Baker & McKenzie

Private Banking Newsletter

July 2008

This quarterly newsletter looks at important issues facing private bankers and trustees operating internationally.

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Featured Article

Mistake of fact: Ogden and Hutchison

"I always avoid prophesying beforehand, because it is a much better policy to prophesy after the event has already taken place".

- Winston Churchill (1874-1965)

In the recent judgment of the High Court in London in Ogden and Hutchison v. Trustees of the RHS Griffiths Settlement 2003 and others [2008] EWHC 118 (Ch) the court reviewed the equitable jurisdiction of the English courts to set aside gifts made to a trust on the basis of a mistake of fact. In this unprecedented case, the mistake in question was that the Settlor did not know that he was suffering from cancer and therefore likely to die within seven years. Mr Justice Lewison, in setting aside a gift into trust, found that a mistake for such purposes need not be a mistake as to the effect of the transaction in question, but simply a mistake about an existing or pre-existing fact of a sufficiently serious nature that, had it been known, would have caused the person in question to act differently to the way that he did.

Facts

The case concerned the application of inheritance tax on the estate of Mr. Ronald Griffiths and certain dispositions he made in the years preceding his death.

Mr Griffiths and his wife obtained tax planning advice in 2003 in order to limit their exposure to inheritance tax on either of their deaths. Part of this advice suggested that Mr Griffiths, who was then aged 73, transfer certain assets into trusts and that he obtain insurance to cover the potential impact of him not surviving the necessary period of time for these transfers to become exempt for inheritance tax purposes.

On 7 April 2003, Mr Griffiths transferred his shares in Iota Properties Limited into a newly created trust called the RHS Griffiths 2003 Settlement. The settlement provided for discretionary trusts of the income from the shares for a period of ten months from the date of the transfer. On 8 April 2003, he and his wife jointly granted a deferred lease of their home to themselves and their two children to be held on trust. On 3 February 2004, Mr Griffiths transferred his reversionary interest in the shareholding of Iota Properties Limited to the trustees of a newly created family trust. All of the above transfers were considered potentially exempt transfers, or "PETs", for inheritance tax purposes.

However in late 2004, Mr Griffiths was diagnosed with cancer and he subsequently died on 17 April 2005. Since he had not survived for more than three years following the transfers, they were fully chargeable for inheritance tax purposes (with the tax payable exceeding £1 million). Mr Griffiths' executors applied to set aside the transfers.

The defendants to the action were the trustees and beneficiaries of the respective trusts. The Inland Revenue did not intervene in the case but instead asked that certain authorities to be brought to the Court's attention. As acknowledged in the judgment, this meant that there was no adversarial argument on either the law or facts of the case.

Application

Lewison J. noted that the executors relied on the broad equitable jurisdiction of the Court to set aside a voluntary transaction on the ground of mistake, which was described by Millett J in Gibbon v Mitchell [1990] 1 WLR 1304 as follows:

> *"...... wherever there is a voluntary transaction by which one party intends to confer a bounty on another, the deed will be set aside if the court is satisfied that the disponor did not intend the transaction to have the effect which it did. It will be set aside for mistake whether the mistake is a mistake of law or of fact, so long as the mistake is as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it. The proposition that equity will never relieve against mistakes of law is clearly too widely stated."*

Lewison J. summarised the elements for recovery on the basis of Millett J's judgment as follows:

- The operative mistake must be a mistake which existed at the time when the transaction was entered into. The mere falsification of expectations entertained at the date of the transaction is not enough.

- Millett J's formulation does not limit the overall scope of the equitable jurisdiction to relieve against the consequences of a mistake; he did not say that a voluntary deed will **only** be set aside if the court is satisfied that the disponor did not intend the transaction to have the effect which it did.
- Applying *Seiff v. Fox and Re Hastings Bass*, a claimant must show that, had the person been aware of the true facts, he **would** not have acted as he did (as opposed to **might** have acted differently). It is not necessary for the claimant to show what the person would have done if he had not made the mistake. It is sufficient for them to show that he would not have done what he in fact did.

Lewison J accordingly refused to set aside the first two transactions made by Mr. Griffiths, the first occurring before it was proven that he had contracted cancer and the second being a joint disposition with his wife who had not been demonstrated to have made any mistake as to the effect of the transaction. However, he agreed to set aside the third transaction on the basis of mistake of fact because agreed evidence from all sides demonstrated that Mr. Griffiths had contracted cancer by this date but had not yet been informed of the fact - he had therefore made a mistake as to the state of his health that, had he known it, would have caused him not to make the relevant transaction.

Comment

The key issue in this case is whether Lewison J was correct to rule that the equitable jurisdiction to set aside a transaction on the basis of mistake of fact is not confined to a mistake as to the effect of that transaction. The mistake in this case was essentially as to a fact that altered the ultimate effect of the transaction. However, it is questionable whether the equitable jurisdiction to set aside transactions should have been engaged in this case and whether the court should place the risk of such mistakes with the relevant individual or the tax authorities.

Arguably, Mr. Griffiths, being of an advanced age and aware of the effect of the transaction if he did not survive for seven years, should have undergone a medical examination to assess the state of his health and/or taken out insurance as advised when making the transactions. His failure to do so therefore meant that the risk he had made a mistake as to the state of his health and to his potential life expectancy should have been carried by him and his estate. However, such arguments were not raised in this case because the parties involved all had the common objective of avoiding the payment of inheritance tax on these transfers where possible and the Inland Revenue did not intervene to make the opposing points.

Given that this judgment means the allocation of risk in making a mistake now weighs so heavily against them, perhaps the Inland Revenue will reconsider the value of intervention when the question of mistake of fact next arises.

Whilst the judgment does not explicitly make the point, the mistake was not that Mr. Griffiths would die but that he did not realise that he had an illness that increased the likelihood of that happening rather rapidly. The judge therefore apparently distinguished situations where the cause of a person's death is already writ in stone at the time of the transaction, i.e. he is unknowingly infected with terminal cancer and so he would certainly have acted differently had he known, and those situations where the cause and time of a person's death could not have been predicted, for example, if he is killed in an accident after making the relevant transaction.

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UNITED KINGDOM

Sisters lose their inheritance tax battle

Two English sisters have lost their final battle at the European Court of Human Rights ("ECHR") to avoid paying inheritance tax on their shared home when the first of them dies.

Joyce and Sybil Burden, aged 90 and 82 respectively, have lived together all their lives, for the last thirty-three years in a house built on land inherited from their parents near Marlborough, Wiltshire. The house is held in their joint names and each sister's will leaves all of her possessions to the other. However, under Inheritance Tax Act 1984, when one sister dies her estate will be liable to pay the 40% inheritance tax due on the value of the estate above the nil-rate threshold (currently £312,000). Since Joyce and Sybil's home was valued in 2006 at approximately £875,000, and each sister also owns other investments and property worth more than £150,000, the tax will be considerable for them, necessitating the sale of their home in order to meet the tax bill.

Further, as both sisters are elderly, their estates are likely to be taxed twice within a few years: once on the death of the first sister, and again on the death of the second. Married couples and those in civil partnerships can leave property to one another free from inheritance tax, but this tax break is not available to cohabiting siblings. The Burdens are not eligible to enter into a civil partnership because they are sisters.

The Burdens have been fighting for thirty-two years to address this "unfair" discrepancy in the rules relating to the payment of inheritance tax. They have written to the Chancellor of the Exchequer on the day before every Budget since 1976, seeking an exemption from inheritance tax for family members and pleading for recognition as a cohabiting couple, with no success. When the Civil Partnership Act 2004 first recognised the rights of gay and lesbian couples for inheritance tax purposes, the sisters turned to the ECHR, claiming that the act violated Protocol 1 Article 1 and Article 14 of the European Convention on Human Rights outlawing discrimination in respect of the protection of a person's property.

In their claim in the ECHR, the sisters argued that current UK inheritance tax laws breached their human rights by exempting married couples and civil partners from paying inheritance tax, but not cohabiting siblings. They claimed that they should be treated no less favourably than married couples and civil partners, as they have demonstrated a relationship that is as committed and enduring as any marriage or civil partnership. However, the UK government argued that the favourable tax treatment for married couples and civil partners is justified, because it encourages stable, committed relationships. Both Ireland and Belgium filed arguments with the court in support of the UK's position.

In December 2006 a panel of seven judges of the ordinary chamber of the ECHR ruled against the Burdens by a majority of four to three on the grounds that the UK government was justified in giving tax benefits to some groups while excluding others in order to achieve legitimate policy aims, and was afforded a wide margin of appreciation in relation to measures of economic or social strategy. However, judges described the sisters' plight as "awful", "particularly striking" and, in one dissenting judgment, "fundamentally unfair and unjust". Joyce and Sybil therefore decided to apply to the Grand Chamber for permission to appeal against the judgment, which was given.

However, in April 2008 the Grand Chamber ruled, in a 15-2 vote, that the Burdens do not face unfair discrimination, as they could not be compared for the purposes of Article 14 of the European Convention on Human Rights to a married or Civil Partnership Act couple. The court stated that "marriage [and now civil partnership] remains an institution which is widely accepted as conferring a particular status on those who enter it. (…) Rather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature". It added that "The absence of such a legally binding agreement between the

applicants renders their relationship of co-habitation, despite its long duration, fundamentally different to that of a married or civil partnership couple". The court also agreed with the ruling of the ordinary chamber that national governments are entitled to a wide discretion when deciding taxation policy.

A victory for the Burdens could have forced the UK government to change the law relating to inheritance tax in order to place cohabiting couples on an equal footing with married couples and civil partners, and would have set a difficult precedent for HM Revenue & Customs ("HMRC") because the bulk of a family estate is often tied up in property.

Interestingly, when the Civil Partnership Bill was being considered in Parliament, the House of Lords passed an amendment extending the benefit of the spouse exemption from inheritance tax to family members aged over thirty, who had lived together for at least 12 years and who were not already married to or in a civil partnership with another person. This amendment was reversed when the Bill returned to the House of Commons.

The issue was raised again in the House of Lords following the outcome of the Burdens' appeal, where it was noted that the UK government has no plans to alter the inheritance tax rules for cohabiting and dependant close family members. It was suggested by some members of the House that the current law could be changed so that couples such as the Burdens would not be exempt from paying inheritance tax on the death of the first sister, but would be able to defer the tax payable until the death of the second, thus allowing the second sister to remain in her family home until her death. This would not result in any great loss of funds to HMRC, given the small number (4%) of UK estates which are liable to inheritance tax. Lord Davies responded on behalf of the Government that in such cases HMRC works sympathetically and takes care to ensure that payments of inheritance tax are staggered over a period of time in order that someone is not forced to sell a home they may have lived in for a long time, and that this approach would be taken in the case of the Burdens.

Therefore, despite losing their final legal battle, Joyce and Sybil will be able to approach HMRC for special consideration on how to pay the inheritance tax bill. They vowed to continue lobbying Parliament on this issue despite their "bitter disappointment" with the result of their appeal.

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UNITED KINGDOM

Confidentiality and disclosure of letter of wishes

The judgment in *Breakspear and others v Ackland and others [2008] EWHC 220 (Ch)* provides clear and long-awaited guidance as to the principles that trustees and beneficiaries can follow relating to disclosure of letters of wishes to beneficiaries and how these principles can be applied to particular circumstances. This case follows the traditions in *re Londonderry's Settlement* and *Schmidt v Rosewood* reported in PBN May 2003

Background

The claimants were three discretionary beneficiaries of the A Settlement, a discretionary trust. The A Settlement had a nominal settlor of Reeva Dunning but was in fact settled by the claimants' father, Basil Dunning, towards the end of his life and whilst he was in the process of divorcing Reeva Dunning, his second wife. The trustees of the A Settlement were Basil, his accountant friend, Robert Ackland, and later, in addition, Basil's third wife, Patricia Dunning. Basil died in 2002. The claimants were informed of the existence of the trust in 2005 in correspondence about Basil's estate. The trustees, Robert and Patricia, provided copies of the settlement deed but refused to disclose both the letter of wishes and further oral wishes that they claimed that Basil had communicated to the trustees at a later date.

The claimants applied to the court to learn the content of the letter of wishes and the oral statements to ascertain their expectation from the A Settlement. The beneficiaries also wished the court to set aside the purported addition of Patricia to the beneficiary class, which they argued breached the self dealing rule. However, the claimants appear to have accepted that the disclosure of the letter of wishes was not relevant to the resolution of this issue.

Trustee has a discretion regarding disclosure of confidential material

Following the line of thought in *Schmidt*, Briggs J in the English High Court held that the trustees had the discretion to disclose or refuse to disclose letters of wishes and that disclosure of certain documents to beneficiaries is not a proprietary right.

Further, in the context of a family discretionary trust, a letter of wishes, unlike a trust deed, is inherently confidential, as it was created for the sole purpose of serving and facilitating an inherently confidential process, namely the exercise by trustees of discretionary powers. The confidential nature exists for the benefit of the beneficiaries rather than merely for the protection of the trustees and it is a matter for the trustees and, in the appropriate cases the court, to preserve, relax or abandon. The trustees and the court should have no pre-disposition to disclosure or non-disclosure but should make their decision by considering all the relevant circumstances. For the better discharge of their confidential functions, the trustees need not disclose a letter of wishes to beneficiaries merely because they request it unless, in their view, disclosure is in the interests of the sound administration of the trust, and the discharge of their powers and discretions.

Settlor cannot fetter trustees' discretion to disclose

Although the point may be decided on another occasion, Briggs J indicated that he was not persuaded that it was appropriate or legitimate for a settlor to fetter the trustees' discretion with respect to disclosure of letters of wishes, either by the inclusion of special terms of confidentiality in the letter itself or, still less, on any subsequent occasion.

Trustees need not give reasons but can waive their immunity

Briggs J also held that, having made their decision regarding disclosure, the trustees are not obliged to give reasons for it, any more than in relation to any other exercise of their discretionary powers. Indeed, English law has for over 150 years protected trustees from having to give reasons for their discretionary decisions at the request of beneficiaries. In difficult cases, the trustees can seek the court's directions but should bear in mind the inevitable time and cost in doing so.

However, in this case, the trustees had not remained entirely silent as to their reasons and said that, in their view, the disclosure of the letter of wishes would be divisive and would lead to family discord. In consequence, the court was entitled to examine the rationality of the reasons for declining to disclose by reference to the contents of the letter of wishes. Having examined it, the court could still choose not to reveal the contents of the letter of wishes to the claimants. Briggs J therefore concluded that he should read the letter of wishes to determine whether the trustees' decision not to disclose the letter of wishes was a rational decision.

Having read the letter, Briggs J held that the decision not to disclose the contents of the letter was a proper exercise of the trustees' discretion and on the stated grounds was within the range of reasonable and rational decisions which trustees might make. He was not inclined to exercise the court's inherent jurisdiction set out in *Schmidt* as nothing indicated to him that the trusts of the settlement needed administration in any respect that would be illuminated by the requested disclosure.

Letter of wishes may be disclosed in the course of litigation

However, if a genuine issue as to the construction of a trust deed was to become subject to litigation, and that issue appears likely to be illuminated by relevant background material evidenced by a letter of wishes, then the letter of wishes may become disclosable, regardless of confidentiality, in accordance with ordinary principles of disclosure in civil litigation.

In this case, counsel for the trustees had acknowledged that the letter of wishes would need to be disclosed at a later date in any event, when the trustees sought the court's sanction, as they proposed to do, for distributing the trust fund. The trustee's reason for seeking the court's blessing for any scheme of distribution was the family history and acrimony surrounding the settlement.

In view of the likelihood that the beneficiaries would see the letter of wishes in this future application, Briggs J was minded to order disclosure to the claimants before the application for approval of the scheme for distribution had been brought, unless the trustees indicated that they had decided not to pursue the application after all. But for the trustees' stated intention to seek sanction for any future scheme of distribution, Briggs J would uphold their refusal to disclose it.

Comment

The judgment and guidance in this case is particularly welcome given the lack of authority on this specific point to date; the fact that the previously relatively settled state of the law and underlying principles with regard to the identity and disclosure of trust documents had been recast following the decision by the Privy Council in *Schmidt v Rosewood*; and the fact that reported decisions of courts in other jurisdictions including Australia, New Zealand and the Channel Islands on the disclosure of letters of wishes had been controversial and at variance.

The case also made it clear that, in spite of increasing global transparency, there are still public policy reasons why confidentiality should be preserved and the courts will not always tend towards disclosure.

Points in practice

1. From a trustee's perspective, regardless of the terms of the letters of wishes themselves, letters of wishes are inherently confidential and trustees have discretion on a fiduciary basis as to whether or not to disclose letters of wishes. The trustees should have no predisposition towards disclosure or otherwise.
2. Trustees have no duty to give reasons for their decision and, should they do so, they open their decisions up to challenge by beneficiaries and to closer examination by the courts. They may therefore be best advised not to disclose their reasons either to the beneficiaries or to the court.
3. Although trustees can apply to the court for directions, they do not have to do so and should take the time and costs of doing so into account before applying. If the trustees apply to court for directions then full disclosure must be made. The letter of wishes itself will almost always have to be disclosed. The court is likely to join the requesting beneficiary to the application before making any decision. The court will have to consider whether and to what extent to restrict disclosure to the beneficiary for the purpose of enabling submissions to be made.
4. Regardless of express terms as to confidentiality in the letters of wishes, settlors cannot ensure that letters of wishes are protected by confidentiality. The presumption that letters of wishes are confidential can be overridden by beneficiaries.
5. Settlors and trustees should beware that passing on wishes by word of mouth rather than in writing or by the trustees recording the settlor's oral wishes in a memorandum rather than the settlor writing a letter of wishes will not necessarily avoid disclosure. In the present case, Briggs J treated the oral

expressions of wishes, which were recorded in the trustees' written statements to the court, on the same level as the settlor's written letter of wishes.

6. A beneficiary may apply to the court to challenge the exercise of the trustees' discretion. The trustees will be entitled and again may be best advised to decline to give reasons for their non disclosure and to defend the challenge on the grounds that there is no material before the court for impugning either the fairness or the honesty of their decision, their reasons being off-limits.

7. Alternatively, a beneficiary could invoke the court's administrative jurisdiction. In which case, the beneficiary would need to demonstrate that an occasion has arisen which calls for the court's interference. A mere refusal to disclose a letter of wishes, unaccompanied by reasons or evidence of bad faith or unfairness would not ordinarily justify such intervention. Further, subjective arguments, such as that it would help the beneficiary to understand his expectations, are unlikely on their own to be sufficient for the trustees to agree to disclose or for the court to order disclosure.

8. Tactically, a beneficiary who wishes a non-co-operative trustee to disclose a letter of wishes may find that asking a trustee, who is not properly advised, to explain the trustee's reasons for non disclosure opens up opportunities to contest the non disclosure that might otherwise have been closed, as, once the trustees have volunteered reasons for their refusal, the court may investigate the reasons and call for further factual material and explanation.

9. Finally, although there are sometimes overriding reasons for confidentiality, one reason why the dispute and associated court costs arose was that the beneficiaries had not been made aware of the trust and their expectations during their lifetime. Had the settlor educated the beneficiaries as to the nature of the trust and the beneficiaries' entitlements during his lifetime, this dispute might have been avoided.

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Recent Changes to the Brazilian Tax Legislation

On 24 June 2008, the Official Gazette published Law No 11,727 /08 (the "New Legislation"). The New Legislation implements Provisional Measure No. 413/08. The following is a discussion of its main provisions.

1. Special Regime for Infrastructure Development ("REIDI")

Article 4 of the New Legislation provides for the suspension of Social Contributions on Gross Revenues (PIS/COFINS), levied on rents from the lease of machinery, devices, instruments and equipment used in infrastructure projects, and financed by legal entities entitled to REIDI benefits.

REIDI is a special regime introduced by Law No. 11,488/07. It applies to legal entities which have approved projects for the implementation of transport, energy, ports and sanitation infrastructure. The regime provides for the suspension of PIS/COFINS, when equipment and services used to implement infrastructure projects are either acquired locally, or imported.

The New Legislation has extended the suspension of PIS/COFINS to machinery, instruments and equipment which is leased by a legal entity benefiting from the regime.

2. Extension of the "Tax Haven" Concept

Article 22 of the New Legislation amends the provisions (contained in Law No. 9,430/96) relating to tax havens, adding a new §4 to Article 24 of that law. The concept of a tax haven will be extended to include any country or location with favourable taxation, where the legislation does not allow access to information relating to the corporate structure of legal entities, legal ownership or the identity of actual beneficiaries of income attributable to non-residents. The new provision will be effective from 1 January 2009.

Taken together with Article 8° of Law No. 9,779/99, the new provision (§4 to Article 24 of Law No. 9,430/96) can be interpreted to mean that income from any transaction in which the beneficiary is resident or domiciled in a country which either does not tax income, or taxes it at a maximum rate lower than 20%, is subject to withholding income tax at the rate of 25%. From a practical standpoint, however, there are strong rumors that the tax authorities (before year-end) will issue a new list of jurisdictions/type of companies that should be deemed to be low tax jurisdictions.

3. Privileged Tax Regime

Article 23 of the New Legislation adds two new articles to Law No. 9,430/96 (24-A and 24-B), both of which aim to extend (from 1 January 2009), the application of transfer pricing rules to transactions under privileged tax regimes.

Article 24-A defines a privileged tax regime as one in which: (i) income is not taxed or is taxed at a maximum rate of less than 20%; (ii) tax advantages are granted to non-resident individuals or legal entities, either (a) without requiring any substantial economic activity to be carried out in the country or location, or (b) contingent on there being an absence of substantial economic activity in the country or location; (iii) income earned outside the territory is either not taxed, or is taxed at a maximum rate of less than 20%; and/or (iv) does not allow access to information about corporate structure, ownership of goods or rights or economic transactions. Article 24-B allows the executive to reduce or re-establish the 20% maximum set out in Article 24-A.

Notably, the provisions in Articles 24-A and 24B may be applied to countries belonging to the same economic blocs as Brazil.

It would seem that the concept of a privileged tax regime should not affect the list of jurisdictions which are currently subject to the 25% (as opposed to the 15%) withholding tax, on remittances to non-residents of loan or equity interest, capital gains on the disposal of assets or investments located in Brazil, and royalties for technology and technical services. This is because the concept of a privileged tax regime does not extend that of "countries that do not tax the income or taxes it at a rate lower than 20%", this being the concept used to determine the withholding income tax on remittances abroad.

As such, we understand that the notion of a privileged tax regime should be used only to determine those transactions which are subject to transfer pricing.

4. Presumed Profit Method of Taxation - Hospital Services

Article 29 of the New Legislation amends Law No. 9,249/95, so that the rate of 32% of gross revenues shall not be used to calculate the presumed profit of the providers of the following services: hospital services and diagnostic and therapeutic assistance; clinical pathology; image diagnosis; pathological anatomy; nuclear medicine; clinical analysis and pathologies. This is subject to any service provider being a duly organized legal entity, which complies with the rules of the National Agency of Public Sanitation (ANVISA).

Previously, the 32% rate was applicable to service providers generally, with the exception of hospital service providers.

The service providers falling within the new definition will calculate their Corporate Income Tax ("IRPJ") at 8% of their gross revenues. The 32% rate will still apply to other service providers, except those with an annual gross revenue of R$ 120,000, who are taxed at 16% of their gross revenues.

5. Deferral on the Recognition of Interest Expenses and Financial Charges Incurred by Holding Companies

Article 31 of the New Legislation allows holding companies (from 1 January 2009) to defer the recognition of interest expenses and financial charges, incurred on loans for the purpose of investment in their holdings.

The article sets out the tax treatment for the deferral: the deferred value will integrate the investment cost for the purposes of accruing the capital gain or loss, if the holding company sells or liquidates those assets.

6. New tax regime applicable to transactions with alcohol fuel

From 1 October 2008, revenues earned by a producer or importer from the sale of alcohol, will be subject to PIS and COFINS at 1.5% and 6.9%. The PIS and COFINS rates will be reduced to a 0% rate in subsequent transactions by distributors and retailers. A 0% rate will also apply to certain stock market transactions.

The New Legislation allows producers, importers and distributors of alcohol to benefit from a system of PIS/COFINS tax credits (obtained in the acquisition of these products from other producers, importers and distributors) in respect of resale.

7. Specific Import Duty Rates

Article 2º of the New Legislation allows import duty to be calculated by applying a rate per kilo or measurement unit: R$ 15.00 per kilo, with the possibility of reduction by the executive authorities.

8. CSLL Applicable Rate

Most entities are required to pay social contributions ("CSLL") on net income at the rate of 9%. Article 17 of the New Legislation provides for an increase in the CSLL rate to 15% for financial institutions (effective from 1 May 2008).

9. Offsetting or Reimbursement of withheld PIS/COFINS

Article 5 º of the New Legislation provides that amounts withheld as PIS/COFINS contributions, may be offset (or reimbursed) against other taxes and contributions managed by the Brazilian Internal Revenue Services. This possibility is only available when the amount withheld is higher than that owed.

PIS/COFINS contributions withheld before the publication of Provisional Measure No. 413/08 may be offset against other federal taxes. Regulation of this area is pending.

10. Amendments to the PIS and COFINS One-Time Levy Regime

Article 24 of the New Legislation establishes that legal entities which export, produce or manufacture products which are subject to the PIS and COFINS one-time levy regime, may offset their retail or export tax liability, by benefiting from a system of credits gained in respect of the acquisition of these products from another such entity.

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2008 Japanese Tax Legislation

On January 23, 2008, proposed tax legislation for 2008 was approved by Japan's Cabinet and submitted to the Japanese Diet. The new legislation was originally expected to be enacted on April 1, 2008, but the ruling and opposition parties failed to reach consensus by that date on some key issues, and a temporary bill was passed extending to May 31, 2008 some rules that would otherwise have expired on April 1, 2008. Media and public attention focused on the suspension of the provisional gasoline tax–a "temporary" tax which has been in force since 1974 - during April, while the ruling Liberal Democratic Party/Komeito Party coalition (which currently holds a majority in the lower house) and opposition Democratic Party of Japan (which controls the upper house) reached an impasse on the rate, with the Japanese public enjoying reduced tax on gasoline throughout April. On April 30, 2008, the lower house of the Diet exercised its right to enact legislation despite rejection by the upper house and passed the 2008 tax reforms–including the reimposition of the JPY25.10 per liter gasoline tax–with effect from May 1, 2008.

This article provides a general explanation of items of the 2008 Japanese tax legislation that are likely to be of interest to companies with business interests in, or associations with, Japan.

I. International Taxation

A. Elimination of Permanent Establishment Risk Associated with Independent Agents

1. Previous Rule

Under Japanese domestic law, a permanent establishment ("PE") of a non-resident includes an agent who habitually concludes contracts in Japan, an agent that maintains inventory and fills orders, and an order-securing agent (Income Tax Law ("ITL"), Art. 164(1)(iii)). Unlike the OECD Model Treaty and most tax treaties to which Japan is party, an independent agent, such as a broker, a general commission agent or investment manager, is not excluded from the domestic law definition of PE.

2. New Rule

"Independent agents" will be expressly excluded from the scope of a PE for Japanese tax purposes.

3. Effective Date

The new rule will be effective from April 1, 2008.

4. Comments

While PE risk was always present with an independent agent in Japan, the risk was a theoretical one given the situation under Japan's various treaties, so the new rule merely codifies existing practice. The change aims to eliminate the theoretical risk under domestic legislation and bring Japanese legislation into line with the OECD Model Treaty and tax treaties to which Japan is party.

B. Exemption with Respect to Interest and Original Discount on Private Euro Bonds

1. Previous Rule

Interest or original discounts received by a non-resident individual or a non-resident corporation on private Euro bonds issued on or before March 31, 2008 is exempt from tax if certain conditions are met (Special Tax Measures Law ("STML") Arts. 6, 41-13, 67-16(2)).

2. New Rule

The current rule will be extended for a further two years, and corporate bonds issued by certain foreign corporations will be included in the scope of the current rule.

3. Effective Date

The new rule will be applicable to bonds issued in fiscal years beginning on or after April 1, 2008.

4. Comments

Expanding the scope of the current rule to exempt from tax interest received by non-residents from corporate bonds issued by foreign companies is linked to the rule discussed later in this article, which includes interest from foreign bonds paid to residents in the scope of domestic source income.

C. Transfer Pricing (Local Tax Grace Period)

1. Previous Rule

There is no existing rule in this area.

2. New Rule

This new rule will provide a grace period with respect to the payment of local inhabitants' tax and local enterprise tax when a competent authority procedure is in progress. This new rule is in addition to the grace period already available for corporate tax during a competent authority proceeding under Art. 66-4-2 of the STML.

3. Effective Date

The new rule will be applicable to competent authority applications made on or after April 1, 2008.

4. Comments

A grace period for national taxes for the duration of a competent authority application was introduced in 2007 tax legislation, but local taxes were still payable. This new rule now makes local taxes subject to the grace period, which lasts for the duration of the competent authority process.

D. Foreign Tax Credit for *Tokutei Mokuteki Kaisha* ("TMK")

1. Previous Rule

For TMKs and other investment vehicles, including specified investment companies, the foreign tax credit limitation is calculated based on profits before deducting dividend payments, as provided by Arts. 67-14, 67-15, 68-3-2 and 68-3-3 of the STML. Dividends paid by TMKs and other investment vehicles are subject to withholding tax at source.

2. New Rule

Foreign taxes paid by TMKs and other investment vehicles can be credited against withholding taxes on dividends paid by TMKs and investment companies.

3. Effective Date

The new rule is applicable to dividends paid with respect to fiscal years beginning on or after April 1, 2008.

4. Comments

The dividend payable deduction and the exemption from withholding tax on income from underlying assets under Art. 9-4 of the STML currently aims to eliminate double taxation at the TMK level and investor level, so there is effectively no tax burden at the TMK level. The result is that foreign tax cannot be credited under the current rule. This change should result in a reduction of the investor's tax burden as it allows foreign taxes to be credited against Japanese withholding tax on dividends payable. The new rule is consistent with Arts. 176(3) and 180-2(3) of the Individual ITL, which provide for a foreign tax credit from withholding tax on distributions paid by securities investment funds. A foreign tax credit from withholding tax with respect to contract-type securities investment trusts is also applicable to foreign taxes paid by other contract-type securities investment trusts in which a contract type securities investment trust holds an interest.

E. Expansion of Domestic Source Income to Include Interest on Bonds Issued by a Foreign Entity

1. Previous Rule

Interest on bonds falling within the category of "domestic source income" is limited to interest on Japanese Government Bonds, local government bonds and bonds issued by Japanese companies. Interest on bonds issued by non-resident companies is excluded from the scope of domestic source income (ITL, Art. 161(4)).

2. New Rule

Interest on bonds issued by a non-resident company which is attributable to business conducted in Japan by the foreign company will be within the scope of "domestic source income", and consequently taxable in Japan. The change aims to rationalize the source rules in line with those under many income tax treaties (e.g., Art. 11(7) of Japan-US tax treaty, etc).

3. Effective Date

The new rule is applicable to interest on foreign bonds issued on or after April 1, 2008.

4. Comments

This amendment to the ITL seeks to stop the tax advantages offered by the so-called "double SPC structure", whereby a special purpose company ("SPC") incorporated in Japan subscribes for corporate bonds issued by an SPC established in a non-treaty country with a permanent establishment in Japan. Interest income earned through such SPC structures falls outside the income tax net in Japan because Art. 161(4) of the ITL did not include in taxable income interest on bonds issued by foreign companies. The attraction of the double SPC structure for taxpayers has been not only related to tax avoidance, but also for non-tax reasons, including increasing remoteness in the case of bankruptcy. Increasing the scope of domestic source income in this way has been deemed necessary by the Japanese Government in order to deny the unjust tax benefits provided by the double SPC structure.

F. Rationalization of the Anti-Tax Haven Rules

1. Previous Rule

The anti-tax haven rules as provided in Art. 66-6 of the STML are applicable to resident

individuals and resident corporations in the same family shareholder group who collectively own at least 50% of the shares of a designated foreign subsidiary. A member of a family shareholder group includes a resident individual, a resident corporation and other persons who have a special relationship with the resident individual and the resident corporation.

2. New Rule

A corporation controlled by a director of a resident corporation, a designated foreign subsidiary or any other corporation which is regarded as having a special relationship will be included in a family shareholder group.

3. Effective Date

The new rule will be effective for fiscal years of a designated foreign subsidiary or designated foreign corporation ending on or after April 1, 2008.

4. Comments

Under the previous rule, a family shareholder group included a director of a resident corporation, etc. However, a corporation controlled by a director of a resident corporation etc., was not previously included in the definition of "family shareholder group". The inclusion of such closely-held corporations in the new legislation aims to prevent tax avoidance commonly achieved by using this loophole.

G. Change to the Valuation Formula for Goodwill

1. Previous Rule

For inheritance tax and gift tax purposes, the goodwill of a private company is valued based on the following formula found in Art. 165 of the Property Valuation Basic Circular:

(Average income x 0.5) – entrepreneur consideration – ((total assets x basic annual rate) compound interest rate for the life of goodwill [10 years, in principle])

For the purposes of this formula:

- The current "basic annual rate" is 2%; and
- "Entrepreneur consideration" is a prescribed amount based on the entrepreneur's average income.

Current amounts for entrepreneur consideration are:

Average Income	Entrepreneur Consideration Amount
JPY 2 million or more - JPY 3 million	JPY 0.9 million
JPY 3 million or more - JPY 4 million	JPY 1.25 million
JPY 4 million or more - JPY 5 million	JPY 1.6 million
JPY 5 million or more - JPY 7 million	JPY 2 million
JPY 7 million or more - JPY 10 million	JPY 2.5 million
JPY 10 million or more - JPY 15 million	JPY 3 million
JPY 15 million or more - JPY 20 million	JPY 4 million
JPY 20 million or more - JPY 30 million	JPY 5.5 million
JPY 30 million or more - JPY 50 million	JPY 7 million
JPY 50 million or more - JPY 70 million	JPY 8.5 million
JPY 70 million or more - JPY 100 million	JPY 10 million
JPY 100 million or more	10% of average income

2. New Rule

The "entrepreneur consideration" amount and the basic annual rate will be amended as follows:

- The "basic annual rate" is 3%; and
- "Entrepreneur consideration" will be changed as shown below:

Average Income	Entrepreneur Consideration Amount
JPY 100 million or less	30% of average income + JPY 10 million
JPY 100 million - JPY 300 million	20% of average income + JPY 20 million
JPY 300 million - JPY 500 million	10% of average income + JPY 50 million
JPY 500 million or more	5% of average income + JPY 75 million

3. Effective Date

The new rule is applicable to inheritances, gifts and bequests made on or after January 1, 2008.

4. Comments

The method of valuation of shares in private companies for inheritance tax and inhabitants' tax purposes is the same as that used for corporate tax purposes (9-1-4 of the Corporation Tax Law Basic Circular, etc). As the current "basic annual rate" under the valuation rule is set by reference to the risk-free interest rate on long term Japanese Government Bonds (currently 2%), goodwill exists when the ROA exceeds 4% (taking the 50% discount into consideration). The new rule will raise the basic annual rate from 2% to 5%, and cases where goodwill is over-valued should decrease significantly.

II. Other Changes

A. Tax Ruling System

1. Previous Rule

The tax ruling system was introduced in 2001, with minor modifications in 2004. Under this system, the issuance of binding tax rulings is limited to current and past transactions, the applicant's name is publicly disclosed and details of the ruling are made public within 60 days in most cases. Further, the tax authority is under no statutory obligation to issue a ruling within a set period.

2. New Rule

The following amendments will be made to the current tax ruling system:

- The scope of items for which tax rulings can be obtained will be expanded to include transactions which are scheduled to take place in the future (in which case explanatory documents can be submitted);
- The name of a taxpayer (or any information that may identify the taxpayer) who requests a ruling will not be disclosed;
- Currently, the content of rulings is disclosed within 60 days after they are made, and on the reasonable request of the taxpayer, such disclosure can be postponed for up to 120 days. The new proposal allows for postponement of tax ruling disclosures for up to 180 days; and
- As a general rule, the ruling office currently tries - but is not obliged - to issue rulings within three months of receiving a ruling request. The 2008 reform proposal obliges the ruling office to issue rulings within three months, where possible.

3. Effective Date

This amendment will become effective for ruling requests submitted on or after April 1, 2008.

4. Comments

The previous tax ruling system was not particularly useful to the majority of taxpayers, as the scope of transactions for which the system was available was limited, details of the applicant were publicly disclosed, and the ruling office was under no statutory obligation to issue the ruling within a reasonable time.

For the full article which also covers tax legislation changes relevant to M&A, corporate taxation and investments please contact the authors of this article.

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The State Secretary of Finance announces legislative proposals affecting the Inheritance Tax Act 1956

The basis of the Dutch Inheritance Tax Act, including Dutch regulations on Dutch gift taxes, has its origins in legislation introduced 150 years ago. Ever since then the Inheritance Tax Act has been subjected to (re)developments and modifications. As a result the Inheritance Tax Act has become complex and unclear. The State Secretary of Finance has announced a wide-ranging reform of the current Inheritance Tax Act. In a speech on 14 April 2008 the State Secretary announced that he is planning to tackle the outdated and complex regulations in the Inheritance Tax Act. In this respect the State Secretary announced a legislative proposal called "Schenk- en erfbelasting" (Gift and Inheritance Tax) which will be published in 2009 and will replace the current Inheritance Tax Act. The new Gift and Inheritance Tax Act is intended to become effective as of 1 July 2010.

In anticipation of this legislative proposal the State Secretary announced that the proposal will include, amongst others the following measures:

- A reduction of the tax rate for the surviving partner/spouse and children to a maximum of 20%. The State Secretary announced as well that the tax rate for "other beneficiaries" should not exceed 50%.
- An increase of the tax allowances especially for the surviving partner/spouse and descendants.
- A modification of the legislation in order to bring it more in line with economic reality. For example, currently, descendants are being taxed at the moment the first parent dies, although they do not receive anything at that time, based on the so-called division of the parental estate ("ouderlijke boedelverdeling"). Those descendants should no longer be taxed on their future claim which will not become due and payable prior to the death of the surviving partner/spouse. The State Secretary proposes to shift that taxable moment to the time when the surviving partner/spouse dies.
- A modification in order to counter the widespread use of tax planning, which enables taxpayers to avoid tax on gifts and inheritance. In particular tax planning using discretionary trusts or specific "custom made" wills (e.g. the "ik-opa", "turbo" and "superturbo" wills), which erode the Dutch tax base, will be targetted. With respect to the taxation of discretionary trusts and similar special-purpose funds, the State Secretary is considering two alternatives.

1. The first is to tax the beneficiaries on the capital of the trust/fund on the basis of a notional yield for *personal income tax*. In this scenario, the capital of the trust would be allocated to the beneficiaries of the trust. This would allow the Dutch tax authorities to levy personal income tax on beneficiaries on the basis of a notional yield from the moment the capital was contributed to the trust, regardless of whether or not the beneficiaries were familiar with knew that they were actual or potential beneficiaries or potential beneficiaries of the capital. The State Secretary states that this alternative is more in line with the economic reality, but does not explain how beneficiaries who are not yet aware of a trust entitlement (yet) would know what to include in their personal income tax return. In order to achieve this notional yield levy, a legal assumption would have to be included in the Personal Income Tax Act, in box 2 (capital gains and other income from a substantial interest in a company) and box 3 (income from savings and investments).
2. The second is to treat the trust in a similar way to the so-called "stichting" (foundation) for *gift tax* purposes. In this alternative, the distributions from the trust to the beneficiaries would be subject to gift tax. The State

Secretary said that distributions from trusts settled outside the Netherlands should also be subject to gift tax. If this alternative is adopted and distributions are subject to gift tax, no inheritance tax would be levied at the moment the settlor/parent dies.

Please note that the above alternatives for avoiding tax planning should not alter the basic rule of the Inheritance Tax Act: i.e. gift and inheritance tax will still be levied only when the donor or deceased is or was resident or deemed to be resident in the Netherlands. These two possible approaches have only been suggested with regard to trusts and similar special purpose funds.

- A simplification of the facility for business succession as provided in the Inheritance Tax Act. This facility provides, for example, for a conditional exemption of inheritance tax levied on 75% of the value of the business. One of the conditions is that the successor would have to manage the company for a period of five years. During these five years, the tax due on this part of the shares is postponed and no interest is due on the conditional debt. Further, the tax due on the remaining 25% of the value of the business could conditionally be postponed for 10 years. In both cases, the Dutch tax authorities assess a preserved tax assessment. In particular, the possibilities of abolishing this preserved tax assessment are to be examined.

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Singapore's 2008 Budget: Tax Exemption for Family-Owned Investment Holding Companies

One of the bases of taxation in Singapore is the remittance basis. In this regard, Singapore taxes foreign-sourced income which is received in Singapore. In recent years, significant changes have been made into this remittance basis. Foreign income is now exempt from Singapore taxation when it is received in Singapore by a Singapore tax-resident individual.[1] In a similar vein, Singapore now exempts certain types of investment income from taxation when it is earned by a resident individual. There are thus differences in the tax treatment between individuals and companies as the latter continues to be subject to Singapore taxation on the receipt of foreign income in Singapore and certain types of investment income. Inadvertently, these differences in tax treatment may have limited the tax planning options available to individuals, as shareholdings in companies might be an unattractive option.

It is thus against the backdrop of the wish to develop Singapore as a wealth management hub that the 2008 Budget Speech introduced a new scheme where tax exemption is granted to qualifying Family-Owned Investment Holding Companies ("**FIHC**") so as to equalise the aforementioned differences in tax treatment. Details of this FIHC scheme were finalised by the Monetary Authority of Singapore ("**MAS**") on 23 June 2008.

Definition of "Family-Owned"

As mentioned above, the premise of the FIHC scheme is to eliminate the discrepancies in tax treatment between different categories of taxpayers. However, in order to maintain the integrity of Singapore's remittance and territorial bases of taxation, there is a need to have limited categories in which a company may enjoy the same tax exemptions as resident individuals. Hence, the use of the terminology "Family-Owned".

The MAS has clarified that generally, a FIHC is a company whose immediate shareholders are all individuals and the individuals are connected persons. This 'connected persons' concept is borrowed from legislation which defines and regulates a Private Trust Company. Accordingly, a qualifying FIHC must have immediate shareholders who are individuals who satisfy the definition of 'connected persons' as per the Trust Companies Act 2005.[2] Generally, there must be a blood relationship or a formal legal status between individuals before they may be considered as 'connected persons'.

Besides the 'connected persons' requirement, there are further conditions which a company must satisfy so as to avail itself of the tax exemptions.

List of Tax Exempt Income

For a qualifying FIHC, certain types of income accrued, derived or received in Singapore on or after 1 April 2008, will be exempt from tax. Broadly, income which arises from sources outside Singapore and is received in Singapore, shall be exempt from tax. Certain types of investment income are also exempt.

It should be noted that expenses incurred by a FIHC which are in excess of its specified income cannot be deducted against other taxable income of the FIHC.

[1] Please note that where foreign income is received in Singapore though a partnership in Singapore, such income continues to be subject to Singapore taxation.

[2] A trust may be an immediate shareholder if its beneficiaries are connected to the individuals of the FIHC.

Availability of FIHC Scheme

The FIHC scheme does not apply to companies incorporated on or after 1 April 2013. If a company wishes to avail itself of the FIHC scheme, it is required to submit annual declarations to the MAS and the Inland Revenue Authority of Singapore. These declarations will state that the requisite conditions are met and must be signed off by a director of the FIHC and by a member of the key management team of a Singapore financial institution that is providing services to the FIHC.

Conclusion

Recent years have seen a steady introduction of efforts by the Singapore Government to elevate Singapore's status in the asset and wealth management industry. To the extent that the FIHC scheme helps to remedy the discrepancies in tax treatment between companies and individuals, and thereby provides private bankers and advisers with more planning options, this FIHC scheme should be added to the list of commendable measures to grow Singapore's private banking industry.

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SPAIN

SICAVS are back

Could 2008 be the year SICAVs return? All indications are positive. Everybody knows that SICAVs (Investment Companies with Variable Capital) are a useful instrument for tax planning which, in some cases, make it possible for family-owned groups of companies to structure their financial investments with tax advantages: a 1% Corporate Income Tax rate on returns and deferment of tax payment until divestment. However, despite their fiscal attractiveness, their use has been called into question over the last few years due mainly to two factors.

First, SICAVs have been thoroughly inspected by the Spanish Tax Authorities, which have, in some cases, denied them the special tax regime. Basically, the tax authorities' arguments in these cases have been that some SICAVs did not qualify as true collective investment instruments, but were a mere tax planning instrument controlled by a family-owned group of companies.

Second, being a securities investment company made a SICAV's holding shares directly or indirectly subject to Net Wealth Tax in the hands of their shareholders, while other investment companies, such as real estate companies, could be exempt from this tax if they met some easily assumable requirements.

These two factors which limited the use of SICAVs have been overcome, and they have returned to the limelight. Two rulings by the Central Economic-Administrative Court (of 22 November and 20 December 2007) - creating binding case law for the tax authorities - have overcome the tax authorities' position with respect to the legal classification of SICAVs. In line with Additional Provision Three of Law 23/2005, on Boosting Productivity, these rulings conclude that the decision as to the "goodness" of SICAVs belongs not to the tax authorities but to the Spanish equivalent of the US Securities and Exchange Commission (the *Comisión Nacional del Mercado de Valores or CNMV*), which has to date been favorable to the "family" nature of SICAVs. It seems that the Equity Tax will finally be eliminated as of 1 January 2008 (pending publication in the Official State Gazette). Thus, SICAVs holding shares will no longer put them at a disadvantage compared to companies which invest in other types of assets. Return takes precedence over tax considerations. Furthermore, there is another factor that may play a role in reactivating SICAVs in Spain: the scandal over the Liechtenstein accounts and the general sensation that the tax authorities at last have the means to extend their investigations abroad could motivate more than one SICAV to regularize its tax situation and structure its equity legally and effectively, using the legal instruments offered under Spanish legislation.

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Is There a Rational Way to Address the Global Problem of Tax Evasion?

Recent high profile tax investigations have given pause to families burdened by the offshore ownership of funds that, contrary to the laws of their home countries, remain undeclared for tax purposes. Recent events, however, do not signal any change to a long standing reality: in today's increasingly transparent world, wealth owners have only two choices. These are to "play by the rules" of their home country or to "get out," giving up taxable residence (and, in some cases, citizenship).

It is, however, high time for the realities to be addressed in a calm, rational way by the holders of such funds and their bankers. And, given the amount of undeclared money held abroad, which some estimate at around US$6 trillion, it is also time for governments to make it easier for taxpayers to "come clean."

Increasing global transparency is not a recent development

For many years, countries have been taking steps to obtain tax information from banks and others whether or not in bank secrecy locations. Developments here range from the U.S. Qualified Intermediary rules to the contribution of technology, and the growing ease of tax authorities to obtain credit card, financial and other information. Cooperation among countries, resulting in wide information sharing, is now also a growing focus.

The European Union Savings Directive was designed to capture tax on interest payments made to individuals who reside in a different EU country from where the payment is made. Filled with loopholes, the Directive permitted many to avoid the rules. However, the EU has made it clear that the loopholes will be closed down and the scope of the Directive extended. One can run, but for how long can one hide?

The industry is badly serving wealth owners

In today's transparent world, wealth owners are badly served by advisors who emphasise bank secrecy as a means of avoiding taxation. It is surprising that Singapore, a model of strategic planning, seems to be falling into the trap of secrecy-based private banking, maintaining a system that attracts Europe's tax evaders fleeing the tightening grip of the EU Savings Directive.

Bank secrecy is important and wealth owners have rights to privacy in relation to financial and other affairs. However, bank secrecy can no longer be misused to permit the evasion of tax.

At the moment, the wealth management industry is not doing enough to address the real long-term needs of wealth owners. While a substantial and growing business, in all too many quarters little effort is made to understand the changing international environment within which banks operate and on training and knowledge management.

What needs to be done?

Wealth owners need to understand that non-compliance with tax laws is simply not an option in today's environment. Breaking the law carries criminal, financial and reputational risks, and all too often these are left to the younger generation to sort out. Given that many advisers and intermediaries are living in the past, great care needs to be taken by wealth owners who obtain advice from those who have a financial interest in perpetrating the continuation of assets being maintained on a non-declared basis.

Wealth owners must become familiar with ways to address issues of undeclared money, including voluntary disclosure, amnesty arrangements and review of statutes of limitations and other relevant rules that can help families to "come clean". Wealth owners are doing their children no favours by not thinking seriously about the future.

A solution to undeclared money requires a different approach

A solution to the issue of undeclared funds will need to involve financial institutions and governments working together cooperatively.

First, there needs to be an acceptance that undeclared tax money exists, and that the issue is not by any means confined to well-known bank secrecy centres.

Second, the historical reasons, often unrelated to tax issues, for wealth owners holding undeclared funds need to be acknowledged. Bank secrecy rules in a number of countries were developed to help families protect against expropriation of assets and corruption in their home countries.

While bank secrecy has been abused, many wealth owners deserve a sympathetic approach to regularizing past undeclared monies, something that will require the cooperation of both governments and the banks and other service providers wealth owners work with.

It is time for a creative approach to resolving a global problem.

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How far can America reach? Implications for Swiss advisors travelling to the UK and elsewhere

The indictment of a former client advisor at a well-known Swiss bank, leaves no doubt that the American government intends to pursue aggressively anyone it suspects of assisting its taxpayers to evade taxes. Following the temporary detention of a senior executive from the same bank, it is also apparent that the US Securities and Exchange Commission ("SEC") intends to enforce its rules more rigorously in the future. A number of banks and their employees are now quite cautious about travel to the US. However, will this provide sufficient protection for professionals who fear they may have US exposure?

Is it risky to travel?

In the above-mentioned case, both men were apprehended in the US, and it is alleged that the former client advisor travelled to America to provide his clients with illegal advice. However, there would be nothing to prevent US authorities from seeking to extradite individuals suspected of similar offences. This is true even for advice which was given in Switzerland; even for advice which did not contravene any Swiss criminal law. As far as the US Department of Justice is concerned, what matters is whether the offence sufficiently touched the US.

Switzerland will not currently extradite for fiscal offences unless they constitute fraud under Swiss law. Less certain is the attitude other countries might take, particularly the UK, but also other European states. The risk is that an advisor based in Switzerland may face extradition to the US from another country he or she is visiting. Moreover, if extradition is sought, there is a good chance that it will be preceded by provisional arrest, itself an unpleasant, and usually lengthy, experience. In the UK a person may be held for four months before actual extradition, and longer if the decision is appealed.

The Extradition Act 2003

The UK Extradition Act, 2003, implemented into domestic law the extradition agreement signed between EU Member States and the US. The legislation has teeth, and has already been used to great effect by the American government in pursuing alleged white-collar criminals resident in the UK. Some aspects of this newly-intensified co-operation could have serious implications for Swiss-based advisors concerned about the prospect of visiting the UK.

The UK: important developments

Relying on the "spirit" of dual criminality

Although there has traditionally been great reluctance to grant extradition for purely tax-based crimes, the 2003 Treaty makes no mention of fiscal offences providing grounds to refuse extradition. In any event, where the circumstances allow, it may be that the court deems that a different, less controversial offence forms the subject of the request.

The principle of dual criminality as it is set down in the 2003 Act, means that extradition will only be granted for an act which constitutes an offence punishable by at least one year's imprisonment in both the UK and the US. (Note that it is irrelevant whether it constitutes a criminal offence in the country where it was carried out.) In 2006, Ian Norris was extradited to the US to face charges of price-fixing, which was not specifically a criminal offence in the UK at the time it was carried out. Both the English court and the Home Office showed their willingness to apply something akin to a spirit of dual criminality, by finding that the conduct equated "to the offence of conspiracy to defraud". Many fiscal offences could be similarly described - albeit with the IRS (US Internal Revenue Service) as the victim.

Extra-territorial jurisdiction

The US aggressively asserts extra-territorial jurisdiction. It considers that it can try individuals for alleged offences which were basically committed abroad, as long as there is a significant link with the US. The extradition of the "NatWest Three" in 2006, showed a willingness on the part of the British government to respect such extra-territorial claims.

In that case, US jurisdiction was based on telephone calls made in America. The use of US wires or email servers, or email exchanges with a person in the US, could also be sufficient. That a suspect did not step foot in the US will not prevent an indictment. Nor, it seems, will it prevent the British government (and possibly others), from extraditing.

Speciality, prima facie cases, retroactive application and statute of limitations

A few additional points to note: since the 2003 Act does not recognise statutory limitations, the risk of extradition will be ongoing; the act has retroactive effect it allows individuals to be prosecuted; for offences other than those for which they were extradited (thereby undermining the well-established principle of specialty); and it does away with the need for the US (but not the UK) to make out a prima facie case.

Outside Europe

Not just Europe

The US can request extradition from any country (including those with which it does not have a treaty), as long as the suspect is present in that country, even for the briefest of periods. It may put out an Interpol red notice, which will be treated by many of the organisation's members (there are currently 186), as a valid request for provisional arrest. Fiscal offences often form the basis of such notices, and the US requests more of them than any other country.

Abduction

The American government considers itself legally within its rights to kidnap foreign citizens to stand trial; it has said so before an English court. In 2006, it attempted to abduct Gavin Tollman, a British-based businessman wanted on charges of evading US taxes using a Channel Islands bank account. The attempt took place in Canada, with the collusion of Canadian authorities. This adds an intriguing dimension to the issue of the risks involved in travelling, particularly since Mr Tollman was not even aware that he had been indicted.

Who is at risk?

Extradite to extract information?

Extradition remains a cumbersome process: it must be worthwhile initiating proceedings. Those with most to fear are probably individuals in possession of information which could form the basis of other high-value or high-volume prosecutions. Notwithstanding Swiss banking secrecy rules, the US authorities no doubt believe that there is an excellent chance that if extradited to the US, faced with bail restrictions, lengthy sentences far from home and the option of plea-bargaining, a suspect will tell prosecutors what he or she knows.

Wait and see

It may be that the pursuit of the former advisor in the case of the Swiss bank mentioned at the beginning of this article dies down. However, similar investigations may be launched in respect of other banks suspected of wrongdoing, with the threat of prosecutions remaining for the foreseeable future. We shall have to wait and see.

What Now?

If the risk of a US indictment seems very high, it may be worth considering the possibility and wisdom of triggering a prosecution at home, since a person cannot be extradited for a crime for which he or she has already been tried.

Those who fear they may be exposed should attempt to establish the likelihood and legal basis of prosecution, and whether that could provide grounds for extradition. Going forward, the need to understand and comply with US, Swiss and any other relevant laws, must become a priority.

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President Signs “Exit Tax” Into Law

On June 17, 2008 President Bush signed into law a $1.2 billion military tax relief package which includes an Exit Tax on U.S. citizens and long-term green card holders who expatriate from the United States. The Exit Tax is part of the Heroes Earnings Assistance and Relief Tax Act (“HEART”) of 2008. Although the Exit Tax has been seriously considered by Congress in the past, the measure has never been approved by both Houses of Congress, usually because of disputes over the provisions the Exit Tax was meant to fund.

The Exit Tax (the “Exit Tax Provision”) requires many U.S. citizens and long-term permanent resident who expatriate on or after June 17, 2008 to recognize and pay tax on unrealized gain in excess of $600,000 on their assets, i.e., they must “mark-to-market” their assets and pay tax on the excess gain. In addition, the Exit Tax Provision imposes a new tax on gifts and bequests by those expatriates, to U.S. citizens or U.S. residents. This new provision (styled Section 877A) is a replacement of the former expatriation tax rules of Section 877.

“Covered Expatriate”.

“Covered expatriates” will be subject to the new Exit Tax Provision. A “covered expatriate” is defined as anyone who renounces his or her U.S. citizenship or who relinquishes his or her permanent residence status after holding it in 8 years of the last 15 years (“expatriates”) and who (i) has an average annual net income tax liability for the five preceding years of more than $139,000 (2008 amount adjusted for inflation); (ii) has a net worth of over $2,000,000; or (iii) failed to certify compliance with U.S. tax obligations for the prior five years. The exceptions provided are for dual nationals (from birth) and for persons under 18½, but only if they have not lived in the United States for more than 10 years of the last 15 (dual nationals), or for more than 10 years (for those under 18½), as defined under the Code’s “substantial presence” test of residency. These are broader, more generous exceptions than those under the old Section 877 which, among other things, require that a dual citizen never held a U.S. passport at any time.

Key New Rules

- **“Exit Tax” - Property Subject to Mark-to-Market.** All property of a covered expatriate is deemed to be sold for its fair market value on the day before expatriation. This applies even to U.S. real property interests, accelerating the recognition of gain that would be taxed in any event. Covered expatriates must recognize gain on the deemed sale and pay U.S. income tax on gains over $600,000 (adjusted for inflation). Some assets are not marked-to-market (e.g., deferred compensation items and interests in non-grantor trusts), but they are otherwise taxed (see below).
- **Gifts and Bequests from Expatriates to U.S. Citizens and Residents Taxed.** U.S. citizens or residents receiving gifts or bequests of over $12,000 (adjusted for inflation) from a covered expatriate will be taxed at the highest gift or estate tax rate (45% in 2008, and scheduled to increase to 55% in 2011). There is no time limitation to this provision — a person who expatriated could make a gift to a U.S. citizen 40 years after expatriation out of newly-acquired assets (i.e., post-expatriation assets), and the tax would be imposed on the U.S. citizen or U.S. resident. Further, it appears that the donor need not have been a “covered expatriate” at the time he or she expatriated — *only at the time the gift or bequest was made*. In the statutory language, the expatriate need only satisfy the “covered expatriate”

definition, above, *at the date the gift or bequest is made*. So if an individual becomes modestly wealthy (net worth of $2 million, not adjusted for inflation) after expatriating, any gift he or she makes to a U.S. citizen or U.S. resident will be taxed to the recipient. There is an exception to the imposition of this tax for gifts and bequests to spouses of the expatriate and to U.S. charities.

- **Deferred Compensation Items.** Depending on the exact nature of the deferred compensation item, it will be either subject to 30% withholding tax or immediately includible in the covered expatriate's income, and taxable at U.S. income tax rates.
- **Treatment of Specified Tax Deferred Accounts.** A covered expatriate's entire interest in such accounts (e.g., qualified tuition plan, Archer MSA) will be treated as immediately includible in his or her income and taxable at U.S. income tax rates.
- **Special Rules for Non-Grantor Trusts.** The Exit Tax expressly excludes non-grantor trusts from the property subject to the mark-to-market calculation; however, the trustee of a non-grantor trust must withhold 30% when a covered expatriate receives (directly or indirectly) a distribution from a non-grantor trust, regardless of the fact that a lower withholding rate may apply under a treaty. Moreover, non-grantor trusts must recognize gain on distributions of appreciated property to covered expatriates. The new law imposes the withholding requirement on the trustees of both U.S. resident or foreign resident trusts. As such, under the new rules a trustee of a foreign non-grantor trust is under an obligation to withhold on distributions to a covered expatriate.
- **Tax Effect of Expatriation.** Expatriation will be effective for tax purposes even if the expatriate does not file Form 8854. Thus, the imposition of the Exit Tax cannot be delayed (unlike application of the former expatriation tax rules) by failing to file Form 8854.

Existing Expatriation Tax Regime is Terminated

There is a bright side to the Exit Tax Provision-the former expatriation income tax rules (Section 877) will no longer apply to a covered expatriate if his or her expatriation occurs on or after June 17, 2008. Under the former expatriation rules of Section 877, an expatriating individual subject to Section 877 who visits the U.S. for 30 days in any calendar year for the ten years after expatriation is treated as a U.S. person for tax purposes for that calendar year. Thus, under the new Exit Tax Provision, a covered expatriate would be able to travel to (and potentially reside in) the U.S. without becoming taxable as a U.S. person unless he or she becomes a U.S. resident under the normal U.S. tax rules. The repeal of Section 877 by the Exit Tax Provision is, in this respect, a marked improvement over previous legislative proposals of the Exit Tax and may make the tax effects of expatriation less onerous in some cases.

Interaction of New and Old Law

If an individual "expatriates" as that term is defined under the Exit Tax Provision, ***prior to*** June 17, 2008, he or she would not be subject to the new law. This appears to be true even if the individual does not file a Form 8854 until after the enactment of the new law. Such a filing is necessary for an individual's effective expatriation for tax purposes under current law (Section 877), but not under the Exit Tax Provision. This has interesting consequences for those who "expatriate" (as defined in the Exit Tax Provision) prior to June 17, 2008, but who have yet to file Form 8854. Such individuals will continue to be covered by Section 877 as if the Exit Tax Provision had not come into effect, and will continue to be taxed as U.S. persons until they file Form 8854.

Conclusion

On the one hand, the Exit Tax Provision's mark-to-market tax offers a clean break with the U.S. tax system as of the date of expatriation without imposing a ten-year period after expatriation during which special tax rules apply. Instead, a covered expatriate will pay the mark-to-market tax and immediately thereafter be treated for U.S. tax purposes as a non-resident alien. In addition, up to $600,000 of the covered expatriate's unrealized gains will escape U.S. taxation permanently, unless the gains would otherwise be taxed to a non-resident alien owner under normal U.S. tax rules (e.g., real estate). Moreover, a covered expatriate may visit the U.S. for more than 30 days a year without becoming a U.S. tax resident again, unless he or she would become resident under the normal rules. Importantly, under the Exit Tax Provision the covered expatriate can freely acquire and dispose of U.S. securities or receive U.S. portfolio interest without incurring any special U.S. taxation (a marked improvement over the former rules, which encouraged expatriates to avoid investment in U.S. assets).

On the other hand, the Exit Tax Provision contains a number of “shadow” provisions which can trigger additional U.S. tax liability even though the mark-to-market tax was paid on a covered expatriate’s worldwide gains in excess of $600,000. For example, a covered expatriate is subject to 30% tax on any distributions he receives from a non-grantor trust, regardless of whether the trust is a foreign or domestic resident trust for U.S. tax purposes. And the new tax imposed on U.S. recipients of gifts or bequests from a covered expatriate applies indefinitely after expatriation and is likely to be a trap for the unwary.

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Oops... that insurance contract you issued has fallen out of Compliance. What should you do? The IRS has listened, then spoken.

Annuity and life insurance contracts must meet a variety of requirements under the U.S. tax laws in order to provide tax benefits to the policyholder and the beneficiaries. The IRS has had procedures in place for taxpayers to correct various qualification errors and failures related to such contracts but has publicly acknowledged that implementing these procedures has been, in some instances, too expensive and burdensome for the taxpayers. In response to the industry's concern, the IRS issued Notice 2007-15 in early 2007 requesting comments from the public on how various correction procedures may be improved. After more than a year of dialogue with the industry, the IRS has issued five new revenue procedures to simplify the correction process.

1. **Revenue Procedure 2008-38** applies to any issuer of a contract that failed to meet the definition of a life insurance contract under Section 7702(a) of the U.S. Internal Revenue Code ("Code") by reason of a compliance system that does not account for charges for qualified additional benefits ("QABs") under the expense charge rule of Code Section 7702(c)(3)(B)(ii) and provides a procedure by which such issuer may remedy the failure. The five categories of QABs are guaranteed insurability, accidental death or disability benefit, family term coverage, disability waiver benefit, and other benefits prescribed under regulations.

2. **Revenue Procedure 2008-39**. A life insurance contract becomes a so-called modified endowment contract ("MEC") if premiums paid at any time during its first seven years exceed the premiums that would have been paid if the contract had called for full payment in seven level annual premiums. Why may MEC status be problematic? Generally, a distribution from a MEC is treated as made from income and, thus, taxable to the contract holder to the extent of any income on the insurance contract. Also, any loan from a MEC is treated as a distribution, taxable to the holder to the extent of the contract income. Finally, taxable distributions before age 59½ from a MEC are subject to a 10% penalty unless an exception applies. Sometimes a life insurance policy inadvertently fails to qualify as a non-MEC. Without a correction mechanism available to the insurer, contract holders would be subject to the tax disadvantages of MECs for as long as their policies are in force.

   To prevent such negative tax consequences for contract holders, the IRS has since 2001 permitted issuers to remedy "inadvertent nonegregious" failures to comply with the MEC rules by entering into a closing agreement with the IRS. Revenue Procedure 2008-39 supersedes previous guidance and provides the new procedure by which an issuer of a life insurance contract may remedy an inadvertent nonegregious failure to comply with the MEC rules.

3. **Revenue Procedure 2008-40.** If at any time a life insurance policy does not meet the requirements of Code Section 7702(a), the investment build-up income on the contract is treated as ordinary income received by the policyholder during that tax year. In addition, if during any taxable year of the policyholder the life insurance policy ceases to meet the Code Section 7702(a) requirements, the build-up on the contract for *all* prior taxable years is treated as received by the policyholder during the taxable year in which such cessation occurs. The consequences of such a cessation could be extremely harsh to a policyholder. The policyholder may not only be liable for a potentially very large amount of tax, but may also lack the liquidity to pay it. If the policy is liquidated to deal with this, the (former) policyholder may not be able to obtain adequate insurance going forward, for example, if his or her health has deteriorated in the meantime. If a policy is re-acquired with a non-U.S. carrier, the 1-percent U.S. federal excise tax would apply anew to any premium.

Revenue Procedure 2008-40 provides a procedure by which an issuer of a life insurance contract may remedy the failure of a contract to meet the definition of a life insurance contract under Code Section 7702(a). The IRS has set forth several methods under which the issuer may determine the amount required to be remitted to the IRS (based on excess premiums, income on the contract, or excess earnings).

4. **Revenue Procedure 2008-41.** A so-called "variable contract" is a life insurance or annuity contract which provides for the allocation of premiums received to an account segregated from the general asset accounts of the insurer pursuant to state law or regulations. In addition, in the case of an annuity contract, the amounts paid out must reflect the investment return and the market value of the segregated account, and in the case of a life insurance contract, the amount of the death benefit must be adjusted on the basis of the investment return.

   A variable contract must be adequately diversified pursuant to Code Section 817(h) in order to provide U.S. income tax benefits to the policy holder; if a variable contract is not adequately diversified, the investment build-up is taxable to the policyholder.

Revenue Procedure 2008-41 provides a procedure by which an issuer of a variable contract may remedy an inadvertent failure of the variable contract to satisfy the diversification requirements of Code Section 817(h). The amount the issuer is required to remit to the IRS as a penalty is the lesser of (1) an amount determined based on the income on the contract (which is determined in a different manner for annuities and for life insurance contracts) and (2) an amount by which the segregated asset account was nondiversified. In any event, the amount required to be paid is limited to the lesser of $5,000,000 or 5% of the total asset value of the segregated asset account.

5. **Revenue Procedure 2008-42** provides a procedure by which an issuer of a life insurance contract may automatically obtain a waiver under Code Section 7702(f)(8) for certain reasonable errors (e.g., clerical or mathematical errors) that caused the contract to fail to satisfy the requirements of Code Section 7702(a).

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Reports

The Misuse of Life Insurance as a Wealth Planning Tool

Marnin Michaels and Marie-Thérèse Yates hosted a briefing in Zurich on June 16, 2008 on the use and “abuse” of life insurance products.

Historically, the use of life insurance was closely tied to the policy reasons behind its creation: providing families with the necessary financial support to deal with the unexpected death of the family “breadwinner”. Since its inception, life insurance has enjoyed numerous advantages, the most important being considerable tax benefits and security with respect to estate planning, along with the general flexibility of the product.

According to Mr. Michaels and Ms. Yates, today there is an increasing trend in the industry to push the limits of the product, both on the part of carriers and of potential investors. First, there has been a significant drop in risk-shifting: the insurance industry is increasingly offering clients account “wrappers” where the death benefit, formerly the most important part of the product, is reduced to a bare minimum.

As a result of the decreased risk-shifting, the cost of many life insurance products, which was formerly quite high, has dropped considerably. Further, in many jurisdictions, policy holders are being given greater control over the choice of bank as well as greater investor control as to investments. Both carriers and potential investors have pushed the limits too far in this respect, to the point that regulators are becoming increasingly wary of the way in which these products are used.

Finally, Mr. Michaels highlighted the additional risk of having sales forces offer products designed for one jurisdiction in other jurisdictions: “We are increasingly seeing sales forces marketing products in jurisdictions without due regard to the particular issues posed by such jurisdictions and this is a real danger.”

In closing, Mr. Michaels encouraged the industry, both carriers and investors, to take a close look at its current practices and its future: “Life insurance is a great product but some promoters are running the risk of killing their own industry.”

For information on future business briefings and other events organized by Baker & McKenzie, please refer to the following schedule: http://www.bakernet.com/BakerNet/Events/Events+by+Date/default.htm.

Geneva Business Briefings

Topic:	***Update on the UK Tax Situation for Resident Non-Domiciles***
Dates:	*Tuesday, 26 August 2008 (in French),* *Tuesday, 2 September 2008 (in English)*
Time:	*17.00 - 18.30*
Location:	*Baker & McKenzie, Geneva*
Session Leaders:	*Stephanie Jarrett, Baker & McKenzie Geneva* *Chris Williamson, Baker & McKenzie Geneva*

These sessions will take stock of where we are today, after the uncertainties and proposals of the past ten months which have led to the changes in the tax legislation. Are you clear where you are today and where you need to be tomorrow with bank accounts, holding UK real estate and trust structures?

Topic:	***Extradition***
Date:	*Tuesday, 9 October 2008*
Time:	*17.00 - 18.30*
Location:	*Baker & McKenzie, Geneva*
Session Leader:	*Cindy Chambaud, Baker & McKenzie Geneva*

This session will look at some of the important issues affecting Swiss private banking and the ever-expanding reach of the extradition treaties.

To register for any of these briefings please contact:

Catherine Esteves at catherine.esteves@bakernet.com or
tel: +41 22 707 98 00

Topic: ***The New Exit Tax on Expatriates: A Status Update***

Date: *Wednesday, 20 August 2008*

Time: *08.00 - 09.30*

Location: *Hotel Glockenhof, Sihlstrasse 31, 8001 Zurich*

Session Leaders: *Marie-Thérèse Yates, Baker & McKenzie Zurich*
Matthew Ledvina, Baker & McKenzie Zurich

On June 17, 2008, the President of the United States signed into law a new exit tax for United States citizens and long-term green card holders. During the past few years, largely similar versions of the exit tax have been introduced by Congress. The consequences of the new exit tax for U.S. citizens and long-term green card holders who expatriate are significant. This briefing will provide an analysis of the key provisions of the new legislation as well as the relevant US tax issues. It will also address practical issues that expatriating individuals and their advisors should bear in mind.

Topic: ***Tax Planning Strategies for Inbound and Outbound Investments in Spain***

Date: *Wednesday, 3 September 2008*

Time: *08.00 - 09.30*

Location: *Hotel Glockenhof, Sihlstrasse 31, 8001 Zurich*

Session Leader: *Fabricio Gonzalez, Baker & McKenzie Zurich*

This briefing will focus on tax planning strategies using different vehicles and jurisdictions to channel inbound and outbound investments (such as financial products, real estate, etc.) with Spanish connections. Also covered in this session will be how to create tax-efficient schemes for cross-generational transfer of wealth.

Topic: ***Using New Zealand and Singapore for Latin American Families***

Date: *Thursday, 25 September 2008*

Time: *08.00 - 09.30*

Location: *Hotel Glockenhof, Sihlstrasse 31, 8001 Zurich*

Session Leader: *Dharshi Wijetunga, Baker & McKenzie Zurich*

This session will focus on the use of New Zealand and Singapore as a planning jurisdiction for Latin American families. We will cover the use of New Zealand and Singapore trusts and underlying companies, and how they can be used as part of a wider Latin American planning strategy.

Topic: ***Recent Developments in Insurance Intermediation***

Date: *Tuesday, 30 September 2008*

Time: *08.00 - 09.30*

Location: *Hotel Glockenhof, Sihlstrasse 31, 8001 Zurich*

Session Leader: *Joachim Frick, Baker & McKenzie Zurich*

This briefing will summarize the current legal framework for insurance intermediation activities in and from Switzerland, including the more recent case law affecting insurance intermediaries. The planned revisions of the legal framework will also be presented and discussed.

Topic: ***Tax Planning for Polish Individuals - Trends***

Date: *Monday, 6 October 2008*

Time: *08.00 - 09.30*

Location: *Hotel Glockenhof, Sihlstrasse 31, 8001 Zurich*

Session Leader: *Slawomir Boruc, Baker & McKenzie Warsaw*
Piotr Wysocki, Baker & McKenzie Warsaw

This session will focus on the recent developments in tax planning/business structures for Polish family-controlled businesses. Various business structures used in Poland will be presented, as well as the issues related to pre-sale structuring, change of residency and use of trusts/foundations.

Topic: ***Structuring for Wealthy Russian Nationals: Major Concerns***

Date: *Thursday, 16 October 2008*

Time: *08.00 - 09.30*

Location: *Hotel Glockenhof, Sihlstrasse 31, 8001 Zurich*

Session Leader: *Sergei Zhestkov, Baker & McKenzie - CIS, Limited, Moscow*

This session will cover recent private banking developments and trends in Russia, and the main issues (and solutions) for Russian high-net-worth individuals.

Topic: ***Legal Developments in Swiss Insurance and Reinsurance***

Date: *Friday, 31 October 2008*

Time: *08.00 - 09.30*

Location: *Hotel Glockenhof, Sihlstrasse 31, 8001 Zurich*

Session Leader: Joachim Frick, Baker & McKenzie Zurich

This briefing will focus on the regulatory framework and recent legal developments affecting insurance and reinsurance companies in Switzerland, with special emphasis on the new FINMAG and the new Swiss Financial Services Authority.

Topic: ***How the IRS Obtains non-U.S. Records and Documents in Tax Investigations - Update***

Date: *Monday, 3 November 2008*

Time: *08.00 - 09.30*

Location: *Hotel Glockenhof, Sihlstrasse 31, 8001 Zurich*

Session Leader: *Milan Patel, Baker & McKenzie Zurich*

The U.S. government through its tax collection body, the IRS, has increasingly taken steps to obtain non-U.S. based records and documents in investigations into various international transactions which the IRS views as aimed at avoiding or evading U.S. taxes. This session will focus on providing an update of the various legal mechanisms used to exchange tax and related information including the Tax and the Mutual Legal Assistance Treaties entered into between the U.S. and Switzerland, as well as other information gathering tools (such as summonses or subpoenas to U.S. financial institutions) employed by the IRS in search of such information.

Topic: ***Switzerland as Part of a Family's Planning Strategy***

Date: *Wednesday, 19 November 2008*

Time: *08.00 - 09.30*

Location: *Hotel Glockenhof, Sihlstrasse 31, 8001 Zurich*

Session Leader: *Stephanie Jarrett, Baker & McKenzie Geneva*

In some cases family members are living in Switzerland, in other cases the family is simply using Switzerland as a base for the management of its assets and at times the two are mixed: this session will look at the tax, legal and other issues affecting families with these different ties to Switzerland.

Topic: ***Strategies for Dealing with Undeclared Funds***

Date: *Thursday, 25 November 2008*

Time: *08.00 - 09.30*

Location: *Hotel Glockenhof, Sihlstrasse 31, 8001 Zurich*

Session Leader: *Philip Marcovici, LawInContext PTE LTD, Zurich*

Belinda Theron, Baker & McKenzie Zurich

The question of how banks should deal with undeclared funds has become increasingly important. The climate within which banks operate is changing rapidly in light of increased pressure from tax authorities and the need for greater transparency. This session will look first at the issues relating to undeclared funds and will then focus on some strategies for banks in connection with these issues. We will look at how banks should develop their businesses and work with clients in this new environment. Particular emphasis will be placed on the risks for bank employees and some practical advice on how to avoid the pitfalls.

To register for any of these briefings please contact:

Elizabeth Stocker at elizabeth.stocker@bakernet.com or
tel: +41 (0)44 384 12 87

Other Events

A Program in Asia for Wealth Owners and their Families

Date: 26 August 2008
Location: Hong Kong

This event is only open to wealth owners and their families, and employees of private, single family offices.

If you would like to receive further information on this event please contact Marianne Shaw at marianne.shaw@bakernet.com

Private Banking Boot Camp Training Course in Asia

Date: 27 August 2008
Location: Singapore

If you would like to receive further information on this event please contact Marianne Shaw at marianne.shaw@bakernet.com

13th Annual Tax & Trusts Training Course in Asia

Date: 28-29 August 2008
Location: Singapore

If you would like to receive further information on this event please contact Marianne Shaw at marianne.shaw@bakernet.com

3rd Annual Insurance Training Program in Asia

Date: 1 September 2008
Location: Hong Kong

If you would like to receive further information on this event please contact Marianne Shaw at marianne.shaw@bakernet.com

Private Investment Fund Program - 2008

Date: 16 September 2008
Location: Seedamm Plaza, Zurich

If you would like to receive further information regarding the content of this event please contact Marnin Michaels at marnin.michaels@bakernet.com or tel: +41 (0)44 384 12 08

If you would like to register for this event please contact Elizabeth Stocker at elizabeth.stocker@bakernet.com or tel: +41 (0)44 384 12 87

5th Annual International Insurance Training Program

Date: 17 September 2008
Location: Widder Hotel, Zurich

If you would like to receive further information regarding the content of this event please contact Marnin Michaels at marnin.michaels@bakernet.com or tel: +41 (0)44 384 12 08

If you would like to register for this event please contact Elizabeth Stocker at elizabeth.stocker@bakernet.com or tel: +41 (0)44 384 12 87

US Securities Issues Relevant to non-US Financial Institutions

Date: 18 September 2008
Location: Hotel Glockenhof, Zurich

If you would like to receive further information regarding the content of this event please contact Marnin Michaels at marnin.michaels@bakernet.com or tel: +41 (0)44 384 12 08

If you would like to register for this event please contact Elizabeth Stocker at elizabeth.stocker@bakernet.com or tel: +41 (0)44 384 12 87

Private Banking Annual Tax & Trusts Conference

Date: 22-23 September 2008
Location: London

If you would like to receive further information on this event please contact Angela Fletcher at angela.fletcher@bakernet.com

9th Annual Tax & Trusts Training Program in Miami: a focus on Latin America

Date: 2-3 October 2008
Location: JW Marriott Hotel, Miami

If you would like to receive further information on this event please contact Jeanne Valois at jeanne.valois@bakernet.com or tel: +1 305 789 8925

5th Swiss Trust Seminar

Date: 18 November 2008
27 November 2008
Location: Zunfthaus zum Ruden, Zurich (18 November 2008)

Hotel Metropole, Geneva (27 November 2008)

If you would like to receive further information on this event please contact Carole Stoakes at carole.stoakes@bakernet.com

5th Annual Middle East Trust, Tax and Insurance Training Programme

Date: 27-28 January 2009
Location: Abu Dhabi, U.A.E.

Should you have any queries on the content of the programmes, please contact Stephanie Jarrett at stephanie.jarrett@bakernet.com

Should you have queries on the logistics, please contact Marie-Claire Salamin at marieclaire.salamin@lawincontext.com

14th Annual International Tax, Trust and Insurance Training Programme

Date: 25 March 2009 (supplementary programmes)

26-27 March 2009 (main programme)

Location: Montreux, Switzerland

If you would like to receive further information on this event please contact Marie-Claire Salamin at marieclaire.salamin@lawincontext.com

Awards

Congratulations to Paul Stibbard! On 8 May 2008 Paul received a Lifetime Achievement Award at the CityWealth dinner

LawInContext Online Legal Information

Tools for Private Bankers to Survive and Thrive in a Transparent World

The Private Banking Helpdesk and The Financial Products Distribution Helpdesk

At a time when the private banking world is increasingly under scrutiny, those involved in wealth management need to be better armed with timely legal and tax information, as well as training.

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- **Private Banking Helpdesk:** detailed country analyses providing legal and tax information on the needs of high-net worth families in key countries around the world. Each country report covers general country information and trends; key issues relevant to high-net worth families; tax planning issues and strategies; estate and wealth planning; immigration; change of residence and expatriation alternatives; family law.
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