO Bank was liable to tax at the same rate as applied to Indian companies. However, a second letter was issued by the CBDT on 24 March 2000 that revised the first letter and clarified that the tax authorities could apply a higher rate of tax in respect of assessment years not covered by the first letter.

- Explanation 1 to section 90 of the Act inserted by Finance Act 2001, which provides that 'for the removal of doubts, it is hereby declared that ***the charge of tax in respect of a foreign company at a rate higher than the rate at which a domestic company is chargeable, shall not be regarded as less favourable charge or levy of tax in respect of such foreign company***', has ***retrospective effect*** with effect from 1 April 1962.
- The Court has also not considered the decision, dated 17 June 2005, of Kolkata ITAT in the case of ABN AMRO Bank[1] for AYs 1992–93 to 1995–96, in which it was held that Explanation 1 to section 90 of the Act applied and superseded, as from 1 April 1962, the letters previously issued by the CBDT.
- Other examples exist of decisions where it has been held that Explanation 1 to section 90 of the Act applies to a PE of a foreign bank and therefore, imposing a higher rate of tax on income of the PE of a foreign bank is not discrimination under the provisions of a relevant tax treaty.

FOOTNOTES

1. *ABN AMRO Bank NV v. Joint Commissioner of Income-tax* [2005] 4 SOT 643.



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