



Luxembourg Tax Update

12 December 2006

Topics and presenters

Holding 1929 / SPF

- Georges Bock, Tax Partner

VAT – Domestic Implications of Abbey National

- Geroges Bock, Tax Partner

Securitisation Companies / Sicars

- Roger Molitor, Tax Partner

Participation Exemption

- Roger Molitor, Tax Partner

National & International Tax Update

- Louis Thomas, Tax Partner



Holding 1929

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Holding 29 – Phase out

- **Draft law 5624**
 - **Cut off: 20.07.2006**
 - **Transitional period: 01.01.2007 – 31.12.2010**
 - **Restriction on transfer of shares (01.01.2007)**
 - **Exceptions to transfer restrictions**
 - **Stock exchange rule (20.07.2006)**
 - **Intragroup transactions and existing shareholders**
 - **Transfer in relation with successions, donations, matrimonial situations or similar**
 - **Transfer protection clause**
 - **Any harmful transfer of shares to be preagreed by 2/3 of the shareholders**

Holding 29 – Phase out

- **Compliance aspect**
 - **Non-objection certificate to be issued by**
 - **Domiciliation agent, if not**
 - **Réviseur d'entreprises**
 - **Expert comptable**
 - **Stock exchange listing**
- **Non compliance situation**
 - **Exchange of information from AED to ACD**

Holding 29 – Phase out

Conclusion

SPF (Société de gestion de patrimoine familial)

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Legal status

- SA
- Sàrl
- SCA
- Société coopérative (SA)

Activity limited to passive investment of individuals

- Financial instruments
- Participations if not actively managed
- Cash at banks
- No real estate
- No financing activity

Eligible Investors

- Individuals
- Estate vehicles representing individuals
- Professional representing individuals

Restriction

- Stock exchange listing
- Public offering
- Limited number of participants

Taxation

- No IRC, ICC, IF
- No withholding tax
- Non resident investors exempt (capital gains and liquidation proceeds)
- Taxe d'abonnement 0,25 % (cap € 125'000, floor € 100)
 - Share capital, share premium
 - Excess debt over (8 x share capital + share premium)
 - Paid quarterly
- If more than 5 % non qualifying dividends from non quoted non residents loss of SPF status

SPF - Compliance

AED

Annual certification by an domiciliation agent, or if not, réviseur d'entreprises, expert comptable

- Confirming status
- Savings directive compliance

Exchange of information with ACD



VAT – Domestic Consequences of Abbey National

VAT – Consequences of Abbey National

- **Consultation process in progress**
 - Application delayed until April 1st 2007
 - Strict application of Abbey National case
- **Custody services according EU directive 85/611 vatable:**
 - Safe keeping but not global custody services
 - Supervision
- **Contract requirements**
 - Problem flat fee pricing
- **No contract change required but**
 - Vatable basis has to be documented

VAT – Consequences of Abbey National

- Problem in practice



Conclusion



State Aid: Securitisation - SICAR

Participation Exemption Implementation of 2nd EU directive Law of 17 November 2006

Law of 17 November 2006

- Law dated 17 November 2006 (almost) limited to the implementation of the Directive 2003/123/EC modifying Parent-Subsidiary Directive 90/435/EC
- Applicable since tax year 2005
- Art 147 LIR, 166 LIR, 175 LIR / Par 11bis StAnpG and art 60 BewG changed
- Art. 9 GewStG and Art.115 par 15a are not modified

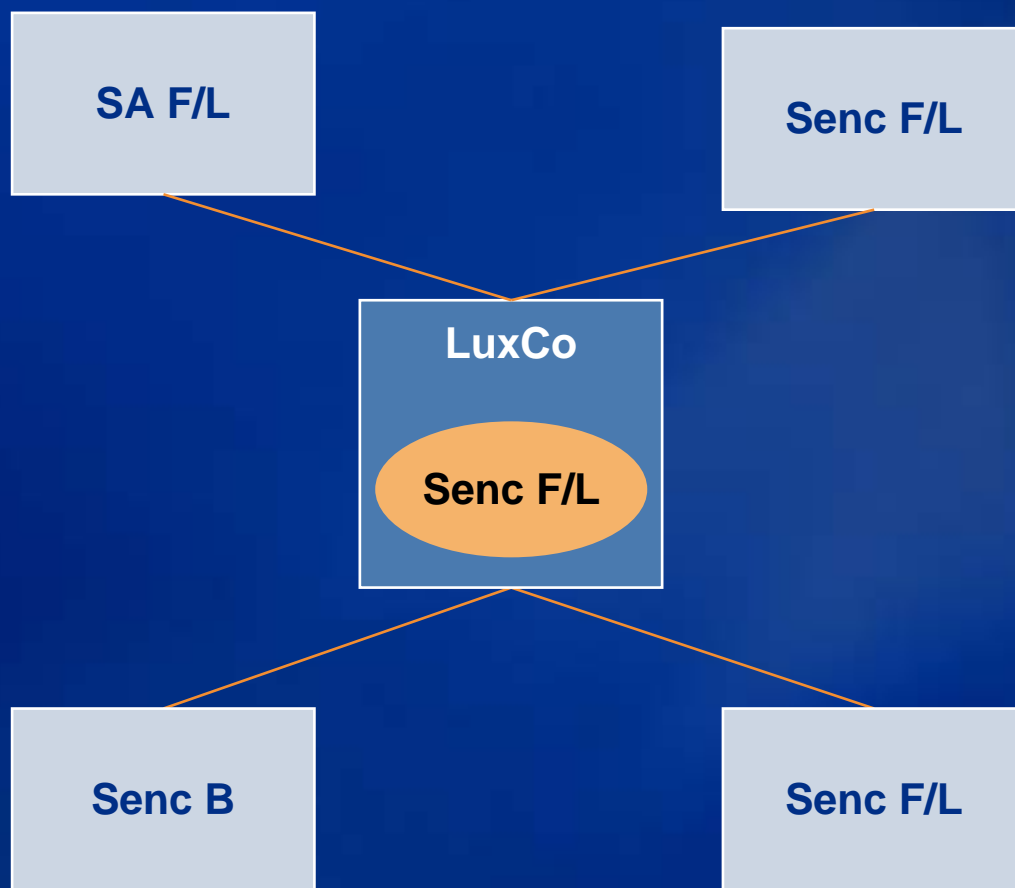
Major changes introduced by the directive

- **New definition of partnership versus corporation**
- **List of companies benefiting from participation exemption**
- **Application to permanent establishments**
- **P.m.: Minimum investment of an eligible participation**
- **Additional specific issues**

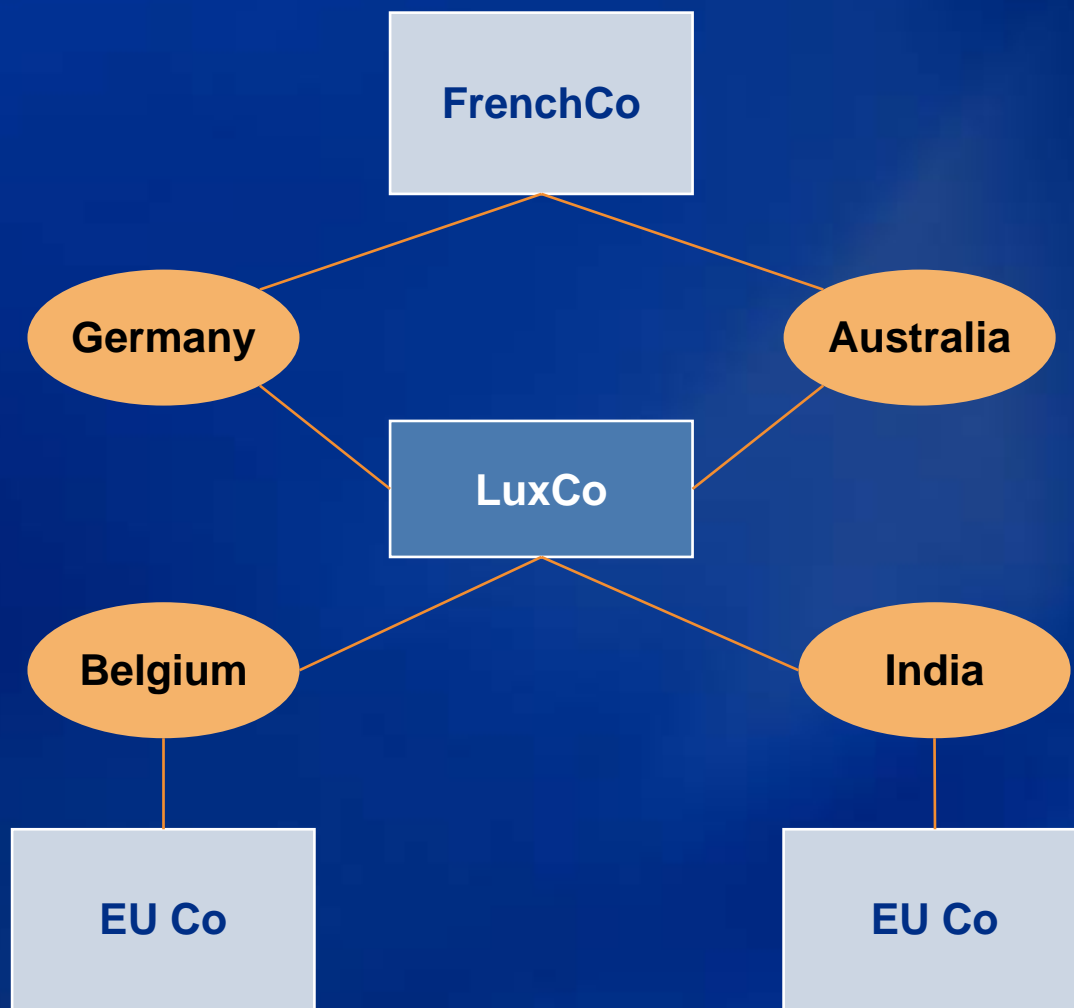
New definition of partnership vs. corporation

- Par 11bis of StAnpGes dated 16 October 1934
- List of partnerships unchanged
- Direct reference to the list of companies of the directive
- Example : treatment of a “société en nom collectif” established in
 - Luxembourg
 - Belgium
 - France
 - Morocco

List of companies benefiting from participation exemption



Application of participation exemption to permanent establishments based outside Luxembourg



Additional specific issues

- **Participation exemption: extension to Switzerland**
- **The special treatment of Estonia**
- **The question mark of Iceland, Norway, Liechtenstein**
- **The future change for Romania, Bulgaria...**
- **The status of dependent territories, e.g. Gibraltar...**



National & International Tax Update

Topics

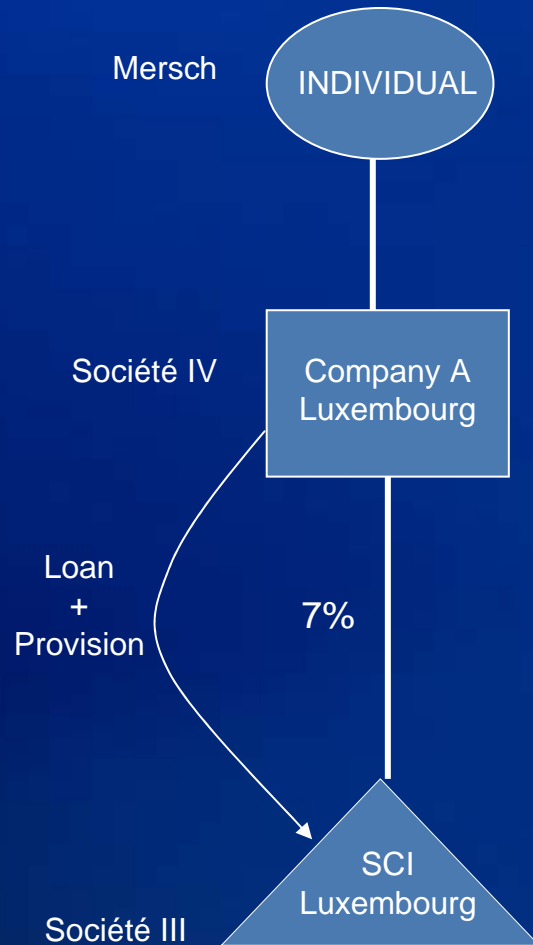
- Domestic tax changes
- European update
- International update

2007 Budget – Tax Provisions

- **Withholding tax on dividends (art. LIR 146-151)**
 - Withholding tax rate on dividends reduced to 15% (and 17.65% if paid net)
- **VAT**
 - VAT rate of 12% for services rendered by members of liberal professions (lawyers, consultants, auditors, architects, etc), by travel agencies, travel tour organizers and advertisement agencies will increase to 15%
 - Labour intensive services (hair dressing, bicycle repairs, window cleaning...) - reduced rate of 6%
- **Public maritime register**
 - Abolition of registration duty of 0.24% on the registration of new mortgages over ships (fixed duty of €12 remains due)
- **Other measures**
 - Petrol duty to increase by 2 cents/litre, diesel duty by 1.25 cents/litre
 - Dependence contribution to increase from 1 to 1.4% of total gross income for individuals (the marginal income tax, including social security contribution, will raise to 40.35%)

Administrative Court 18.10.2006

Luxembourg SCI – Provision for Bad Debts

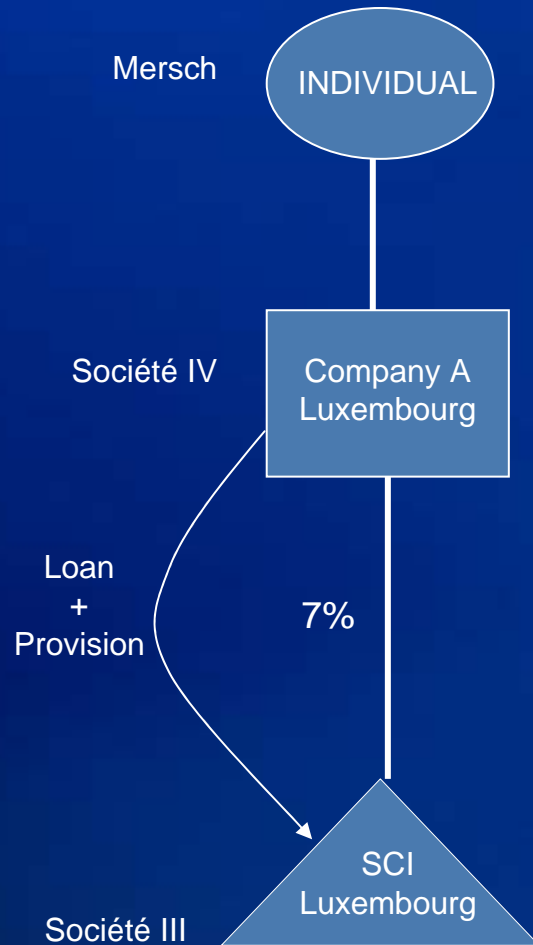


Issue

- Are the provisions for bad debts tax deductible:
 - When determining the tax bases in the SCI?
 - When determining the tax base in Company A?

Administrative Court 18.10.2006

Luxembourg SCI – Provision for Bad Debts



Solution -> Claim rejected

Specific regime of tax transparent entities – art. 175 LIR

- Company A:
 - Transactions between the shareholder and the transparent entity are to be ignored because they are deemed to be self-concluded
 - The loan is not considered as part of the own assets of Company A but is taken into consideration when determining the part of income of the SCI attributable to Company A
 - The loan is to be qualified as a contribution of Company A to its own business

Administrative Court – Tax Consolidation

- Judgment number 19717/20624 dated 23/08/06 - appeal in progress: number a.21979c
- Assurisk (KBC group) vs Company Tax Office n° VI
- Facts:
 - Belgium holding company holds participations in 5 Luxembourg sister companies
 - The Belgium based group applied for tax consolidation. They asked for one of the Luxembourg sister companies to carry out all material and procedural obligations applicable within the tax consolidation regime.

Administrative Court – Tax Consolidation Parties' arguments

- **Tax Office**

- “None of the Luxembourg companies qualify as a fully taxable resident parent company or as a Luxembourg permanent establishment of the Belgian parent company ...”

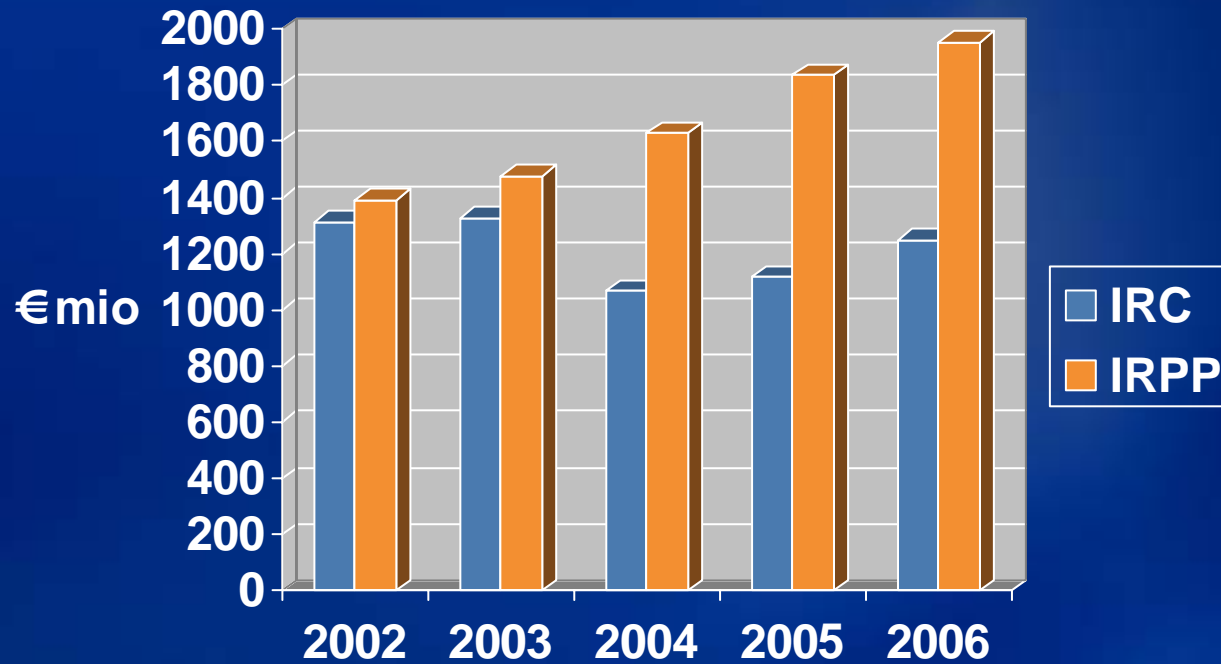
- **Claim :**

- “There is a violation of article 24 § 6 of the Belgium-Luxembourg tax treaty as this article states that the tax treatment applied to Luxembourg resident companies held by Belgian residents should be comparable to the tax treatment applied to Luxembourg resident companies held by Luxembourg residents.
- A Belgian company may benefit from art.164bis only if it has a Luxembourg permanent establishment. Even if one of the subsidiaries undertakes to carry out the material and procedural obligations of the parent company, the tax consolidation regime is denied.
- The refusal to accept the tax consolidation → tax treatment is less favourable than for Luxembourg companies + more obligations than for Luxembourg companies.”

Administrative Court – Tax Consolidation Conclusion

- The refusal by the authorities to allow the application of the tax consolidation regime for the subsidiaries is only based on the fact that the parent company is a Belgium resident whereas, with regards to other elements, the situation is identical to that of subsidiaries that have a Luxembourg resident parent company.
 - The condition of residency violates article 24 § 6 of the Belgium-Luxembourg tax treaty (primacy of international treaties on domestic law).
- JUDGMENT REFORMED

ACD – Revenue statistics 2002-2006

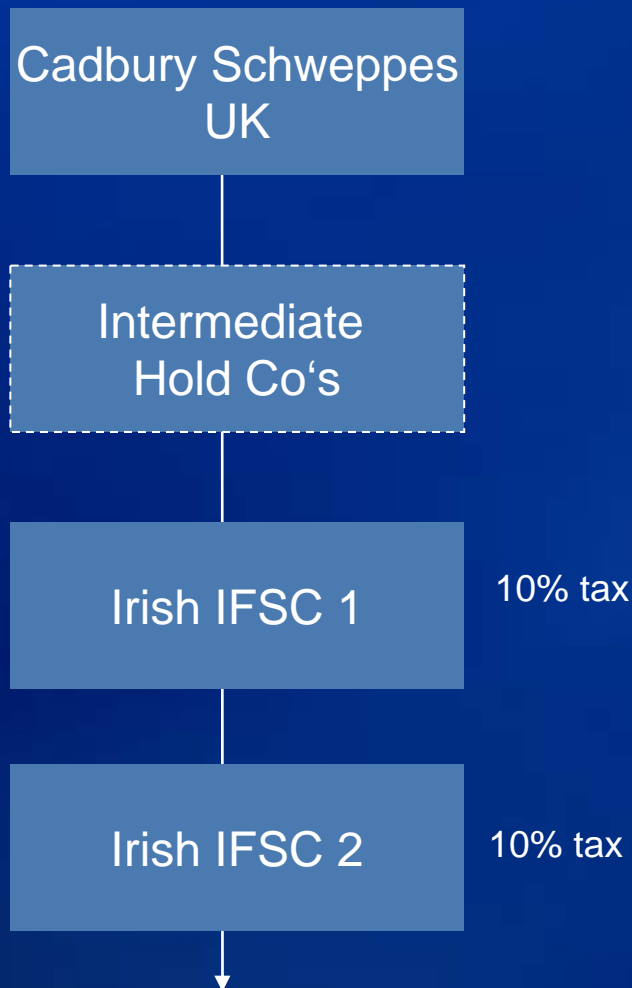


European Update - Capital Duty

- **EU Commission proposed to abolish capital duty by 2010 (IP/06/1673, 4 December 2006)**
 - **Greece, Spain, Cyprus, Luxembourg, Austria, Poland and Portugal**
 - **Phasing out in 2 steps**
 - **Limit of 0.5% on the rate of capital duty by 2008**
 - **Phasing out of capital duty by 2010**
 - **Member States having reduced or abolished capital duty after 1 January 2006 are not permitted to increase or reintroduce it**

ECJ – Cadbury Schweppes C-196/04

Facts and UK CFC regime



- **UK CFC rules attributed profits of Irish companies to Cadbury Schweppes UK**
- **Exemptions did not apply:**
 - Excluded countries list (i.e. a whitelist, but Irish IFSC regime expressly disqualified)
 - Acceptable distribution policy
 - Exempt activities test
 - Public quotation condition
 - *De minimis* test
 - Motive test
- **Cadbury Schweppes claimed that UK CFC rules are in conflict with EU freedoms**

ECJ – Cadbury Schweppes C-196/04

Conclusion

**CFC rules should only apply
if the foreign company is set up
as a “wholly artificial arrangement”,
not if that company is actually established
and its activities are genuine**

**Taxpayer should be able to prove the
genuine nature of the foreign company
and its activities**

ECJ – Cadbury Schweppes C-196/04

<u>Country</u>	<u>Exemptions from CFC regime</u>	<u>Compliant?</u>
Denmark	Business of foreign sub/PE is not mainly of a financial nature (< 1/3 passive income)	x
Finland	Production and related sales and marketing; Residence in DTT State and not taxed < 19.5% or entitled to specific tax benefits; Blacklist: Malta	x
France	EU subsidiaries, unless artificial arrangement (since 2006)	v
Germany	Active income; Dividends and capital gains	x
Hungary	Genuine economic presence: mainly active business with own assets and employees	v
Italy	Manufacturing or commercial activity; Blacklist: Cyprus, Malta, Lux 29	x
Lithuania	Residence in DTT state; Income of foreign sub/PE < 5% of total income; Active income; Whitelist; Blacklist: Liechtenstein (holding companies)	x
Norway	Residence in DTT State and active income; Whitelist	x
Portugal	≥ 75% active income or main listed activity (e.g. insurance, holding); Blacklist: Cyprus, Lux 29	x
Spain	EU subsidiaries, unless resident in listed tax haven; Active income; Active holding; Income from some financial assets; Blacklist: Cyprus, Malta, Lux 29	x
Sweden	International shipping in EU; Whitelist (excluded: certain income arising in Belgium, Cyprus, Estonia, Ireland, Lux, the Netherlands, and certain financial activities); Blacklist: Malta	x
UK	See previous slides	x

Wholly Artificial Arrangements – European Definition

- **The EU concept of establishment presupposes**
 - The **actual establishment** of a company in the host Member State
 - And the pursuit of **genuine economic activity** there
- **Abuse depends on**
 - Subjective element: intention to obtain a tax advantage
 - Objective (ascertainable by third parties) element: premises, staff and equipment
- **If no abuse, CFC rules should not apply**

Wholly Artificial Arrangements - European Definition

- **Advocate General**

- Premises, staff and equipment necessary to carry out the services it is paid for
- Staff must have the competence required for carrying out those services and for taking related decisions

- **EU Commission**

- Matter of transfer pricing: remuneration of services and means by which services are provided must correspond to CFC's functions and risks

Wholly Artificial Arrangements - Substance Methodology

- **Residence**

- is the company really managed and controlled outside the parent jurisdiction?

- **Permanent establishment**

- is part of the activity really carried on in the parent jurisdiction?

- **Transfer pricing**

- are services provided by associates?
- should a charge be made?
- Paragraph 1.37 OECD Transfer Pricing Guidelines, July 1995
(re-categorisation where rational parties would not have done the transaction)

Germany: Anti-abuse Rules: Art. 50d par. 3 Income Tax Act

- According to the voted legislation to become effective as of 1 January 2007, no entitlement to an exemption/a reduction in German withholding tax rates if
 - The receiving parent company is owned by persons who would not be entitled to the reduction if they derived the income directly, **and if**
 - One of the following additional conditions is met:
 - The interposition of the foreign company cannot be justified by economic motives or other substantial reasons **or**
 - The foreign company does not derive more than 10% of its total earnings from its own economic activities **or**
 - The foreign company does not engage in general economic interchange through a business organization appropriate to its business purpose.
- **Exception:** Not applicable if the foreign company's shares are listed and regularly traded on a recognized stock exchange
- ➔ Holding companies would not qualify for reduced WHT rates by merely holding interests in other entities; additional management functions required

Other News

- **Netherlands**
 - **5% interest box / 10% royalty box**
- **Belgium**
 - **Exemption from withholding tax of dividends paid to corporations of treaty countries**

International - Double Tax Treaties

- **Treaties signed and in force**
 - Israel, Latvia, Lithuania
- **Treaties signed but not yet in force**
 - Argentina, Azerbaijan, Estonia, France (new protocol), San Marino, Ukraine, United Arab Emirates
- **Treaties initialled**
 - Georgia, Moldova
- **Negotiations**
 - India, Lebanon, Serbia & Montenegro, United Kingdom (new treaty)



Q & A

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